(21)

No. 88-1309-CFX
Status: GRANTED

Title: Minnesota, et al., Petitioners
v.
Jane Hodgson, et al.

Docketed:
February 3, 1989

Court: United States Court of Appeals
for the Eighth Circuit

Vide:
88-1125

Counsel for petitioner: Galus,John

Counsel for respondent: Pentelovitch,William Z.,
Benshoof,Janet

Entry	Date	Note	Proceedings and Orders
1	Oct 28 1988	G	Application (A88-348) to extend the time to file a petition for a writ of certiorari from November 6, 1988 to January 5, 1989, submitted to Justice Blackmun.
2	Dec 5 1988		Application (A88-348) granted by Justice Blackmun extending the time to file until January 5, 1989.
3	Feb 3 1989	G	Petition for writ of certiorari filed.
4	Mar 8 1989		DISTRIBUTED. March 24, 1989
5	Mar 8 1989	X	Brief of respondents in opposition filed.
6	Jun 23 1989		REDISTRIBUTED. June 29, 1989
7	Jul 3 1989		Petition GRANTED. The case is consolidated with 88-1125, and a total of one hour is allotted for oral argument.
			**********
9	Jul 11 1989		Order extending time to file brief of petitioner on the merits until September 1, 1989.
44	Aug 3 1989		Brief amicus curiae of American Family Association filed.
15	Aug 25 1989		Record filed.
		*	Certified copy of original record and proceedings, 25 volumes, box, received.
11	Aug 28 1989	X	Brief amicus curiae of United States Catholic Conference filed. VIDED.
12	Aug 28 1989		Brief amicus curiae of Knights of Columbus filed. VIDED.
13	Aug 28 1989		Brief amici curiae of Focus on the Family and Family Research Council, et al. filed. VIDED.
21	Aug 30 1989		Brief amicus curiae of Hon. Christopher H. Smith, et al. filed. VIDED.
22	Aug 30 1989		Brief amicus curiae of American Academy of Medical Ethics filed. VIDED.
23	Aug 30 1989		Brief amicus curiae of National Right To Life Committee, Inc. filed. VIDED.
24	Aug 31 1989		Brief amicus curiae of James Joseph Lynch, Jr. filed.
17	Sep 1 1989		Brief amici curiae of The Center for Population Options, et al. filed. VIDED.
18	Sep 1 1989		Brief amici curiae of American Psychological Association, et al. filed. VIDED.
19	Sep 1 1989		Brief of Jane Hodgson, M.D., et al. filed. VIDED.
20	Sep 1 1989		Brief of petitioners Minnesota, et al. filed.
40	Sep 1 1989		Joint appendix filed. VIDED.
16	Sep 5 1989		Lodging received.
25	Sep 7 1989		Brief amici curiae of Anti-Defamation League of B'Nai B'Rith filed. VIDED.
27	Sep 16 1989		Order extending time to file brief of respondent on the

No. 88-1309-CFX

Entry	Date	Note	Proceedings and Orders
			merits until October 14, 1989.
28	Sep 25 1989		Brief amicus curiae of Lutheran Church-Missouri Synod filed. VIDED.
29	Sep 26 1989		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 29, 1989. (CONSOLIDATED WITH 88-1125) (2ND CASE)
30	Sep 29 1989		Brief amicus curiae of General Assembly of the Commonwealth of Pennsylvania filed. VIDED.
31	Oct 10 1989		Brief amicus curiae of Assn. of American Physicians and Surgeons filed. VIDED.
32	Oct 10 1989		Record filed.
		*	Certified copy of original supplemental record, box, received. (Vide: 88-1125).
38	Oct 11 1989		Brief amici curiae of Elliot Institute for Social Sciences Research, et al. filed. VIDED.
35	Oct 12 1989		Brief amici curiae of Attorneys General of Arizona, Missouri, and Pennsylvania filed. VIDED.
34	Oct 13 1989		Brief amici curiae of Catholic League for Religious and Civil Rights, et al. filed.
36	Oct 13 1989		Brief amici curiae of American College of Obstetricians and Gynecologists, et al. filed. VIDED.
37	Oct 13 1989		Brief amicus curiae of 13 Individual Members of the Panel on Adolescent Pregnancy filed. VIDED.
39	Oct 13 1989		Brief amicus curiae of United States filed. VIDED.
33	Oct 14 1989		Brief of respondents Jane Hodgson, M.D., et al. filed. VIDED.
41	Oct 18 1989		CIRCULATED.
42	Nov 1 1989	G	Motion of Abortion Rights Council, et al. for leave to consider their brief as amici curiae filed in No. 88-790 and No. 88-805, filed in these cases filed.
43	Nov 13 1989		Motion of Abortion Rights Council, et al. for leave to consider their brief as amici curiae filed in No. 88-790 and No. 88-805, filed in these cases GRANTED.
45	Nov 13 1989		Brief amici curiae of 274 Organizations in Support of Roe v. Wade filed. VIDED.
46	Nov 13 1989	X	Reply brief of petitioners Minnesota, et al. filed.
47	Nov 13 1989	X	Reply brief of petitioners Jane Hodgson, M.D., et al. filed. VIDED.
48	Nov 16 1989		LODGING BY PETITIONERS HODGSON, ET AL. (One copy of "1987 Minnesota Health Statistics.")
49	Nov 20 1989		2 envelopes of sealed exhibits, 55a through 55s received.
50	Nov 29 1989		ARGUED.

88-1309

No. 88-_____

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
515 Transportation Bldg.
St. Paul, Minnesota 55155
Telephone: (612) 296-2654
Counsel for Cross-Petitioners

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

25 pp

QUESTION PRESENTED

Cross-petitioners have opposed the petition for certiorari to the Eighth Circuit in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 88-1125. If certiorari is granted in that case, cross-petitioners seek review of the following question:

May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion upon their daughter?

TABLE OF CONTENTS

	Page
Question Presented	i
Opinion Below	1
Jurisdiction	2
Statutory and Regulatory Provisions Involved	2
Statement of the Case	3
I. History of the Litigation	3
II. Facts	3
A. The Parental Notification Requirement Generally	3
B. The Alleged Burden of Parental Notification	4
C. The Need for and Effectiveness of Parental Notification	7
D. The Requirement That Both Parents Be Notified	11
E. The 48-Hour Length of the Parental Notification Requirement	11
Reasons For Granting the Writ	15
I. The Federal Question is an Important One	15
II. The Court Has Not Ruled Upon the Scope of the Authority of States to Require Mere Parental Notice of Children's Abortion Plans	16
III. The Court Should Establish The Proper Recognition of the Several Rights and Interests of Society, Parents and Minors by Upholding Minnesota's Notice Requirement	18
Conclusion	21

TABLE OF AUTHORITIES

Federal Cases: Page

Akron Center for Reproductive Health v. Rosen, 633 F.Supp. 1123 (N.D. Ohio 1986), *aff'd*, 854 F.2d 852 (6th Cir. 1988), *appeal filed sub. nom.*, Ohio v. Akron Center for Reproductive Health, 57 U.S.L.W. 3378 (U.S. Nov. 28, 1988 (No. 88-805)) 15

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 18

Bellotti v. Baird, 443 U.S. 622 (1979) 15, 16, 17, 19

H.L. v. Matheson, 450 U.S. 398 (1981) 17, 18

May v. Anderson, 345 U.S. 528 (1933) 16

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

Parham v. J.R., 442 U.S. 584 (1979) 16

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 16, 18

Prince v. Massachusetts, 321 U.S. 158 (1944) 15

Roe v. Wade, 410 U.S. 113 (1973) 20

Zbaraz v. Hartigan, 584 F.Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided court*, —— U.S. ——, 108 S. Ct. 479 (1987) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-——

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinions below are set forth at pp. 10a-52a of the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in *Hodgson,*

et al. v. State of Minnesota, et al., S. Ct. No. 88-1125. (Hereinafter the petition documents in that case are referred to as "Hodgson Petition" and "Hodgson Appendix.")

The opinion of the district court is reported at 648 F. Supp. 756 (D. Minn. 1986).

The en banc opinion of the Eighth Circuit Court of Appeals is reported at 853 F.2d 1452 (8th Cir. 1988).

JURISDICTION

Jurisdiction has been asserted in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 88-1125, pursuant to 28 U.S.C. § 1254(1). Jurisdiction over this cross-petition is also proper pursuant to that section.

Cross-petitioners received copies of the Petition for Certiorari in *Hodgson v. State* on January 6, 1989. Pursuant to Rule 19.5 of this Court a cross-petition may be filed within 30 days after receipt of a petition for certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Minnesota Statutes § 144.343, subds. 2-5, the statute at issue in this case, is reprinted in full in the Hodgson Appendix. (1a-4a). These subdivisions require, with certain important exceptions, that a physician attempt with reasonable diligence to notify the parents of an unemancipated minor child at least 48 hours before performing an abortion upon the child.

STATEMENT OF THE CASE

I. History of the Litigation.

The chronological history of this litigation is contained on pages 3-6 of the Hodgson Petition. As respects the parental notice requirement both the district court (Hodgson Appendix 38a) and the court of appeals (Hodgson Appendix 81a) concluded rather summarily that prior decisions of this Court hold that a judicial bypass procedure is constitutionally required as an alternative to a parental notification law.

II. Facts.

A. The Parental Notification Requirement Generally.

The statutory requirement of parental notification contained in Minn. Stat. § 144.343, subd. 2, was intended to serve the state's substantial and legitimate interest in the family-based child-rearing process and in protecting the well-being of minors in connection with the consequences of a decision to have an abortion by enabling parents to offer support and guidance in helping their daughter to make an informed decision regarding her unintended pregnancy without imposing a parental veto on that decision. Defendants' Exhibits (hereinafter D. Exh.) 70-72.

Plaintiffs[1] at trial brought on numerous lay and expert witnesses in support of their challenge to the parental notification requirement. The testimony critical of the parental

[1] The parties will be referred to with reference to their posture at trial. Cross-petitioners will be referred to as "defendants" and the respondents as "plaintiffs."

notification requirement falls into two broad categories: (1) testimony concerning various burdens allegedly imposed upon pregnant minors by the parental notification requirement, and (2) testimony questioning both the necessity and the effectiveness of the parental notification requirement in actually furthering the statutory purpose of promoting the well-being of minors confronted with an unintended pregnancy and the decision of whether or not to terminate that pregnancy.

B. The Alleged Burden of Parental Notification.

Much of plaintiffs' evidence concerning the alleged burdens of the parental notification requirement relates to the incidence and prevalence of "dysfunctional" families and intrafamilial violence in the United States generally. According to one of plaintiffs' experts, a "normal" family is one in which there is functioning communication and a reasonable amount of trust. T. 983.[2] By contrast, a "dysfunctional family," as defined by plaintiffs' experts, does not cope effectively with daily stresses and woes of its members and communication is impaired. A. 461,[3] T. 904-05, 984-85. Members of a dysfunctional family may engage in family violence, and studies indicate that violence occurs in two million families in the United States. A. 457-61, T. 333-34, 984-85. There are some minors in Minnesota who fear violence from family members. A. 297, A. 382, A. 486. In addition, it appears that a very small minority of pregnant minors in Minnesota wish to

[2] Page references herein preceded by "T." are to portions of the trial transcript which were not contained in the Appendix on appeal to the Eighth Circuit.

[3] Page references herein preceded by "A." are to the Appendix filed in the Appeal to the Eighth Circuit.

avoid telling one or both of their parents about their intended abortion because of fear of physical abuse.[4]

The State's witnesses did not dispute that there exist dysfunctional families in which there is violence or abuse or that there are minors in Minnesota who are victims of violence or who fear violence. Nevertheless, although parents of several thousand minors were notified of their daughters' decision to have an abortion pursuant to the statutory requirement from August 1, 1981, to March 1, 1986,[5] the record fails to reveal a single instance in which any such minor has suffered any violence as a consequence of the notification.

A small minority of Minnesota minors have sought to avoid notifying their parents of the abortion on the basis of an apprehension that their parents would somehow prevent the abortion from occurring.[6] Once again, however, of the several thousand pregnant minors who have notified both parents

[4] Of 258 minors appearing before Ramsey County Judge Peterson in judicial bypass hearings in the period from August 1, 1981, through November 30, 1982, four percent indicated that they did not wish to notify their parents about their abortion because of fear that prior physical abuse would reoccur. Plaintiffs' Exhibit (P. Exh.) 21.

[5] During this period 3,573 bypass petitions were filed in Minnesota courts. Hodgson Appendix 23a. Both Dr. Hodgson (Hodgson Depos. at 122, see footnote 7 *infra*) and Paula Wendt (A. 312) testified that only about one-half of their minor patients choose the court bypass option. The actual figures offered by Wendt disclose, in fact, that only 40 percent of Meadowbrook minors have actually chosen the court option. A. 312. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors who have notified their parents is at least equal to the number that sought court dispensation. *See also* Opinion of the Circuit court. Hodgson Appendix at 83a n.9.

[6] Of the 258 minors appearing before Juvenile Court Judge Peterson in judicial bypass proceedings for the period August 1, 1981, to November 30, 1982, five percent expressed such a fear. P. Exh. 21.

pursuant to the statutory requirements since August 1, 1981, the record fails to reveal a single instance of parental prevention of an abortion.

Plaintiffs also presented evidence of the claims of various minors made to counselors, health care providers and judges that notification to their parents would result in various other consequences perceived by the minor as unpleasant. The reasons claimed by minors for not wishing to make their parents aware of their pregnancy and abortion decision are numerous and include fear of disapproval and hostility, punishment, interference with her relationship with her boyfriend, upsetting a seriously ill parent and generally damaging the parent-child relationship. *See, e.g.*, A. 292-93; Hodgson Depo. of July 11, 1985, at 122;[7] P. Exh. 21.

It appears, however, that a common, if not the most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her relationship with her parents. P. Exh. 21. This is so even in good, functional families. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing] to ruin a good relationship." A. 293. Similarly, Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a matter of love for their parents and they don't want to spoil the relationship that they have with their parents." Hodgson Depo. of July 11, 1985 at 122. Moreover, as testified by a number of witnesses, including Dr. Hodgson, adolescents often misapprehend their parents' likely actions in response to their decision to obtain an abortion. A.

[7] The testimony of Dr. Hodgson is found in the transcript of her deposition given for purposes of trial on July 11 and July 12, 1985, and appears in the record as P. Exh. 92.

228, A. 786-87, A. 878, A. 996-97. Dr. Hodgson likewise agreed with defendants' experts that notwithstanding the apprehensions of pregnant minors, parents are generally supportive in helping a minor deal with an unintended pregnancy. A. 229, A. 851-53, A. 866, A. 877.

C. The Need for and Effectiveness of Parental Notification.

In addition to plaintiffs' evidence concerning the alleged burdens involved in the parental notification requirement, a number of plaintiffs' expert witnesses also presented theories challenging the need for and the effectiveness of the statutory notification requirement in promoting the state's goals of protecting the well-being of minors in connection with the consequences of a decision to have an abortion.

With respect to the necessity of parental notification, plaintiffs' several psychological experts testified that in their view the maximum level of intellectual ability is reached by age 14 and that by all available measures of competency, minors are indistinguishable from adults in their capacity to make personal decisions. A. 601-04, A. 607-08, A. 611, A. 692-93, A. 851-53, A. 866-67, A. 877-78. More particularly, the plaintiffs' psychological experts testified that, in their opinion, minors are as competent as adults to make reproductive decisions, including whether or not to terminate a pregnancy and that there is no empirical basis for distinguishing between competency to choose to abort and competency to choose to carry to term or to obtain prenatal medical care. A. 617, A. 635, A. 675a, T. 900, 1135, 1143-44. These same psychological experts, however, also testified that "capacity" to give informed consent to a particular medical procedure is unrelated to maturity, quantity of life experience, overall reasoning ability or even mental health. A. 612-13, T. 887, 959-60.

With respect to the effectiveness of a parental notification requirement, a number of plaintiffs' psychological and health care witnesses questioned the proposition that a parental notification requirement would promote family communication or aid minors in their abortion decision-making. For example, plaintiffs' psychological expert, Dr. Melton, observed that laws mandating parental notice "are not necessarily going to result in [a minor's] more reasoned decision-making." A. 633. Another of plaintiffs' experts in the field of communication patterns with violent families similarly testified that there is no clinical or research data which suggests that forced parental notification in abusive, dysfunctional families would have a positive effect on family communication. A. 473. *See also* A. 230, T. 930, 919, 1395.

However, as a number of plaintiffs' experts themselves recognize, an unplanned pregnancy is an extremely traumatic event for a minor and subjects her to extreme psychological stress. A. 225, A. 337, A. 689-90. In this regard, plaintiffs' experts appear to agree in substantial measure with the testimony of defendants' expert Dr. Vincent Rue. Based upon his clinical experience in providing therapy to pregnant minors, Dr. Rue testified that such minors are psychologically vulnerable when dealing with an unintended pregnancy. Dr. Rue further testified that such vulnerability can result in irrational and emotional decision-making. A. 879-80. For those minors who choose abortion, distinct medical and psychological risks are posed.

Although abortion is a relatively safe medical procedure, there is at least a remote risk of death. A. 120, A. 845. In addition, the risks of abortion include hemorrhage, infection, perforation of the uterus, cervical damage and possible future infertility. A. 845-46. As Dr. Hodgson has herself recognized, adolescents tend to have higher infection rates

after abortion than adults because they tend to delay post-abortion care and ignore complications. A. 170-71. It has also been the experience of the plaintiff abortion clinics that some minors are unable to take responsibility for their post-abortion care without adult supervision, and many do not return to the clinic for after-care. A. 288-89, A. 355, A. 516. Parental notification can thus, in many cases, serve the important function of assisting in the prompt recognition of post-abortion complications and in providing adult supervision for proper post-abortion care. In addition, parents may in some cases be aware of aspects of a minor's medical history of which the minor herself is not aware. A. 848.

A minor who chooses to resolve an unwanted pregnancy through abortion is also at psychological risk. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, it is not uncommon for young women to feel depressed after an abortion, and for some this feeling of depression is not a trivial phenomenon. A. 353-54, P. Exh. 69. The adverse psychological consequences of abortion may also include guilt, hostility, sadness, remorse, insomnia, eating disorders, relationship difficulties, anniversary reactions and even suicide attempts. A. 881. These adverse consequences, although not common in their more severe form, are well documented in the professional literature. A. 882, D. Exh. 68.[8] Dr. Steven

[8] Dr. David, one of the plaintiff's several expert witnesses, testified that women age 16 and under are very likely to find abortion more stressful than older women and that even 17-year-old women may also encounter greater stress than older women depending on the individual and her family situation. T. 2584-85. Dr. David also pointed out that adolescents in the United States are more at risk for adverse psychological sequelae than adolescents in some other countries, e.g., Denmark, where abortion is less controversial or likely to engender feelings of guilt. A. 924.

Butzer, one of plaintiffs' psychiatric experts, testified that he has provided psychiatric therapy to a number of adolescent patients for post-abortion mental health problems. A. 689-91.

Because of the danger of such adverse psychological sequelae, parental involvement and consultation may serve to support the psychological well-being of the pregnant minor, whether or not she chooses to abort. Indeed, the lack of parental involvement in the minor's abortion decision may itself exacerbate the problem by insulating and isolating the minor and creating considerable guilt, depression, remorse and sadness; both immediately and in the future. A. 868-76.

Moreover, adolescents often misapprehend their parents' reaction to their decision to obtain an abortion, and parental guidance in dealing with an unintended pregnancy can be helpful to the minor even though she may not initially seek out such guidance. A. 226-29, A. 692-93, A. 878, A. 996-97.

Although abortion providers generally counsel their patients concerning options in resolving an unintended pregnancy, there is no assurance that such counseling will be performed by trained and experienced persons. For example, two teen advocates of the Midwest Health Center for Women have performed abortion counseling when only 17 years old and while relatively untrained and inexperienced. A. 526, T. 712, 733 and 738.

In light of the totality of evidence concerning the need for or the utility of a parental notification requirement, the district court specifically found that:

> Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure.

District court finding 58, Hodgson Appendix 24a-25a.

D. The Requirement That Both Parents Be Notified.

Plaintiffs' evidence also criticized the parental notification law to the extent that it requires that *both* parents be notified. Plaintiffs' evidence in this regard falls into three categories: (1) evidence concerning the prevalence of divorce in the United States and in Minnesota (A. 315, T. 996-97); (2) opinion testimony that in "dysfunctional" families, involvement of the second biological parent can produce unwanted or disappointing consequences to the custodial parent and the minor (A. 318-21, A. 324-25, A. 392-94, T. 911-13); and (3) opinion testimony that where a minor has already voluntarily notified a single parent, notification of the second parent serves little purpose. T. 927-28, 995-96.

Defendants' expert Dr. Rue testified as to his clinical experience in providing psychotherapy to minors confronted with problem pregnancies. Dr. Rue has encouraged his pregnant minor patients to involve the non-custodial parent and when such advice has been followed, he has observed a subsequent improvement in the relationship between the child and the non-custodial parent. T. 2414-15.

E. The 48-Hour Length of the Parental Notification Requirement.

Plaintiffs also challenge the 48-hour length of the parental notification requirement. Plaintiffs' evidence pertinent to this particular challenge consists of evidence relating to medical

risks associated with the postponement of an abortion procedure.

Minors who elect to notify one or both parents by written notice must wait until 48 hours after actual or consecutive delivery of written notice. Constructive delivery of mail notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice requirement may in many instances be 72 hours.

It is undisputed that, all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age and that a second trimester abortion is statistically somewhat more risky and is in fact more expensive than a first trimester procedure. There is no evidence in the record, however, that a delay of 48 or 72 hours is medically significant. Plaintiff Meadowbrook's co-director Paula Wendt and Dr. Horowitz, an experienced abortion practitioner and co-owner of Meadowbrook, each testified that there is no significant increased risk of medical complication from week to week within the first trimester and that delays of up to one and one-half weeks within the first trimester do not generally increase the risk of medical complication. A. 347, A. 352, A. 898-99, A. 900-01. Presumably based upon such testimony, the district court specifically found that although delay of any length in performing an abortion increases the statistical risk of mortality and morbidity, "[t]he increase in risk becomes statistically significant when the length of delay reaches one week." District court finding 53, Hodgson Appendix 23a.

With respect to the actual operation of the 48-hour waiting period, the district court found that:

> This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of delay may reach a week or more.

District court finding 52, Hodgson Appendix 22a-23a. The court's finding regarding possible delays of a week or more appears to be based upon facts relating to the relative inaccessibility of abortion services in Minnesota. District court findings 22-26, Hodgson Appendix 14a-15a. It is not otherwise apparent from the record, however, how these logistical difficulties would cause the 43 hour notice requirement to result in delays of a week or more. Typically, when a pregnant minor telephones an abortion clinic to arrange an abortion, the operation, in the absence of unusual medical circumstances, is not scheduled to occur sooner than 48 or 72 hours hence. T. 156-59, A. 158-59 Opinion of the Circuit Court, Hodgson Appendix 97a. Accordingly, in such typical cases it does not appear from the record how the fulfillment of the 48 hour parental notice requirement delays the abortion operation at all.[9]

In any event, the record fails to establish a single instance in which any delay associated with the length of the parental notification requirement has resulted in medical complication. Public health data collected, maintained and published by the Minnesota Department of Health likewise fails to reveal any increase in medical complications among the population of

---

[9] For example, the telephone training manual of Meadowbrook Clinic indicates that if a pregnant minor calls on a Monday and reveals that she wishes to comply with the statute by mailed parent notification, the notification is mailed on that same day and the abortion may be scheduled as soon as Thursday. *See* P. Exh. 70A, at p. 4.

minors undergoing abortions since August 1, 1981. A. 827-28, D. Exh. 25. Moreover, that data records no increase in the average gestational age of minors obtaining abortions in Minnesota or in the proportions of minors receiving second trimester abortions in Minnesota since August 1, 1981. A. 243, A. 826, A. 829, D. Exh. 35.

The district court further acknowledged that "[s]ome period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors" and that "[a] waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." District court finding 73, Hodgson Appendix 32a. The district court also found, however, that:

> The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

District court finding 74, Hodgson Appendix 32a. The district court does not otherwise explain the basis of this finding, and defendants are unaware of any evidence in the record to support it.

REASONS FOR GRANTING THE WRIT

I. The Federal Question is an Important One.

The State of Minnesota, in adopting Minn. Stat. § 144.343, Subd. 2-5, merely attempts to pursue a policy which, in virtually any other context, would be so plainly permissible as to need no discussion; that is, that the parents should know about and be able to have a role in traumatic crises and pivotal choices in the lives of their children.

As pointed out by the plaintiffs in their petition for certiorari, at least nine other states have statutes which require notice to parents of minors' abortions.[10] At least two of these other states have sought review by this Court of circuit court decisions which have imposed severe restrictions upon the authority to require that parents be even notified of their daughter's impending abortion.[11]

Few, if any, principles of our society are so central or long standing as the cardinal notion that the care, custody and nurture of children should reside presumptively in the parents. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (state's interest in protecting children from harm is sufficient to sustain child labor laws despite basic parental rights to control of children); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*)

---

[10] Hodgson Petition at 14-15. The petition also lists 14 states which have statutes requiring parental consent to minors' abortions.

[11] *Zbaraz v. Hartigan*, 584 F.Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded* 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided court*, —— U.S. ——, 108 S.Ct. 479 (1987); *Akron Center for Reproductive Health v. Rosen*, 633 F.Supp. 1123 (N.D. Ohio 1986), *aff'd* 854 F.2d 852 (6th Cir. 1988), *appeal filed sub. nom., Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 28, 1988 (No. 88-805)).

(state may require parental consent to minors' abortions if certain conditions are met); *Parham v. J.R.*, 442 U.S. 584 (1979) (hearing not required when parents seek admittance of child to state mental health facility). Few, if any, rights are more cherished than the right of parents to raise and care for their own children. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (statute forbidding the teaching of foreign languages invalid); *May v. Anderson*, 345 U.S. 528, 533 (1933) (court not having *in personam* jurisdiction over parent may not cut off her rights to the care, custody and management of children—rights which are "far more precious than property").

Thus, it is plain that the question of whether parents are entitled to know of their daughters' abortion decisions is of critical importance throughout the country.

II. The Court Has Not Ruled Upon the Scope of the Authority of States to Require Mere Parental Notice of Children's Abortion Plans.

Given the necessary recognition of these strong public purposes and parental rights, the Court has determined that states may promote parental involvement in circumstances where a pregnant minor child proposes to undergo an abortion. *See, e.g., Bellotti II*, 443 U.S. at 643. However, in view of what the Court has viewed as the "unique" and non-postponable nature of the abortion decision, the Court has held that statutes requiring parental consent could not grant a parent "an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy." *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). Therefore, the Court concluded that a state may not mandate parental consent to abortions unless some alternate procedure

is available whereby an arbitrary veto may be avoided. *Bellotti II*, 443 U.S. at 643-44.

While a majority of the *Bellotti II* Court concurred in the judgment striking down the Massachusetts statute, it is clear that a majority of the Court did not necessarily endorse, in principle, Justice Powell's suggestion that minors may need to be permitted to avoid even parental notice when employing a court bypass option. *See* 443 U.S. at 651-52 (Rehnquist, J., concurring). *Id.* at 656-57 (White, J., dissenting). As Justice Stevens also wrote in concurrence,

> By affording such a veto, the Massachusetts statute does far more than simply provide for notice to the parents. . . . *Neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.*

443 U.S. 654 n.1 (emphasis added).

In *H.L. v. Matheson*, 450 U.S. 398 (1981), the Court was faced with a Utah statute which required parental notice, but not parental consent, to abortions. The Court did not, however, declare the statute unconstitutional on its face due to failure to provide a formal notice-avoidance procedure. Instead the Court upheld the statute on its face and as applied to the plaintiff who was not found to have established that she was "mature or emancipated" and made no showing as to her relations with her parents with respect to abortions. *See H.L. v. Matheson*, 450 U.S. 398, 407 (1981). Thus while there exist a number of opinions by individual justices upon the question, there exists no direct holding by the Court concerning the

authority of a state to require that the parents of an unemancipated minor be notified prior to an abortion.[12]

III. The Court Should Establish the Proper Recognition of the Several Rights and Interests of Society, Parents and Minors by Upholding Minnesota's Notice Requirement.

A statute which only requires parental notice presents substantially different questions from those involved where parental consent is required. Providing merely for parental notice gives no one the legal power of veto over the abortion decision. Rather it merely permits an opportunity for parental care and involvement, not only in the abortion decision process itself, but also in addressing the related problems of youthful sexual activity and pregnancy. To deny notice, however, virtually assures that no such opportunity will exist in many cases.

As was observed by Justices Stewart and Powell concurring in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976), and reiterated by Chief Justice Burger in *H.L. v. Matheson*, 450 U.S. 398, 409-10 (1981):

> [The decision whether or not to bear a child] is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

[12] In *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court reiterated the *Bellotti II* standards for statutes requiring parental consent, but did not have occasion to address the parental notice aspect of the ordinance involved since the decision upholding that requirement had not been appealed. A footnote in *Akron* suggested that *Matheson, supra*, had held that requiring notice of a court proceeding to parents of a "mature minor" would be unconstitutional. *Akron, supra*, 462 U.S. at 441, n. 31. However, as pointed out by Justice O'Connor, joined by Justices White and Rehnquist, *Matheson* expressly did not decide that issue. *Id.* 462 U.S. at 469 n. 12.

Indeed, as indicated by the trial court, abortion providers rarely if ever decline to perform, without parental notice, an abortion on a minor they believe to be "immature."[13]

The entire tenor of the proposition that parents should be denied notice suggests that the state is obligated to adopt a predisposition favoring abortion which fails to recognize the observation in *Bellotti II* that:

> Yet, an abortion may not be the best choice for the minor. The circumstances in which this issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interests.

443 U.S. at 642-43.

Furthermore, it is clear that a minor may be sufficiently "mature" to make the specific decision to abort but not sufficiently "mature" to face the abortion process and aftercare needs all alone, or to deal with all the underlying factors precipitating the need for abortion.

Closely related to the proper interest of the state in safeguarding the care and decision-making process of minors in crisis situations is the right of parents to raise their minor children and participate in the conduct of their lives. This right has been held to flow from the same constitutional source

[13] District court conclusions of law, Hodgson Appendix at 41a-42a.

as the rights associated with the abortion decision. *See, e.g., Roe v. Wade*, 410 U.S. 113, 153 (1973) (child rearing and education are fundamental personal rights "implicit in the concept of ordered liberty").

It may be correct to conclude that the balance between these rights should not be struck in favor of authorizing absolute parental veto of the abortion decision. However, the most basic and least burdensome provision which may be made for the protection of any right is entitlement to notice. To eliminate a general right to notice and to authorize, by dint of constitutional mandate, either the abortion provider or a judge to veto any parental right whatever to even know of this critical event in their child's life is, in essence, to eliminate totally any parental right in this area.

It is submitted that the proper balance to be struck is that neither "right" be accorded absolute veto over the other. Such a balanced accommodation among potentially competing "rights" can only be struck by providing parents, at very least, reasonable notice that the issue is pending.

CONCLUSION

This case presents the Court with an opportunity to address an extremely important question of constitutional law which has not been, but definitely should be, settled by this Court. The cross-petition should therefore be granted if the Court grants certiorari in *Hodgson v. State of Minnesota*, No. 88-1125.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
515 Transportation Bldg.
St. Paul, MN 55155
Telephone: (612) 296-2654
Counsel for Cross-Petitioners

No. 88-1309

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III as Attorney General of the State of Minnesota,

Cross-Petitioners,

—v.—

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

WILLIAM Z. PENTELOVITCH
REBECCA PALMER
CHARLES HOFFMAN
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, MN 55402
(612) 339-8015

Attorneys for Petitioner Planned Parenthood of Minnesota

JANET BENSHOOF
(Counsel of Record)
RACHAEL N. PINE
LYNN M. PALTROW
AURIE HALL
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioners other than Planned Parenthood of Minnesota

QUESTION PRESENTED

Should a conditional Cross-Petition for Certiorari be granted where it fails to present substantial, meritorious issues for review previously raised by Cross-Petitioners in the proceedings below.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE CROSS-PETITION FOR A WRIT OF CERTIORARI	3
I. PARENTAL NOTICE LAWS MUST PROVIDE A BYPASS OPTION	3
A. It is settled law that parental notice requires a bypass alternative	3
B. The record conclusively establishes that mandating two-parent notice imposes a burden which is in fact comparable to that of parental consent and which, therefore, requires a bypass alternative	6
II. THIS COURT SHOULD REAFFIRM THAT, IN THE CONTEXT OF ABORTION, PARENTS' RIGHTS ARE NOT INDEPENDENT OF THE BEST INTERESTS OF THEIR MINOR DAUGHTER	9

TABLE OF AUTHORITIES

Cases	PAGE
Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988) *aff'g*, *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *appeal filed sub nom. Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 29, 1988) (No. 88-805)	6, 7
Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	4, 5, 9
Bellotti v. Baird, 443 U.S. 622 (1979)	4, 5, 7, 9, 10
Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985)	6
H.L. v. Matheson, 450 U.S. 398 (1981)	4, 5, 9
Indiana Planned Parenthood v. Pearson, 716 F.2d 1127 (7th Cir. 1983)	5, 7, 9
New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1986), *cert. denied sub nom. Township of Piscataway v. New Jersey Citizen Action*, 107 S.Ct. 1336 (1987)	3
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	4, 5
Planned Parenthood v. Harris, 691 F. Supp. 1419 (N.D. Ga. 1988)	6
Planned Parenthood of Rhode Island v. Board of Medical Review, 598 F. Supp. 625 (D.R.I. 1984)	6
Prince v. Massachusetts, 321 U.S. 158 (1944)	9
Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985); *aff'd per curiam by an equally divided court*, 108 S.Ct. 479 (1987)	5

PAGE

Statutes and Rules

Minn. Stat. Ann. § 144.343(1)-(7)..... 8

Minn. Stat. Ann. § 144.343 (2).....3, 4, 6, 8, 10

OPINIONS BELOW

The opinions below are set forth at pages 10a-52a of the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in *Hodgson, et al. v. State of Minnesota, et al.*, S.Ct. No. 88-1125.

The opinion of the district court is reported at 648 F. Supp. 756 (D. Minn. 1986).

The *en banc* opinion of the Eighth Circuit Court of Appeals is reported at 853 F.2d 1452 (8th Cir. 1988).

JURISDICTION

Respondents herein incorporate by reference the jurisdictional statement set forth in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, S.Ct. No. 88-1125.

Respondents received copies of the Cross-Petition for a Writ of Certiorari on February 3, 1989. Pursuant to Rule 22.1 of this Court, a response may be filed within 30 days after receipt of a cross-petition.

STATUTES INVOLVED

Respondents herein incorporate by reference the statement of Statutes Involved set forth in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, S.Ct. No. 88-1125.

COUNTERSTATEMENT OF THE CASE

Plaintiffs[1] herein incorporate by reference the Statement of the Case set forth in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, S.Ct. No. 88-1125.

Curiously avoiding citations to the district court's opinion, the State of Minnesota, in its Statement of the Case, attempts to rewrite the district court's findings by misstating the testimony of plaintiffs' witnesses, and by drawing conclusions contrary to those of the district court.[2] In doing so, defendants rely on the testimony of their witness, Dr. Vincent Rue, who was discredited as an expert by the district court because he lacked the professional experience of plaintiffs' witnesses, and because his testimony was not persuasive. (29a); (40a-41a).[3]

1 The parties will be referred to with reference to their posture at trial. Respondents will be referred to as "plaintiffs" and cross-petitioners as "defendants." Citations to the Appendix of plaintiffs' Petition for a Writ of Certiorari, S.Ct. No. 88-1125, are made to the page number as "(__a)". References to the trial transcript will be denoted as "(T__)".

2 For example, defendants state that the purpose of the statute is to serve the state's interest in the family, Cross-Petition at 3 (hereinafter "C.P. at __"), but ignore the district court's finding that "a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature." (25a). Defendants allege that "parents are generally supportive in helping a minor deal with an unintended pregnancy." C.P. at 7. The district court, on the other hand, found that "when knowledge of an adolescent's pregnancy or abortion is inadvertently communicated to one or both parents, the effect of the communication on the family or relationship between adolescent and parents is 'almost universally negative.' " (28a-29a). Defendants state that "some" minors fear violence in their families and that "a very small minority" want to avoid telling a parent of their pregnancy because of this fear. C.P. at 4-5. This contradicts the district court's findings that "[m]any minors in Minnesota live in fear of violence by family members," and that the documented numbers underestimate the problem because "minors are particularly reluctant to reveal violence or abuse in their families." (30a). These are but a few examples of the defendants' mischaracterizations of the factual record.

The district court's extensive findings of fact have remained undisturbed on appeal. The *en banc* court of appeals did not conclude that the district courts' findings were clearly erroneous, (100a), and defendants do not argue to the contrary in their cross-petition.

This Court must "take the record as it comes," *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3rd Cir. 1986), *cert. denied sub nom. Township of Piscataway v. New Jersey Citizen Action*, 107 S.Ct. 1336 (1987), and review this statute as one "not supported by factual findings that it furthered in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity . . . ." (78a).

REASONS FOR DENYING THE CROSS-PETITION FOR A WRIT OF CERTIORARI

I. PARENTAL NOTICE LAWS MUST PROVIDE A BYPASS OPTION.

It is settled as a matter of law that parental notification of a minor's abortion decision requires a bypass alternative. Thus, the decision of the Eighth Circuit Court of Appeals striking Minn. Stat. Ann. § 144.343 subd. (2) as unconstitutional presents no serious issue for this Court to address.

A. It is settled law that parental notice requires a bypass alternative.

Notwithstanding the opinions of this Court and of every lower court to confront the question, defendants ask this Court to uphold a two-parent notice requirement with no judicial bypass alternative for mature minors or for those whose best

3 The district court found that, "Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses." (29a).

interests compel a private abortion choice.[4] *See* C.P. at 20. The state makes this request as to a provision of the Minnesota statute which was enjoined prior to implementation, has never gone into effect, and whose unconstitutionality was affirmed by the district court and by both a three judge panel and an *en banc* sitting of the court of appeals.[5]

This Court has repeatedly considered state law requirements of parental notice and those of parental consent under the uniform rubric of "parental involvement," and has made clear that states must, in either case, provide a meaningful judicial bypass option. *E.g., Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 n.10 (1983). This is because both parental notice and parental consent, required under threat of criminal sanction, severely burden a minor's ability to exercise her fundamental rights. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976).

The purpose of the bypass procedure is to insure that some minors remain able to exercise their right to terminate pregnancy *without* parental intervention. *Id. See also H.L. v. Matheson*, 450 U.S. 398, 420 (1981) (Powell, J., concurring); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (*Bellotti II*). Without such a waiver provision, all minors would be subject to parental efforts to obstruct their access to abortion, *see* discussion, Section I.B. *infra*, whether or not they are mature and whether or not parental consultation would be in their best interest. This would not sufficiently protect the fundamental

4 Indeed, in Minnesota, the judicial bypass procedure was frequently invoked by 20-25% of minors who, accompanied by one parent, sought judicial approval to avoid notifying the second parent. (22a).

5 Both at trial and on appeal, defendants failed to prevail on their argument that Minn. Stat. Ann. § 144.343 subd. (2), which mandated parental notification without providing a bypass alternative, was constitutional under the decisions of this Court. (38a); (58a) (panel decision). The Eighth Circuit Court of Appeals *en banc* upheld this finding. (81a). It is this issue which defendants raise once again in their Cross-Petition.

right of minors as recognized by this Court.[6] *Akron*, 462 U.S. at 441 n.31; *Matheson*, 450 U.S. at 420. *See Danforth*, 428 U.S. 52 (1976).

Mandatory notification is as burdensome to minors as a requirement of consent. *See* Section I.B., *infra*. In addition, this Court has declined to require a subjective determination of the *degree* of burden as a prerequisite for applying heightened scrutiny. *Akron*, 462 U.S. at 419 n.1. For these reasons, "a state choosing to encourage parental involvement [either through notice or consent] must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interest." *Id.* at 427 n.10 (citing *Bellotti II*, 443 U.S. at 643-44 (1979); *Matheson*, 450 U.S. at 420).[7]

Lower courts have also repeatedly held that both notification and consent require a statutory bypass alternative. In *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983), the Seventh Circuit held that a notification statute required the same constitutionally sufficient bypass procedure as a consent statute. *See also Zbaraz v. Hartigan*, 763 F.2d 1532, 1536 (7th Cir. 1985), *aff'd per curiam by an equally*

6 This right is shielded from impermissible state regulation by a heightened standard of review. Such laws must "plainly serve[ ] important state interests . . . [and be] narrowly drawn to protect only those interests." *Matheson*, 450 U.S. at 413; *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985), *aff'd by an equally divided court*, 108 S.Ct. 479 (1987). Because a minor's right is fundamental, it cannot be "balanced" against the interests of her parents as defendants suggest. C.P. at 20. *See generally* Section II, *infra*.

7 "[A] state may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests." *Matheson*, 450 U.S. at 420 (Powell, J., concurring). *Matheson* upheld a notice requirement *only* as applied to immature, dependent minors. A majority of the court held that notification was unconstitutional as applied to mature or "best interest" minors without a meaningful bypass procedure. *Id.* at 414 (Powell, J., joined by Stewart, J., concurring); *id.* at 450-54 (Marshall, J., joined by Brennan and Blackmun, J.J., dissenting).

divided court, 108 S.Ct. 479 (1987). A notification requirement "cannot be supported in the case of a mature minor or a minor whose best interests do not include parental notification of the abortion decision" and, therefore, must be accompanied by a bypass alternative to permit evaluation of these factors by an impartial decisionmaker. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988), *aff'g, Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1132-33 (N.D. Ohio 1986), *appeal filed sub nom. Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 29, 1988) (No. 88-805) (*Rosen*). *Accord, Planned Parenthood v. Harris*, 691 F. Supp. 1419, 1423 (N.D. Ga. 1988); *Glick v. McKay*, 616 F. Supp. 322, 325 (D. Nev. 1985). *Cf. Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 634-35 (D.R.I. 1984) (striking a spousal notification statute).

The district court decision, (38a), the panel decision, (53a), and the *en banc* decision of the circuit court, (81a), rested on established, uncontroverted constitutional principles in finding Minn. Stat. Ann. § 144.343 subd. (2), standing alone, to be unconstitutional because it required parental notice without also providing a bypass alternative.

B. The record conclusively establishes that mandating two-parent notice imposes a burden which is in fact comparable to that of parental consent and which, therefore, requires a bypass alternative.

In holding that notice and consent require like constitutional treatment, the cases discussed above acknowledge that mandatory notification imposes burdens on minors which are comparable to those imposed by consent, a finding fully supported by the record of this case. Indeed, this record unequivocally demonstrates that notification in fact serves to give parents opposed to abortion the opportunity to veto their minor daughter's abortion choice. Because there is no evidence to the contrary, and because the district court's findings have not even been alleged to be erroneous, no serious issue as to the unconstitutionality of this holding is presented for review.

There are numerous examples in the record of the consequences of involuntary parental notification. These include: increased violence toward the minor, including physical and sexual abuse (140a-141a); the minor being thrown out of the house (123a); and the minor being disowned by her family (126a). The district court noted these detrimental and potentially devastating effects stating, "[n]otification of the minor's pregnancy and abortion decision can provoke violence," (31a), and some "parents [are] likely to react with psychological, sexual, or physical violence toward . . . the minor . . . ." (21a).[8] The severity of a parent's reaction to notification underscores how, for a dependent minor, the effect of parental notice is comparable to that of consent.

This Court has previously acknowledged that "young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Bellotti II*, 443 U.S. at 647, *quoted in Hodgson v. Minnesota*, 648 F. Supp. 756, 773 (D. Minn. 1986). Lower courts have also consistently recognized that "as a practical matter, a notification requirement will have the same deterrent effect on a minor seeking an abortion as a consent statute has." *Pearson*, 716 F.2d at 1132. *See also Rosen*, 633 F. Supp. at 1132-33 ("[p]arental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion"). The deterrent effect of the statute is the same, whether it mandates notification or consent.

Further, the unique way in which the Minnesota statute is written eliminates even the formal distinction between a notification and a consent statute. In Minnesota, minors are required to provide clinics with written proof of parental notification. (Wendt, T 48, 65-66) (Welsh, T 128). The statute compels this result. The most common means of notifying a parent who does not accompany a minor to the clinic is by certified mail "*return*

8 Judges and experienced counselors repeatedly found that minors' assessment of their situations were credible and accurate. (114a-115a); (122a-123a); (126a); (Wendt, T 41).

receipt requested." *See* Minn. Stat. Ann. § 144.343 (2)(b) (emphasis added); (1a). The parent's signature on the return receipt provides clinics with written proof that notice has occurred. Clinics require written proof of notice because the statute requires *written* evidence of compliance with its terms in order to avoid criminal or civil liability. Minn. Stat. Ann. § 144.343 (5); (2a-3a); (Wendt, T 48, 65-66); (Welsh, T 128).

Because written proof of notice is required, a parent can withhold the necessary proof, thereby delaying or obstructing a minor's abortion entirely.[9] The factual record in this case is replete with evidence that some parents, when notified of a minor daughter's decision, will attempt to obstruct her access to abortion services. One father, when notified, "refused to acknowledge his paternity," causing a two-week delay of the minor's abortion. (119a). Another father, who "hadn't had contact with his daughter for quite some time," (Wendt, T 71-72), initially refused to sign the certified letter. *Id.* at 72. Although he was eventually persuaded to sign the receipt, this man effectively delayed his daughter's abortion. *Id.* at 72-73. Another father stated that he would stop his daughter's abortion, but relented when the mother of the girl drove by his house and fired a gunshot at his front door. His refusal caused a delay of several days in performing the abortion. *Id.* at 78-79. These examples reveal that many parents in Minnesota understood the notification requirement to grant them the ability to withhold consent.[10] On many occasions this pervasive misunderstanding has delayed, deterred, or entirely prevented minors from obtaining the abortion it is their right to choose.

9 Because written proof of notice must be obtained, parents must affirmatively cooperate with a minor who seeks an abortion. Predictably, this affirmative act will be withheld if a parent disapproves of the abortion decision.

10 Clinic personnel have also reported confusion about whether the statute actually requires parental notice or consent. Some of this confusion may have arisen from the statutory provision that alleviates the need for parental notice if written proof of parental *consent* is given. Minn. Stat. Ann. § 144.343 (4)(b); (2a).

In this case, the district court held that mandatory two-parent notification without a bypass option "unduly burden[ed] the exercise" of a minor's right because "there are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise the right." (38a) (citing *Bellotti II*, 443 U.S. at 647; *Pearson*, 716 F.2d at 1132). The district court, relying on Supreme Court precedent and the factual record, concluded that subdivision (2) of the statute could not stand. The factual finding that mandatory notice is unduly burdensome is unassailable.

II. THIS COURT SHOULD REAFFIRM THAT, IN THE CONTEXT OF ABORTION, PARENTS' RIGHTS ARE NOT INDEPENDENT OF THE BEST INTERESTS OF THEIR MINOR DAUGHTER.

Conceding that parental consent without a bypass may be impermissible, the State of Minnesota nevertheless asks this Court to create a "general [parental] right to notice." C.P. at 20. But the interests of parents recognized by this Court have never been endowed with the status of independent rights to be "balanced" against those of the minor. Indeed, these interests have no status independent of the best interests of the minor, to which they are entirely subordinated under the decisions of this Court. As stated in *Bellotti II*, "[i]n the case of the abortion decision . . . the focus of the parents' inquiry should be the best interests of their daughter." 443 U.S. at 649. In sum, the state's interest in "encouraging parental involvement in their minor children's decision to have an abortion . . . must give way to the constitutional right of a mature minor whose best interests are contrary to parental involvement." *Akron*, 462 U.S. at 427 n.10.[11]

11 Even in *Prince v. Massachusetts*, 321 U.S. 158 (1944), a case cited by defendants, C.P. at 15, this Court found that the best interests of the child, and not parental rights, were paramount. While acknowledging that the "custody, care and nurture of the child reside first in the parents," this Court also noted that the "rights of parenthood are [not] beyond limitation." *Id.* at 166. In fact, in *Prince*, this Court upheld a mother's conviction for violation of the state child labor statute because the best interest of the child overrode the rights of the parent. *See also Matheson*, 450 U.S. at 449 (Marshall, J., dissenting).

Therefore, while the state may legitimately protect immature minors whose best interests are served by parental involvement, "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U.S. at 641. Laws that require parental involvement may "not unduly burden the right to seek an abortion." *Id.* at 640. A law that requires notification of both biological parents without any bypass option does just that.

CONCLUSION

For the foregoing reasons, this Court should refuse to grant defendants' Cross-Petition for a Writ of Certiorari.

Dated: March 6, 1989

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA PALMER
CHARLES HOFFMAN
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, MN 55402
(612) 339-8015

Attorneys for Petitioner Planned Parenthood of Minnesota

JANET BENSHOOF
(Counsel of Record)
RACHAEL N. PINE
LYNN M. PALTROW
AURIE HALL
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioners other than Planned Parenthood of Minnesota

Nos. 88-1125 and 88-1309

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, ET AL.,

Petitioners and Cross-Respondents,

—v.—

THE STATE OF MINNESOTA, ET AL.,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

JANET BENSHOOF
(Counsel of Record)
RACHAEL PINE
LYNN PALTROW
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioners/ Cross-Respondents Other Than Planned Parenthood of Minnesota

WILLIAM Z. PENTELOVITCH
REBECCA PALMER
Maslon Edelman Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

Attorneys for Petitioner/ Cross-Respondent Planned Parenthood of Minnesota

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
(Counsel of Record)
525 Park Street
St. Paul, Minnesota 55103
(612) 296-2654

Attorneys for Respondents/ Cross-Petitioners

(Counsel Continued On Inside Front Cover)

PETITION FOR CERTIORARI FILED JANUARY 4, 1989
CROSS-PETITION FOR CERTIORARI FILED FEBRUARY 3, 1989
CERTIORARI GRANTED JULY 3, 1989

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

Attorneys for Petitioners/
Cross-Respondents Other Than
Planned Parenthood of Minnesota

TABLE OF CONTENTS

	PAGE
RELEVANT DOCKET ENTRIES*	1
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, dated March 22, 1982 (Docket No. 69)	21
PRELIMINARY INJUNCTION, dated March 22, 1982 (Docket No. 70)	31
AMENDED COMPLAINT, filed January 31, 1984 (Docket No. 102)	33
AMENDED ANSWER OF DEFENDANTS, dated February 7, 1984 (Docket No. 104)	53
STIPULATION OF FACTS FOR PURPOSES OF TRIAL—SET II, dated August 7, 1985	60
SYLVIA P., Minor, Excerpts from Deposition taken December 15, 1983	64
NATALIE C., Minor, Excerpts from Deposition taken January 10, 1984	66
FRANCIS [illegible]., Minor, Excerpts from Deposition taken January [illegible], 1984	68
CYNTHIA J., Minor, Excerpts from Deposition taken February 23, 1984	72
BONNIE L., Minor, Excerpts from Deposition taken March 23, 1984	93

* All proceedings in this case took place in the United States District Court for the State of Minnesota.

PAGE

DR. STANLEY HENSHAW, Director of Research at Alan Guttmacher Institute, Excerpts of Trial Testimony on February 10, 1986 97

PAULA WENDT, Co-Administrator of Meadowbrook Women's Clinic, Excerpts of Trial Testimony on February 11, 1986 and February 27, 1986 109

JUDGE ALLEN OLEISKY, Juvenile Division Judge of Hennepin County, Excerpts of Trial Testimony on February 11, 1986 154

*H. P., Minor, Excerpts of Trial Testimony on February 11, 1986 171

D. P., Mother of Minor, Excerpts of Trial Testimony on February 11, 1986 179

KATHERINE WELSH, Executive Director of Women's Health Center, Excerpts of Trial Testimony on February 12, 1986 and February 13, 1986 181

CYNTHIA DALY, Assistant Ramsey County Public Defender, Excerpts of Trial Testimony on February 12, 1986 184

DR. LENORE WALKER, Clinical Psychologist, Excerpts of Trial Testimony on February 13, 1986 ... 188

JUDGE GERALD MARTIN, Family and Juvenile Court Judge of St. Louis County, Excerpts of Trial Testimony on February 13, 1986..... 200

CHAR BAKER, Executive Director of Midwest Health Center, Excerpts of Trial Testimony on February 18, 1986 205

* The parties have stipulated to the use of initials in place of the proper names of certain witnesses whose testimony is under seal.

PAGE

MARIA HONKALA, Former Teen Advocate at Midwest Health Center for Women, Excerpts of Trial Testimony on February 18, 1986..... 206

THOMAS WEBBER, Executive Director of Planned Parenthood of Minnesota, Excerpts of Trial Testimony on February 18, 1986 and February 19, 1986 .. 214

M. J., Minor, Excerpts of Trial Testimony on February 18, 1986 216

S. L., Minor, Excerpts of Trial Testimony on February 19, 1986 222

SUSANNE SMITH, Supervisor of Guardian Ad Litem Program in Hennepin County, Excerpts of Trial Testimony on February 19, 1986..... 229

JUDGE HENRY ALBRECHT, Juvenile Court Judge of Hennepin County, Excerpts of Trial Testimony on February 19, 1986 241

HEATHER SWEETLAND, Assistant Public Defender in St. Louis County, Excerpts of Trial Testimony on February 20, 1986 244

LAURA HUNTER, Counselor at Planned Parenthood of Minnesota, Excerpts of Trial Testimony on February 20, 1986 and February 25, 1986..... 247

ELISSA BENEDEK, Director of Research and Training at the Center for Forensic Psychiatry, Ann Arbor, Michigan, Excerpts of Trial Testimony on February 24, 1986 250

GARY MELTON, Professor and Director of Law-Psychology Program at University of Nebraska, Lincoln, Excerpts of Trial Testimony on February 25, 1986 255

PAGE

K. M., Minor, Excerpts of Trial Testimony on February 25, 1986 268

S. L., Mother of Minor, Excerpts of Trial Testimony on February 26, 1986 275

JUDGE GEORGE PETERSEN, Juvenile Court Judge of Ramsey County, Excerpts of Trial Testimony on February 26, 1986 281

JUDGE PAUL GARRITY, Superior Court Judge in Massachusetts, Excerpts of Trial Testimony on February 26, 1986..... 288

DR. STEVEN BUTZER, Psychiatrist at St. Paul Ramsey Medical Center, Excerpts of Trial Testimony on February 26, 1986..... 293

J. M., Minor, Excerpts of Trial Testimony on February 26, 1986 305

I. B., Sister of Minor, Excerpts of Trial Testimony on February 27, 1986 312

J. H., Mother of Minor, Excerpts of Trial Testimony on February 27, 1986 316

MARY RING, Social Worker with Olmsted County Social Service Department, Excerpts of Trial Testimony on March 4, 1986 320

ELDON HALL, Judicial Officer for St. Louis County, Excerpts of Trial Testimony on March 4, 1986 325

SUSAN STACY, Administrative Assistant in Guardian Ad Litem Office of Hennepin County, Excerpts of Trial Testimony on March 5, 1986..... 326

PAGE

JODY DESMIDT, Law clerk for Hennepin County Judge Oleisky, Excerpts of Trial Testimony on March 6, 1986 334

JANE SCHLEUSNER, Court reporter for Hennepin County Judge Oleisky, Excerpts of Trial Testimony on March 6, 1986..... 335

MARK MCDONOUGH, Former law clerk for Hennepin County Judge Oleisky, Excerpts of Trial Testimony on March 6, 1986..... 336

DAVID KNUTSON, Attorney with Hennepin County Public Defender's Office, Excerpts of Trial Testimony on March 6, 1986..... 337

PATRICK CONNOR, Former Ramsey County Public Defender, Excerpts of Trial Testimony on March 6, 1986 339

JUDGE NEIL RILEY, Judge of Hennepin County District Court, Excerpts of Trial Testimony on March 10, 1986 341

EDWARD EHLINGER, Director of Personal Health Services for Minneapolis Health Department, Excerpts of Trial Testimony on March 10, 1986 342

DR. PAUL GUNDERSON, Director of Minnesota Center for Health Statistics, Excerpts of Trial Testimony on March 10, 1986 and March 12, 1986 345

DR. RICHARD SCHMIDT, Physician at Good Samaritan Hospital in Cincinnati, Excerpts of Trial Testimony on March 11, 1986 351

PAGE

VINCENT RUE, Executive Director of Sir Thomas Moore Clinics in Southern California, Excerpts of Trial Testimony on March 11, 1986 and March 12, 1986 357

MARCUS KJELSBERG, Head of Biometry Division of School of Public Health at University of Minnesota, Excerpts of Trial Testimony on March 12, 1986 369

DR. ARTHUR HOROWITZ, Physician at Meadowbrook Women's Clinic, Excerpts of Trial Testimony on March 12, 1986 and March 13, 1986 370

HENRY DAVID, Director of Transnational Family Research Institute, Excerpts of Trial Testimony on March 13, 1986..... 373

EXHIBITS

Plaintiffs' Exhibit No. 10: "Parental Notification Calendar: Statistical Update" 378

Plaintiffs' Exhibit No. 21: Letter from George O. Petersen, Judge of Ramsey County Juvenile Court, to Representative Kathleen Vellenga, dated December 6, 1982 380

Plaintiffs' Exhibit No. 25: "Defendant's Response to Plaintiffs' [Second] Request for Admission", dated December 23, 1983..... 383

Plaintiffs' Exhibit No. 27: "Abortions and Abortion Rates, Minnesota Residents under Age 20, 1980-1982" 388

Plaintiffs' Exhibit No. 28: "Birth Rates, Women Aged 15-17 and 18-19, Residents of Minnesota and Four Comparison States Averaged, 1981 and 1982" 389

PAGE

Plaintiffs' Exhibit No. 41: Excerpts from Defendants' Answers to Plaintiffs' First Set of Interrogatories, dated March 31, 1982 390

Plaintiffs' Exhibit No. 56: "Minnesota Program for Battered Women, 1985 Update"..... 399

Plaintiffs' Exhibit No. 57: "Adolescent Abortion: Psychological and Legal Issues" 403

Plaintiffs' Exhibit No. 60: "Transcription of Hearing on Venue Amendment to M.S. sec. 144.343(6)" 414

Plaintiffs' Exhibit No. 68: Pamphlet from Meadowbrook Women's Clinic on Second Trimester Abortion 417

Plaintiffs' Exhibit No. 69: Post Abortion Follow-Up Care Pamphlet from Meadowbrook Women's Clinic. 421

Plaintiffs' Exhibit No. 70a: Excerpt from Phone Training Manual from Meadowbrook Women's Clinic 429

Plaintiffs' Exhibit No. 73: "Compliance with the Parental Notification Law for Minors"..... 435

Plaintiffs' Exhibit No. 92: Excerpts from Deposition of Dr. Jane Hodgson taken July 11, 1985 and July 12, 1985 438

Plaintiffs' Exhibit No. 122: Table—"Percent in Second Trimester (Minnesota Residents)" 477

Defendants' Exhibit No. 19: "Teenage Pregnancy in Minnesota"..... 478

Defendants' Exhibit No. 35: Minnesota Reported Abortions, 1980-1983..... 481

PAGE

Defendants' Exhibit No. 62: Minnesota Supreme Court Order dated August 13, 1981 482

Defendants' Exhibit No. 62a: Minnesota Supreme Court Order dated June 14, 1984 484

Defendants' Exhibit No. 68: Excerpt from "Major Studies on Psychological Ill Effects of Induced Abortion" 486

Defendants' Exhibit No. 69: "Petitions, Abortion Notification Statute" 493

Defendants' Exhibit No. 70: Partial Transcript of Remarks by Senator Gene Waldorf dated March 24, 1981 502

Defendants' Exhibit No. 71: Partial Transcript of Remarks by Senator Gene Waldorf dated April 7, 1981 504

Defendants' Exhibit No. 72: Partial Transcript of Remarks by Senator Gene Waldorf dated May 6, 1981 506

The following items have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

PAGE

1. Minn. Stat. Ann. § 144.343(1)-(7) 1a

2. Minn. Stat. Ann. § 144.346 5a

3. *Hodgson* v. *Minnesota*, No. 3-81 Civ. 538 (D. Minn. Jan. 23, 1985) (summary judgment order) 146a

4. Order Substituting Caption (April 3, 1986) 6a

5. *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986) 10a

6. *Hodgson v. Minnesota*, 827 F.2d 1191 (8th Cir. 1987) 53a

7. *Hodgson v. Minnesota*, Nos. 86-5423, 86-5431 (8th Cir. Nov. 13, 1987) (order granting petition for rehearing by the panel, vacating and withdrawing prior panel opinion, holding case in abeyance pending the decision in *Hartigan v. Zbaraz*, ____ U.S. ____ (1987), and denying petition for rehearing en banc) 158a

8. *Hodgson v. Minnesota*, Nos. 86-5423, 86-5431 (8th Cir. Dec. 31, 1987) (order granting petition for hearing en banc and vacating opinion and judgment of the panel) 160a

9. *Hodgson v. Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (en banc) 74a

10. Stay of Mandate (Oct. 7, 1988) (stay pending filing of petition for writ of certiorari) 110a

11. Plaintiffs' Exhibit No. 116, "Live Births and Induced Abortions to Women Age 15-19" 136a

RELEVANT DOCKET ENTRIES

Civil 3-81-538

DATE	PROCEEDINGS
7-30-81	1 VERIFIED COMPLAINT Issued Summons
	2 PLTFFS' MOTION FOR TEMPORARY RESTRAINING ORDER pursuant to Rule 65, Fed. R. of Civ. P.
	3 AFFIDAVIT OF JANE HODGSON, M.D.
	4 AFFIDAVIT OF GORDON DITMANSON, M.D.
	5 AFFIDAVIT OF ALICE ROE
	6 AFFIDAVIT OF MICHELLE ROE
	7 AFFIDAVIT OF DIANA ROE
	8 AFFIDAVIT OF JANE E. HODGSON, M.D.
	9 AFFIDAVIT OF GAYNELLE DOE
	10 AFFIDAVIT OF JANE MOE
	11 AFFIDAVIT OF ANN DOE
	12 AFFIDAVIT OF DR. RONALD ANDERSON
	13 AFFIDAVIT OF PAULA WENDT
	14 AFFIDAVIT OF LINDA OJALA
	15 AFFIDAVIT OF JACQUELINE DARROCH FORREST
	16 AFFIDAVIT OF ADELE D. HOFMANN, M.D.
	17 AFFIDAVIT OF THOMAS P. WEBBER
	ASSIGNED TO ALSOP-J per CIVIL RIGHTS 617
7-31-81	18 FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER (Alsop-J 7-31-81) that motion of pltf for

DATE		PROCEEDINGS

temporary restraining order is granted in part and denied in part. FURTHER ORDERED that a temporary restraining order issue, without security therefor, as follows:

> It is Ordered That, until further Order of this Court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are enjoined and prohibited from enforcing the provisions of Minnesota Statutes 144.343, Subd. 2 except insofar as it is enforced, in accordance with Minnesota Statutes 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minnesota Statutes 144.343 Subd. 2.

	19	TEMPORARY RESTRAINING ORDER (Alsop-J 7-31-81)
	20	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) Mr. Jevne moves for the admission of Janet Benshoof to The bar of this Court for purposes of this lawsuit. Hearing on Pltffs' motion for a temporary restraining order: Argued, submitted and taken under advisement.
	21	NOTICE TO COUNSEL
7-30-81	22	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindbergreporter) Hearing on Pltff's Motion For Temporary Restraining Order: Rescheduled to Friday, July 31, 1981 2 P.M.
8-7-81	23	SUMMONS returned served 8-4-81
8-7-81	24	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) STATUS CONFERENCE

DATE		PROCEEDINGS
8-10-81	25	NOTICE OF DISMISSAL pursuant to Rule 41(a)(1)(i) F.R.C.P. to dismiss without prejudice, all claims against Deft. Tom Johnson as County Attorney for Hennepin County by Pltff.
	26	STIPULATION FOR INTERVENTION
	27	AFFIDAVIT OF NADINE T.
	28	ORDER FOR INTERVENTION (Alsop-J 8-10-81) that the unemancipated minor female suing under pseudonym as Nadine T. is hereby permitted to intervene as an additional pltff..
	29	COMPLAINT OF INTERVENOR NADINE T.
	30	NOTICE TO COUNSEL
8-10-81		REPORTER'S NOTES of Motion 8-7-81 (Box 81-3 Lindberg-Reporter)
		REPORTER'S NOTES OF MOTION 7-30-81 and 7-31-81 (Box 81-3 Lindberg-Reporter)
8-24-81	31	JOINT ANSWER OF STATE DEFENDANTS
8-26-81	32	AFFIDAVIT OF KAREN L. IVES
	33	AFFIDAVIT OF MICHAEL D. CALVERT
	34	AFFIDAVIT OF GREGORY DATE
	35	AFFIDAVIT OF PAUL GUNDERSON
	36	AFFIDAVIT OF NANCY L. HELMICH
8-28-81	37	AFFIDAVIT OF JACQUELINE MUCH
	38	AFFIDAVIT OF CARMEN KEMSKI
	39	AFFIDAVIT OF THOMAS CAMPBELL, M.D.
	40	AFFIDAVIT OF A.K.
	41	AFFIDAVIT OF KATHERINE (Tina) Welsh
	42	AFFIDAVIT OF CAROL R.

DATE		PROCEEDINGS
	43	AFFIDAVIT OF RENNE WARD, M.A.
	44	AFFIDAVIT OF JUDY R.
8-28-81	45	AFFIDAVIT of Jan Roe
	46	AFFIDAVIT OF MARTHA Z.
9-3-81	47	AFFIDAVIT OF JANE E. HODGSON, M.D.
	48	REPORTER'S TRANSCRIPT OF MOTION July 31, 1981.
9-4-81	49	SECOND AFFIDAVIT OF KAREN L. IVES
	50	SECOND AFFIDAVIT OF MICHAEL D. CALVERT
9-4-81		REPORTER'S NOTES OF MOTION 9-4-81 (Lindberg-Box 81-4)
	51	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) Hearing on Pltff's Motion for Preliminary Injunction: argued, submitted and taken under advisement. Parties each to submit their proposed findings by Sept. 16, 1981. TRO is continued.
	52	AFFIDAVIT
9-10-81	53	SECOND AFFIDAVIT OF GREGORY DATE
	54	PLTFFS' NOTICE OF MOTION FOR CLASS CERTIFICATION Noticed for Sept. 18, 1981.
	55	PLTFFS' MOTION FOR CERTIFICATION AS A CLASS ACTION, pursuant to Rule 23 of the FRCP.
9-17-81	56	Janet T.'s MOTION FOR LEAVE TO INTERVENE AND TO PROCEED PSEUDONYMOUSLY pursuant to Rule 24 (b) of Fed. R. of Civ. P.
	57	AFFIDAVIT of JANET T.
	58	AFFIDAVIT OF PAULA WENDT

DATE		PROCEEDINGS
9-18-81	59	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR CLASS CERTIFICATION (Alsop-J 9-18-81) that pltff. class is certified to include: All unemancipated pregnant mature minors seeking abortions in Minnesota who have adequate capacity to give informed consent to abortion but who do not want to involve their parents.
	60	STIPULATION CONCERNING CERTIFICATION OF PLAINTIFF CLASS AND INTERVENTION OF ANONYMOUS PLAINTIFF
	61	ORDER FOR INTERVENTION OF JANET T. (Alsop-J 9-18-81) that the unemancipated minor female suing under pseudonym as Janet T. is hereby permitted to intervene as an additional plaintiff in the above-entitled action.
	62	NOTICE TO COUNSEL
9-21-81	63	AFFIDAVIT OF PAULA WENDT
9-30-81	64	JANET T. INTERVENOR'S PROPOSED COMPLAINT
10-26-81	65	PLTFFS' NOTICE OF MOTION TO REOPEN THE RECORD ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION Noticed for Oct. 30, 1981 1:30 P.M. at St. Paul.
	66	MOTION TO REOPEN THE RECORD permitting Pltffs. to submit, affidavits, of Donald R. Rysavy, Sarah L, Kathy M, N.B., Mrs. Nan Roe, Janet Benshoof and Franz Jevne III.
10-29-81	67	STIPULATION CONCERNING LIMITATIONS OF ACCESS TO CERTAIN DOCUMENTS AND TO SHORTEN MOTION TIME ON PLAINTIFFS' MOTION FOR SUBMISSION OF ADDITIONAL DOCUMENTS.

DATE		PROCEEDINGS
10-30-81	68	MINUTES OF PROCEEDINGS: (Alsop-J) (Lindberg-Reporter) Hearing on Pltff's Motion to Re-open Preliminary Injunction Motion: Agreed between parties. Pltffs. to draw stipulation and proposed order.
11-2-81		REPORTER'S NOTES of Motion 10-30-81 (Lindberg-Reporter Box 81-4)
3-23-82	69	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (Alsop-J 3-22-82) that motion of plaintiffs for a preliminary injunction is granted in part and denied in part. FURTHER ORDERED that a preliminary injunction should issue, without security therefor, as follows:

> Pursuant to the Findings of Fact, Conclusions of Law and Order of the court dated March 22, 1982,
>
> IT IS ORDERED That, until further order of this court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are ENJOINED AND PROHIBITED from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2, except insofar as it is enforced in accordance with Minn. Stat. § 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minn. Stat. § 144.343, Subd. 2.

	70	PRELIMINARY INJUNCTION (Alsop-J 3-22-82).
	71	NOTICE TO COUNSEL
9-15-82	72	PRETRIAL CONFERENCE (Short-M; 9-14-82)
9-15-82	73	PRETRIAL SCHEDULE (Short-M; 9-14-82) THAT: 1) the period which parties may conduct

DATE		PROCEEDINGS
		discovery shall terminate on Oct. 1, 1983; 2) all non-dispositive motions, specifically those which relate to discovery and the discovery period, shall be filed and scheduled for hearing on or before Oct. 1, 1983; 3) all dispositive motions shall be filed and scheduled for hearing according to the requirements of Judge Alsop's standing Order Re Motion Practice on or before Nov. 1, 1983; and 4) this case shall be considered ready for trial on Dec. 1, 1983.
12-03-82	74	AFFIDAVIT OF FRANZ P. JEVNE, III
8-29-83	75	DEFTS NO. OF MO. & MO. TO COMPEL DISCOVERY AND EXTEND PRETRIAL SCHEDULE Ret. Bef. Mag. Short on 9-12-83 at 9:00 a.m. in St. Paul, MN.
	76	AFFIDAVIT OF KENT G. HARBISON IN SUPPORT OF DEFTS MO. TO COMPEL (SEPARATE)
9-6-83	77	AFFIDAVIT OF JANET BENSHOOF IN OPPOSITION TO DEFT. MOTION TO COMPEL DISCOVERY
	78	AFFIDAVIT OF LINDA M. OJALA IN OPPOSITION TO DEFT MOTION TO COMPEL
9-16-83	79	AMENDED PRETRIAL SCHEDULE (SHORT-M) THAT: 1) Discovery ends 2-01-84; 2) Nondispositive motions by 2-01-84; 3) Dispositive motions by 3-01-84; 4) Case be ready for trial by 4-01-83. Sent copies to counsel.
12-12-83	80	NO. OF TAK. DEPOSITION OF JANE MORROW ON 12-16-83 at 10:00am in Mpls., MN.
12-09-83	81	PLTFFS MOTION FOR A PROTECTIVE ORDER

DATE		PROCEEDINGS
	82	AFFIDAVIT OF PAM GALLOP IN SUPPORT OF MO. FOR PRO. ORDER
	83	AFFIDAVIT OF JANET BENSHOOF IN SUPPORT OF MO. FOR PROT. ORDER
12-15-83	84	STATE OF MINNESOTA AND JUDGE GERALD MARTIN NO. OF MO. & MO. FOR protective order Ret. Bef. Mag. Short on 12-27-83 at 9:00 a.m.
	85	AFFIDAVIT IN SUPPORT OF MOTION FOR PROTECTIVE ORDER OF JOHN B. GALUS.
12-20-83	86	PLTFFS NO. OF MO. & MO. FOR ENLARGEMENT OF TIME FOR DISCOVERY RET. BEF. Mag. Short on 12-27-83 at 9:00 a.m. in St. Paul, MN.
	87	AFFIDAVIT OF FRANZ P. JEVNE, III IN SUPPORT OF PLTFFS MO. FOR ENLARGEMENT OF TIME
	88	PLTFFS NO. OF MO. & MO. FOR LEAVE TO INTERVENE, TO PROCEED PSEUDONYMOUSLY & TO amend complaint Ret. Bef. on 1-9-84 at 9:00 a.m. in St. Paul, MN.
	89	AFFIDAVIT OF LAUREN Z.
	90	AFFIDAVIT OF ELLEN Z.
	91	AFFIDAVIT OF PAULA WENDT
12-21-83	92	AFFIDAVIT IN OPPOSITION TO PLTFFS MO. FOR PROTECTIVE ORDER OF JOHN B. GALUS
12-22-83	93	AFFIDAVIT IN OPPOSITION TO ANY PROTECTIVE ORDER AGAINST THE DEPOSITION OF Judge Martin of JANET BENSHOOF
12-27-83	94	MINUTES (SHORT-MAG) RE: PLTFFS MO. FOR PROTECTIVE ORDER-DENIED; Defts Mo. for protective order-DENIED.

DATE		PROCEEDINGS
12-30-83	95	ORDER (SHORT-MAG) THAT: PLTFFS MO. FOR PROTECTIVE ORDER IS DENIED; STATE OF MN mo. & Judge Gerald Martin for protective order is DENIED.
	96	NOTICE TO COUNSEL
12-20-83	97	PLTFFS MOTION FOR LEAVE TO INTERVENE, PROCEED PSEUDONYMOUSLY AND TO AMEND the Complaint (Rec'd 1-6-84)
1-11-84	98	AFFIDAVIT OF DR. RONALD ANDERSON in support of pltffs' motion for extension of dis.
	99	AFFIRMATION OF STANLEY K. HENSHAW in support of pltffs' motion for protective order
1-17-84	100	MINUTES (Short-M) pltffs mo. to extend discovery-granted, extended to April 1, 1984; mo. to amend complaint-granted; parties to draft another complaint.
1-31-84	101	ORDER (SHORT-MAG) THAT: PLTFFS MO. FOR ENLARGEMENT OF TIME BY 60 DAYS WITHIN WHICH parties must complete discovery is GRANTED: Discovery ends 4-01-84; nondispositive motions by 4-01-84; dispositive motions by 5-01-84; Case to be considered ready for trial on 6-01-84; Pltffs mo's for leave to intervene and amend complaint are GRANTED.
	102	AMENDED COMPLAINT-ISSUED AMENDED SUMMONS
	103	NOTICE TO COUNSEL
2-13-84	104	AMENDED ANSWER OF DEFTS
3-15-84	105	PLTFFS NOTICE OF MOTION FOR LEAVE TO USE DEPOSITIONS OF MEMBERS OF THE PLAINTIFF CLASS OF WOMEN Ret. before on 3-26-84 at 9:00 a.m.

DATE		PROCEEDINGS
	106	AFFIDAVIT OF PAULA WENDT
	107	STATEMENT OF COUNSEL PURSUANT TO LOCAL RULE 4(c)
	108	STIPULATION RE: PLTFFS MOTION #105
4-2-84	109	NOTICE OF TAKING DEPOSITION AND SUBPOENA DUCES TECUM OF SUZANNE SMITH ON 4-5-84 at 4:00 in Mpls., MN
	110	NOTICE OF TAKING DEPOSITION AND SUBPOENA DUCES TECUM OF JUDGE GEORGE O. PETERSEN ON 4-5-84 at 2:00 in Mpls., MN
	111	NOTICE OF TAKING DEPOSITION AND SUBPOENA DUCES TECUM OF JUDGE ALLEN OLEISKY on 4-5-84 at 12:00 in Mpls., MN
4-11-84	112	STIPULATION OF PARTIES TO DEFER HEARING ON RULE 32 MOTION UNTIL TIME CLOSER TO ACTUAL TRIAL DATE Ret. before Mag. Short Apr. 2, 1984 (rec'd 3-27-84)
5-1-84	113	DEFTS. NOTICE OF MO. & MO. FOR PART. SUMMARY JUDGT. ret. before Judge Alsop June 15, 1984, 10:00 a.m.
	114	DEFT. MO. FOR LEAVE TO FILE MEMORANDUM OF POINTS/AUTHORITIES IN SUPPORT OF PART. SUMMARY JUDGT. IN EXCESS OF 35 PAGES
	115	AFFIDAVIT OF STUART BECK
	116	4th AFFIDAVIT OF MICHAEL D. CALVERT
	117	AFFIDAVIT OF DONALD CULLEN
	118	AFFIDAVIT OF CYNTHIA DALY
	119	4th AFFIDAVIT OF GREGORY J. DATE
	120	AFFIDAVIT OF ESTHER S. FELDMAN

DATE		PROCEEDINGS
	121	AFFIDAVIT OF JOHN FILLENWORTH
	122	AFFIDAVIT OF D.J. HANSON
	123	AFFIDAVIT OF NANCY L. HELMICH
	124	4th AFFIDAVIT OF KAREN L. IVES
	125	AFFIDAVIT OF A. MILTON JOHNSON
	126	AFFIDAVIT OF DAVID KNUTSON
	127	AFFIDAVIT OF MARK A. MCDONOUGH
	128	AFFIDAVIT OF DAVID L. NORRGARD
	129	AFFIDAVIT OF JAMES P. SLTEET
	130	AFFIDAVIT OE SUSANNE K. SMITH
	131	AFFIDAVIT OF PAUL WETPHAL
	132	AFFIDAVIT OF GERALD J. WINTER
5-3-84	133	ORDER (Alsop-J) deft. memo. of points/authorities in support of part. summary judgt. mo. may exceed 35 pages, not to exceed 45 pages, responsive briefs by pltffs may exceed 35 pages, not to exceed 45 pages
	134	NOTICE TO COUNSEL
6-7-84	135	DEFTS RESPONSE TO PLTFFS (SECOND) REQUEST FOR ADMISSION
	136	DEPOSITION OF GERALD C. MARTIN (SEPARATE)
	137	DEPOSITION OF KATHERINE WELSH (SEPARATE)
	138	DEPOSITION OF MARIE HONKALA (SEPARATE)
	139	DEPOSITION OF SHERRY SIMPSON (SEPARATE)
	140	APPENDIX TO PLTFFS BRIEF IN OPPOSITION TO DEFTS MO. FOR SUMMARY Judgment (SEPARATE) (VOLUME I)

DATE		PROCEEDINGS
	141	APPENDIX TO PLTFFS BRIEF IN OPPOSITION TO DEFTS MO. FOR SUMMARY Judgment (SEPARATE) (VOLUME II)
	142	APPENDIX TO PLTFFS BRIEF IN OPPOSITION TO DEFTS MO. FOR SUMMARY Judgment (SEPARATE) (VOLUME III)
6-7-84	143	DEPOSITION OF SHERRY SIMPSON (Separate)
	144	DEPOSITION OF CYNTHIA J. (Separate)
	145	DEPOSITION OF BONNIE L. (Separate)
6-25-84	146	PLTFFS NOTICE OF MO. & MO. RE: DEPOSITIONS—Judge Alsop, July 6, 1984, 2:00 p.m.
	147	AFFIRMATION OF JANE HODGSON IN OPPOSITION TO DEFTS. MO. FOR SUMMARY JUDGT.
7-6-84	148	STIPULATION AND ORDER (Alsop-J) that: 1) pltffs' mo. for leave to use depos of members of the pltff class of women at trial in lieu of testimony is GRANTED; 2) pltffs may use all other pseudonymous depos of minors, parents/ immed. family members at trial in lieu of of testimony; 3) pltffs shall not oppose any mo. of state defts to use same; 4) no waiver of pltffs' nor defts' right to raise evidentiary objections to depos at trial
	149	NOTICE TO COUNSEL
7-6-84	150	MINUTES (Alsop-Lindberg) deft. mo. for summary judgment. Plft. mo. to use testimony by deposition is nesolved parties. Motion taken under advisment.
8-30-84		REPORTERS NOTES OF 7-9-84 (Alsop-J; Lindberg-R) RE: Motion (BOX 84-5)
1-23-85	151	MEMORANDUM ORDER (ALSOP-J) THAT: Defts mo. for partial summary judgment—

DATE		PROCEEDINGS
		GRANTED IN PART & DENIED IN PART.; Defts summary judgment mo. on facial due process claim—GRANTED & that claim is dismissed; Defts' summary judgment motion on due process as applied claim—DENIED; Defts' summary judgment motion on equal protection claim—GRANTED & that claim is Dismissed; Defts' summary judgment motion on state constitutional claims—GRANTED & those claims are dismissed.
	152	NOTICE TO COUNSEL
3-25-85	153	PLTFFS NO. OF MO. & MO. TO REOPEN LIMITED DISCOVERY RET. BEF. MAG. SHORT AT THE Pretrial Conference on March 28, 1985.
	154	AFFIDAVIT OF WILLIAM Z. PENTELOVITCH
3-28-85	155	PRETRIAL CONFERENCE OF 3-28-85 (Short-Mag)
	156	SUBSTITUTION OF COUNSEL
3-29-85	157	CERTIFICATE OF READINESS FOR TRIAL (SHORT-MAG)
	158	ORDER (SHORT-MAG) THAT: All foundation objection to exhibits listed on parties exhibit lists filed at final pretrial conference are waived unless made in writing within 60 days of date of that pretrial conference; Parties' stipulation of facts shall be filed within 60 days of pretrial conference date; Parties shall identify all deposition transcripts intended to be used at trial within 7 days of date on which they receive trial notice. That identification shall include name of deponent, pages to be offered at trial & purposed for which testimony will be offered.
	159	NOTICE TO COUNSEL w/copy of order

DATE		PROCEEDINGS
6-24-85	160	PLTFF'S. NOTICE OF TAKING DEPO. & REQUEST FOR PRODUCTION OF DOCUMENTS OF JANE HODGSON, ON 7/11-12/85 comm. at 10:00 am, in Mpls., MN
9-10-85	161	STIPULATION OF FACTS FOR PURPOSES OF TRIAL—SET II
2-5-86	162	DEFTS' OBJECTIONS TO PORTIONS OF DEPOSITION TESTIMONY OFFERED BY PLTFFS.
	163	DEFTS' NO/MO IN LIMINE TO EXCLUDE THE TESTIMONY OF PAUL G. GARRITY
2-10-86	164	DEPO. OF MARY Y. Taken 1-11-84 in Duluth, MN (separate)
	165	DEPO. OF LORRAINE H. Taken 1-18-84 in Burnsville, MN (separate)
	166	DEPO. OF LAUREN Z., taken 3-20-84 in St. Louis Park, MN (separate)
	167	DEPO. OF JENNY M. Taken 12-16-83 in Duluth, MN (separate)
	168	DEPO. OF IDA B. taken 2-8-84 in St. Louis Park, MN (separate)
	169	DEPO. OF AMELIA F., taken 1-10-84 in Duluth, MN (separate)
	170	DEPO. OF SYLVIA P., taken 12-16-83 in Duluth, MN (separate)
	171	DEPO. OF SUSAN B., Taken 1-11-84 in Duluth, MN (separate)
	172	DEPO. OF AGNES I., Taken 12-16-83 in Mpls., MN (separate)
	173	DEPO. OF AMY W., taken 1-11-84 in Duluth, MN (separate)

DATE		PROCEEDINGS
	174	DEPO. OF ANGELA E., Taken 12-27-83 in Mpls., MN (separate)
	175	DEPO. OF ANNA C., Taken 1-18-84, in Mpls., MN (separate)
	176	DEPO. OF BETH F., Taken 12-28-83 in Mpls., MN (separate)
	177	DEPO. OF BONNIE L., Taken 3-23-84 in Mpls., MN (separate)
	178	DEPO. OF CLARA Z., Taken 1-11-84 in Duluth, MN (separate)
	179	DEPO. OF CYNTHIA J., Taken 2-23-84 in Blue Earth Cty, MN (separate)
	180	DEPO. OF ELIZABETH S., Taken 12-16-83 in Duluth, MN (separate)
	181	DEPO. OF EMMA G., Taken 12-15-83 in Mpls., MN (separate)
	182	DEPO. OF FLORENCE K., Taken 12-28-83 in Mpls., MN (separate)
	183	DEPO. OF FRANCIS H. Taken 1-18-84 in Burnsville, MN (separate)
	184	DEPO. OF HARRIET T., taken 12-17-83 in Mpls., MN (separate)
	185	DEPO. OF MARY J., Taken 12-17-83 in St. Louis Park, MN (separate)
	186	DEPO. OF NADINE T., taken 3-21-84 in St. Louis Park, MN (separate)
	187	DEPO. OF NATALIE C., Taken 1-10-84 in Duluth, MN (separate)
	188	DEPO. OF ROSE C., Taken 12-12-83 in Mpls., MN (separate)

DATE		PROCEEDINGS
	189	DEPO. OF ROSE E., Taken 1-10-84 in Duluth, MN (separate)
	190	DEPO. OF SALLY H., Taken 12-16-83 in Mpls., MN (separate)
2-10-86	191	MINUTES (DDA/LL) RE: FIRST DAY OF COURT TRIAL: Mr. Pentelovitch moves the admission of Ms. Lynn and Ms. Pine to the bar of this court for purposes of this case only—GRANTED.
2-11-86	192	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-13-86	193	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial held before DDA on 2-10-86, comm. at 9:30 a.m. (separate)
2-12-86	194	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-13-86	195	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-17-86	196	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Paula Wendt held before DDA on 2/10 & 11/86. (separate)
2-18-86	197	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
02-19-86	198	MINUTES (Alsop-J; Lindberg-R) Continued Court Trial
	199	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Judge Allen Oleisky before Judge Alsop on 02-11-86 (separate)
	200	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Janet Benshoof, before Judge Alsop on 02-10-86 (separate)
2-20-86	201	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL

DATE		PROCEEDINGS
	202	PARTIAL TRANSCRIPT OF VIDEO DEPOSITION OF JANE HODGSON, M.D., taken 7-11-85 comm. at 10:30 a.m., in Mpls., MN (separate)
	203	PARTIAL TRANSCRIPT OF VIDEO DEPOSITION OF JANE HODGSON, M.D., taken 7-12-85 comm. at 9:30 a.m., in Mpls., MN (separate)
2-28-86	204	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Susanne Smith held before DDA on 2-19-86. (separate)
	205	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Henry Peter Albrecht held before DDA on 2-19-86. (separate)
	206	TRANSCRIPT OF PROCEEDINGS (LPL) RE: Trial testimony of Edwin George Widseth held before DDA on 2-19-86. (separate)
3-4-86	207	PLTFFS FEDERAL RULE OF CIVIL PROCEDURE 26(b)(4)(A)(i) STATEMENT
2-24-86	208	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-25-86	209	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-26-86	210	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
2-27-86	211	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-4-86	212	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-5-86	213	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-6-86	214	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL

DATE		PROCEEDINGS
3-10-86	215	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-11-86	216	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-12-86	217	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL
3-13-86	218	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL; Both parties rest. Proposed Findings of fact, conclusions of law and order for judgment to be submitted 4 weeks after receipt of the transcript. REply brief due 2 weeks later. Final arguments to be scheduled at a later date.
3-14-86	219	COURT EXHIBIT LIST (separate)
3-13-86	220	PLTFFS. WITNESS LIST
	221	PLTFFS. FINAL EXHIBIT LIST
	222	DEFTS. AMENDED WITNESS LIST
	223	DEFTS. AMENDED EXHIBIT LIST
4-3-86	224	ORDER (DDA/4-3-86) that the attached caption be substituted in all future filings of the Court. (counsel list attached)
4-11-86	225	AFF. OF NANCY L. HELMICH wi/att exhibits
	226	STIPULATION AS TO THE RECEIPT OF CERTAIN EVIDENCE BY AFFIDAVITS
6-12-86	227	MINUTES (DDA/LL) RE: CONTINUED COURT TRIAL; the court takes the matter under advisement.
11-6-86	228	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER (DDA/11-6-86) that Minn. Stat. 144.343 (2)-(7) be and the same hereby is declared unconstitutional. That the Clerk enter judgment as follows: IT IS ORDERED,

DATE		PROCEEDINGS
		ADJUDGED, AND DECREED that Minn. Stat. 144.343 (2)-(7) is unconstitutional. IT IS FURTHER Ordered that defendants be and the same here permanently enjoined from enforcing the provisions of Minn. Stat. 144.343 (2)-(7). IT IS FINALLY ORDERED that the following injunction shall issue without security: IT IS ORDERED, ADJUDGED, AND DECREED that defendants are permanently enjoined from enforcing the provisions of Minn Stat 144.343 (2)-(7). (counsel served by Judge's office)
	229	JUDGMENT ENTERED
	230	PERMANENT INJUNCTION (DDA/11-6-86) that upon the court's Order of this date, defts. are permanently enjoined from enforcing the provisions of Minn. Stat. 144.343 (2)-(7). (counsel served by Judge's office)
11-12-86	231	DEFTS. NO/MO FOR PARTIAL STAY OF PERMANENT INJUNCTION ORDER PENDING APPEAL, Ret. before DDA on 11-19-86 at 4:00 p.m.
11-18-86	232	DEFENDANTS' NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE ALSOP'S ORDER OF 11-06-86. Delivered two certified copies and one uncertified copy of each of the following to the Court of Appeals—St. Paul office: Defendants' Notice of Appeal, Order (Alsop-J; 11-06-86), Judgment and District Court Clerk' Docket Entries. Copy of Notice of Appeal and Docket Entries mailed to Counsel.
11-24-86	233	PLAINTIFFS' NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE ALSOP'S ORDER OF 11-06-86.

DATE	PROCEEDINGS
	Delivered two certified copies and one uncertified copy of each of the following to the Court of Appeals—St. Paul office: Plaintiffs' Notice of Appeal, Order (Alsop-J; 11-06-86), Judgment and District Court Clerk's Docket Entries. Copy of Notice of Appeal and last page of the docket entries mailed to Counsel.

Findings of Fact,
Conclusions of Law and Order

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 Civ. 538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, and DIANA ROE, individually and on behalf of all other persons similarly situated; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a non-profit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, a non-profit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; ALBERT QUIE, as Governor of the State of Minnesota; and WARREN SPANNAUS, as Attorney General of the State of Minnesota,

Defendants.

American Civil Liberties Union Foundation, by JANET BENSHOOF, Esq., New York, New York, and Mackall, Crounse & Moore, by FRANZ P. JEVNE, III, Esq., Minneapolis, Minnesota, appeared for plaintiffs.

WARREN SPANNAUS, Attorney General, State of Minnesota, by KENNETH E. RASCHKE, Esq. and WILLIAM P. DONOHUE, Esq., Special Assistant Attorneys General, St. Paul, Minnesota, appeared for defendants.

The above-entitled matter came before the court upon plaintiff's motion for a preliminary injunction. Briefs were submitted on behalf of all parties, and oral argument was heard. Thereafter, the parties agreed to reopen the record and submitted additional affidavits for the court's consideration. The court, having considered the oral arguments and additional affidavits, together with all files, records and proceedings herein, makes the following:

FINDINGS OF FACT

1. Plaintiffs Jane Hodgson, M.D., Gordon Ditmanson, M.D. and Arthur Horowitz, M.D. are all licensed physicians actively engaged in the practice of medicine in the State of Minnesota in the specialty of obstetrics and gynecology, including the performing of abortions. In their practices they provide abortion services to minors, including: (1) minors who are mature and capable of making a well-informed decision to terminate their pregnancies ("mature minors"); (2) minors who may be deemed immature but for whom an abortion is otherwise in their best interest ("best interest minors"); and (3) minors who are "emancipated" as defined under Minn. Stat. § 144.341 and § 144.342 ("emancipated minors").

2. Plaintiff Meadowbrook Women's Clinic, P.A., is a free-standing medical facility located in Minneapolis, Minnesota, which provides contraceptive services, abortion services and related services to its patients, including pregnancy tests and counseling. In 1980, Meadowbrook Clinic provided approximately 2,000 abortions to minors.

3. Plaintiff Planned Parenthood of Minnesota is a non-profit Minnesota corporation. The Planned Parenthood clinic located in St. Paul provides contraceptive services, first trimester abortion services, and related medical services to its patients, including pregnancy tests and pregnancy counseling. In 1980, it provided abortions to 247 minors.

4. Plaintiff Midwest Health Center for Women is a non-profit Minnesota corporation located in Minneapolis, Minnesota, with a branch clinic located in Duluth, Minnesota. Midwest Health Center provides contraceptive services, abortion services, and related medical services to its patients, including pregnancy tests and counseling. In 1980, it provided abortions to about 1,200 teenagers, many of whom were minors.

5. Alice Roe is a sixteen-year old unemancipated minor who was seven weeks pregnant at the commencement of this action. Alice Roe asserts that she is mature and that notification of her parents of her desire to have an abortion would not be in her best interest.

6. Michelle Roe is a fifteen-year old unemancipated minor who was pregnant at the commencement of this action. She asserts that she is mature and that notification of her parents of her desire to have an abortion would not be in her best interest.

7. Diane Roe is a sixteen-year old unemancipated minor who was eight weeks pregnant at the commencement of this action. Diane Roe asserts that she is mature and that notification of her parents of her desire to have an abortion would not be in her best interest.

8. Nadine T. is a sixteen-year old unemancipated minor who was pregnant at the commencement of this action. Nadine T. asserts that she is mature and that to inform her parents of her desire to have an abortion would not be in her best interest.

9. Defendants are the State of Minnesota, its Governor and Attorney General. The Hennepin County Attorney, as representative of all other Minnesota County Attorneys, has been dismissed as a party by plaintiffs.

10. Defendant Albert Quie is the Governor of the State of Minnesota who, as such, is empowered to administer and enforce Minn. Stat. § 144.343, Subds. 2-7.

11. Defendant Warren Spannaus is the Attorney General of the State of Minnesota who, as such, is responsible for the

interpretation, enforcement and implementation of the laws of the State of Minnesota, including the challenged statute.

12. The 1981 Minnesota Legislature enacted Minn. Laws 1981, Ch. 228, codified at Minn. Stat. § 144.343, Subds. 2-7.

13. This Act, effective August 1, 1981, requires 48 hours written notice to both parents of an unemancipated minor or the guardian or conservator of a woman under guardianship or conservatorship prior to the performance of an abortion on the minor, ward, or conservatee insofar as such notice can be given with the exercise of reasonable diligence.

14. The notice requirement (hereinafter referred to as "Subdivision 2") does not apply where both parents, the guardian or the conservator have consented in writing to the abortion, where prompt action is needed to preserve the life of the woman or where a child reports that she is the victim of abuse or neglect.

15. The Act further provides that if Subdivision 2 is enjoined or restrained by judicial order, then the same notice requirement shall be effective, together with an alternative procedure whereby a pregnant woman may secure without notice to her parents a judicial determination that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that the performance of an abortion without notice to her parents would be in her best interest (hereinafter referred to as "Subdivision 6").

16. The plaintiffs have asserted a claim in this court challenging the validity of Minn. Stat. § 144.343, Subds. 2-7 under 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and Articles III § 1 and V § 7 of the Minnesota Constitution.

17. Plaintiffs challenge both Subdivision 2 and Subdivision 6 on the grounds that both present an unreasonable burden upon the right of a pregnant woman to determine, in consultation with her physician, whether or not to terminate her pregnancy by means of abortion. Subdivision 2 of the Act is challenged as unconstitutional on its face. Subdivision 6 of the Act is challenged both on its face and as applied. Plaintiffs raise only the rights and interests of minors and do not address women who are under guardianship or conservatorship.

18. By Order of July 31, 1981, this court temporarily restrained enforcement of Subdivision 2 of the Act but did not restrain enforcement of Subdivision 6 of the Act.

19. Plaintiffs performed a combined total of approximately 90% of the 19,028 abortions performed in Minnesota in 1980. Of these, 2,733 (14.4%) were performed for minors. 409 (19%) of these minors were from states other than the State of Minnesota, or from Canada. Approximately 84% of the minor abortion patients in Minnesota are age 16 or 17.

20. The majority of minors who received abortion services prior to August 1, 1981 did so without notifying both their parents. The study of expert Dr. Ronald Anderson demonstrated that 55% of minors had not notified either living parent that they were obtaining an abortion, and 20% had notified one parent; therefore, approximately 75% of minors had not told both parents.

21. Subdivision 2 of the Act provides for a 48-hour waiting period after parental notice is given. 48 hours is a reasonable period of notice to allow for parents to aid, counsel, advise and assist their minor daughter in connection with the determination to undergo abortion or to provide the physician with information which may be relevant to the medical judgments involved.

22. As a result of the Temporary Restraining Order issued by this court on July 31, 1981, Minn. Stat. § 144.343, Subd. 6, went into effect on August 1, 1981. This is the section of the Act which provides for a judicial by-pass procedure for unemancipated minors who claim to be mature or claim that it is not in their best interest to give parental notification prior to obtaining an abortion.

23. In the county and district courts, procedures have been developed to implement the provisions of Subdivision 6 of the Act. Specifically, in Hennepin, Ramsey and St. Louis Counties,

the three most populous counties in the state, very detailed procedures have been developed to intake and process, in a confidential and expeditious manner, the large volume of cases expected to occur in those counties.

24. In Hennepin County, a 24-hour child protection hot-line telephone number has been established. The hot-line screens for potential public defender referrals and public defenders are appointed automatically without a court order. The child protection unit and the public defender have 24-hour access to the judges of the district court. Form petitions and a form for findings of fact have been prepared and are available. The hearings are scheduled on a separate, confidential calendar and are heard on an expeditious basis. When necessary, hearings are held on an emergency basis.

25. In Ramsey County there is also a 24-hour child protection intake number. The child protection unit determines the urgency of the matter based on the representations of the caller and refers the matter to the public defender. The public defender is available on a 24-hour a day basis and has access to district court judges on a 24-hour a day basis. Form petitions and a form for findings of fact have been prepared and are available. Matters are scheduled in court on a separate, confidential calendar on an expedited basis and, when necessary, on an emergency basis.

26. In St. Louis County access to the courts is through the chief deputy clerk of the probate family division of the county court who is available to the one major abortion provider in the Duluth area and the public defender on a 24-hour a day basis. He has access to Probate Judge Martin and three other judges on a 24-hour a day basis who are available to hear these matters. The procedures utilized in St. Louis County are based on the procedures in Hennepin and Ramsey Counties, and the St. Louis County courts have developed a form for a petition and a form for findings of fact. All files in such cases are confidential and are kept separate from other juvenile court records.

27. In each of those counties, the affidavits of the court personnel indicate that no problems have been encountered in

assuring petitioners anonymous and expeditious handling of their petitions and hearings.

28. With respect to the non-metropolitan counties, efforts have been made to assure that court personnel are aware of the terms of the law and the procedures used in the metropolitan counties. A survey of the non-metropolitan judicial districts of Minnesota indicates that at the time of submission of the motion in this action, few inquiries regarding hearings had been received and only eight petitions had been filed. The prevalent use of the State's metropolitan communities for the obtaining of abortion services together with the newness of the Act combine to provide only minimal experience of its application in non-metropolitan courts. Except for two isolated instances, which are strongly disputed by defendants, plaintiffs have failed to demonstrate that the Act has not been properly administered by non-metropolitan court personnel. Although the problem of confidentiality is more acute in non-metropolitan counties, all such counties have established procedures for handling petitions. Court officials are aware of the problems and do not foresee any difficulty in providing confidential and expeditious treatment of petitions under Subdivision 6. This court is confident that the non-metropolitan court officials of the State are equally as conscientious as their metropolitan counterparts in the exercise of their constitutionally mandated obligation to faithfully administer and apply the Act.

29. As a practical matter, over 90% of the abortions performed in Minnesota and virtually all abortions on minors take place at facilities located in Ramsey, Hennepin and St. Louis Counties.

30. During the first three months of the operation of Subdivision 6, approximately 122 requests or petitions for hearing were filed in the Minnesota courts. All but eight of these requests or petitions were filed in Ramsey (22 petitions), Hennepin (83 petitions), or St. Louis County (9 petitions).

31. In all of these cases hearings were held and decisions were made within 24 to 48 hours of the petition or on the day requested by the petitioner's attorney. When requested by peti-

tioners, hearings are held on an even more expedited basis. In at least one case, the hearing was held and a decision was rendered within four hours of the filing of the petition.

32. In each of these cases, the hearings were conducted in a confidential and anonymous manner. The hearings are either held in the chambers of the judge or in closed juvenile court rooms.

33. At the time of the submission of this motion, there had been no appeals from any of the decisions.

34. The Minnesota Supreme Court has issued an order indicating that all petitions under Minn. Stat. § 144.343, Subd. 6, will initially be filed in and considered by the county court or in the case of Hennepin and Ramsey Counties, in the district court juvenile division. In addition, the Minnesota Supreme Court has ordered that all appeals shall be on the record to one judge of the district court, including the district court of Hennepin and Ramsey Counties.

35. While plaintiffs' affidavits indicate some difficulty in obtaining information and scheduling hearings, these difficulties appear to have occurred primarily within the first week of implementing the statute. These problems do not seem to have persisted, and the affidavits of the court personnel involved do not corroborate the existence of problems.

36. Plaintiffs' affidavits indicate that their primary complaint about the procedure is the delay which occurs because they must appear before the judge. However, the procedure will inevitably require some time for the filing of the petition, hearing and decision to occur. The delay of 24-48 hours from request to decision experienced in most cases is not undue, particularly in light of the systems demonstrated ability to hear cases on an emergency basis in very short periods of time.

37. The operation of the court by-pass procedure as provided in Minn. Stat. § 144.343, Subd. 6, does not unduly burden the abortion decision of unemancipated minors.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the above-entitled action pursuant to 28 U.S.C. §§ 1331, 1343(3), and 1343(4).

2. It is probable that plaintiffs will be successful in their challenge to the provisions of Minn. Stat. § 144.343, Subd. 2, because this statutory section probably will be determined to be unconstitutional on its face. *See Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981).

3. Plaintiffs will suffer irreparable injury if the defendants are not enjoined from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2.

4. The defendants, their agents, employees, and those working in concert with them, should be enjoined and prohibited from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2.

5. It is probable that plaintiffs will not be successful in their facial challenge to the provisions of Minn. Stat. § 144.343, Subds. 2-7, because with Subd. 6 effective, these statutory sections probably will not be determined to be unconstitutional on their face. *See Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, supra*, at 15-20.

6. On the present record, it appears probable that plaintiffs will not be successful in their challenge to the provisions of Minn. Stat. § 144.343, Subds. 2-7, as applied because based on the procedures now in effect in the Minnesota county and district courts, the by-pass procedure of Subdivision 6 is operating effectively and not unduly burdening the abortion decisions of unemancipated minors and, therefore, will probably not be determined to be unconstitutional. *See Planned Parenthood Association of Kansas City Missouri v. Ashcroft, supra.*

7. The court should not enjoin the enforcement of Minn. Stat. § 144.343, Subds. 2-7.

Upon the foregoing,

IT IS ORDERED That the motion of the plaintiffs for a preliminary injunction is granted in part and denied in part.

IT IS FURTHER ORDERED That a preliminary injunction should issue, without security therefor, as follows:

> Pursuant to the Findings of Fact, Conclusions of Law and Order of the court dated March 22, 1982,
>
> IT IS ORDERED That, until further order of this court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are ENJOINED and PROHIBITED from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2, except insofar as it is enforced in accordance with Minn. Stat. § 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minn. Stat. § 144.343, Subd. 2.

DATED: March 22, 1982.

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge

Preliminary Injunction

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-81 Civ. 538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, and DIANA ROE, individually and on behalf of all other persons similarly situated; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a non-profit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, a non-profit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; ALBERT QUIE, as Governor of the State of Minnesota; and WARREN SPANNAUS, as Attorney General of the State of Minnesota,

Defendants.

Pursuant to the Findings of Fact, Conclusions of Law and Order of the court dated March 22, 1982,

> IT IS ORDERED That, until further order of this court, the defendants the State of Minnesota, Albert Quie, and Warren Spannaus, their agents, employees, and those working in concert with them, are ENJOINED and PROHIBITED from enforcing the provisions of Minn. Stat. § 144.343, Subd. 2, except insofar as it is enforced in accordance with Minn. Stat. § 144.343, Subd. 6, as though a paragraph (c) were incorporated into Minn. Stat. § 144.343, Subd. 2.

DATED: March 22, 1982.

/s/ DONALD D. ALSOP
Donald D. Alsop
United States District Judge

Amended Complaint

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-81-538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z. individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

I. PRELIMINARY STATEMENT

1. This is a civil action brought under 42 U.S.C. § 1983 and the United States and Minnesota Constitutions seeking declaratory and injunctive relief against Minnesota Session Laws, 1981, Chapter 228 (hereinafter cited as Minn. Stat. § 144.343(2-7), which went into effect on August 1, 1981. (A copy of the statute is attached hereto as Exhibit A.) Minn. Stat.

§ 144.343(2) through (5) require, in main part, that, with certain narrow exceptions, all doctors in Minnesota must notify both parents of a minor patient in writing before an abortion can be performed on the minor, or suffer criminal and civil penalties. Plaintiffs seek to invalidate this mandatory notification and the attendant mandatory waiting period imposed by these sections on the ground that they violate the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and Article II § 7 of the Minnesota Constitution.

2. Minn. Stat. § 144.343(6), which becomes operative in the event that subsection (2) is enjoined, sets forth a court procedure for minors to secure court authorization for an abortion without parental notification. On July 31, 1981, this Court enjoined the operation of Minn. Stat. § 144.343(2), thus triggering the operation of the court procedures. Plaintiffs seek to invalidate and enjoin the court procedure requirement on the ground that, on its face, and as applied to minors and their families in Minnesota, it violates the First and Fourteenth Amendments to the United States Constitution, Article V § 7 of the Minnesota Constitution, and Article III § 1 of the Minnesota Constitution.

II. JURISDICTION

3. This Court has jurisdiction of this action by virtue of 28 U.S.C. §§ 1343(3) and 1343(4), authorizing jurisdiction of claims brought under 42 U.S.C. § 1983 to enforce rights guaranteed by the United States Constitution. This Court also has jurisdiction of this action pursuant to 28 U.S.C. § 1331 as a claim arising under the United States Constitution. The Court has the power to hear those claims asserted under the Constitution of the State of Minnesota under the principles of pendent jurisdiction. This action also seeks declaratory judgment relief pursuant to 28 U.S.C. §§ 2201 and 2202.

III. PARTIES

4. Plaintiff JANE HODGSON, M.D., is a citizen of the United States and resides in the State of Minnesota. She is a physician licensed to practice medicine in the State of Minnesota and is actively engaged in the practice of obstetrics and gynecology, including the performance of abortions, in Minneapolis, Minnesota, and in Duluth, Minnesota. At the time of the filing of the original complaint Dr. Hodgson was Medical Director of Planned Parenthood of Minnesota. She is currently medical director of the Women's Health Center in Duluth. Dr. Hodgson brings this action on her own behalf and on behalf of her minor patients, among whom are teenagers for whom it is medically inadvisable to notify both parents because of hostile home situations or other reasons; teenagers who are mature and capable of making a well-informed decision to terminate their pregnancy, for some of whom it would be medically inadvisable to notify both parents, such as her three patient plaintiffs Alice Roe, Michelle Roe, and Diana Roe; and minors who have special health problems making abortion medically necessary, but whom Dr. Hodgson cannot certify with any certainty as about to die within three days, as required by Minn. Stat. § 144.343(4).

5. Plaintiff GORDON DITMANSON, M.D., is a citizen of the United States and resides in the State of Minnesota. He is a physician licensed to practice medicine in the State of Minnesota and is actively engaged in the practice of obstetrics and gynecology, including the performance of abortions, in St. Paul, Minnesota. Dr. Ditmanson is Director of the Fertility Control Center at St. Paul Ramsey Hospital located in St. Paul, Minnesota. Dr. Ditmanson brings this action on his own behalf and on behalf of his minor patients, among whom are teenagers for whom it is medically inadvisable to notify both parents because of hostile home situations or other reasons; teenagers who are mature and capable of making a well-informed decision to terminate their pregnancy, for some of whom it would be medically inadvisable to notify both parents; and minors who have special health problems making abortion medically necessary,

but whom Dr. Ditmanson cannot certify with any certainty as about to die within three days, as required by Minn. Stat. § 144.343(4).

6. Plaintiff ARTHUR HOROWITZ, M.D., is a citizen of the United States and resides in the State of Minnesota. He is a physician licensed to practice medicine in the State of Minnesota and is actively engaged in the practice of obstetrics and gynecology, including the performance of abortions, in Minneapolis, Minnesota. Dr. Horowitz brings this action on his own behalf and on behalf of his teenage patients, among whom are teenagers for whom it is medically inadvisable to notify both parents because of hostile home situations or other reasons; teenagers who are mature and capable of making a well-informed decision to terminate their pregnancy, for some of whom it would be medically inadvisable to notify their parents; and minors who have special health problems making an abortion medically necessary but whom Dr. Horowitz cannot certify as about to die within three days as required by Minn. Stat. § 144.343(4).

7. Plaintiff ALICE ROE is a sixteen-year-old, unmarried minor who lives at home. At the time of the filing of the original complaint she was seven weeks pregnant. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician, Dr. Jane Hodgson. Dr. Jane Hodgson agreed with Alice Roe that an abortion was medically indicated for her unplanned and unwanted pregnancy and that notification of both of her parents was likely to cause emotional harm as well as possible physical abuse.

8. At the time of the filing of the original complaint Plaintiff DIANA ROE was a sixteen-year-old unmarried minor living at home who was eight weeks pregnant. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician, Dr. Jane Hodgson. Dr. Hodgson agreed with Diana Roe that she was mature and that an abortion was medically indicated for her unplanned and unwanted pregnancy. Diana Roe and her doctor agreed that

notification of both parents would be medically inadvisable since it could have resulted in serious harm to her.

9. At the time of the filing of the original complaint Plaintiff MICHELLE ROE was a fifteen-year-old unmarried minor living at home with both of her parents. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician Dr. Jane Hodgson. Michelle Roe felt notification would change her entire life and destroy her future.

10. At the time of the filing of an amended complaint on August 7, 1981, Plaintiff NADINE T. was a sixteen-year-old unmarried minor living at home with her parents. She is mature and capable of making an informed decision to have an abortion and so decided in consultation with her physician and counselor at the Meadowbrook clinic. Nadine T. felt that telling either parent would seriously disrupt her family life and decided to seek a court order. Because of the delay Nadine T. encountered in obtaining a court authorization, she was forced to postpone her abortion until the following week, or risk compromising her privacy. Minn. Stat. § 144.343(6) created significant burdens for Nadine by delaying her abortion almost a full week.

11. At the time of the filing of an amended complaint on September 17, 1981, Plaintiff JANET T. was a sixteen-year-old unmarried minor. She is a mature minor who is capable of making an informed decision to have an abortion. Both Janet and her mother felt that it would have been very destructive to them if Janet's father was notified. They elected to go to court. The local judge, however, refused to issue an order certifying her as mature, although he told her that he thought he was and that notification of her father would not be in her best interest. His refusal forced Janet T. and her mother to seek an order in Hennepin County one week later. Although she was granted an order, the delay caused Janet T.'s pregnancy to advance beyond the legal limit for obtaining an abortion in Minnesota. Not having enough time to make travel arrangements or enough money to get to New York to obtain an abortion, Janet T. was never

able to exercise her right to choose abortion and was forced to continue her pregnancy.

13. Plaintiff ELLEN Z. is a seventeen-year-old unmarried minor who lives at home. Her parents are divorced and her mother has legal custody. She is mature and capable of making an informed decision. Ellen's mother agrees that she is mature, that abortion is her best alternative, and that notifying Ellen's father as required by Minn. Stat. § 144.343(2) would be emotionally devastating for Ellen and her mother and would destroy the tenuous relationship Ellen and her father are just now beginning to establish. Ellen and her mother decided to go to court so as to avoid having to notify her father. Because of Minn. Stat. § 144.343(6), she will have to wait 5 days for her court appearance and abortion, will have to miss a second day of school and endure severe emotional distress while waiting for all this to take place.

14. Plaintiffs ALICE ROE, DIANA ROE, MICHELLE ROE, NADINE T., JANET T. and ELLEN Z. wish to sue under pseudonyms to protect their privacy rights. Plaintiffs Alice Roe, Diana Roe, Michelle Roe, Nadine T., Janet T. and Ellen Z. seek to represent themselves and other minors similarly situated who are mature and capable of making their own decisions, and for whom mandatory notification would result in irreparable harm to their privacy rights, their mental and physical health, or their family relationships.

15. Plaintiff LAUREN Z. is the mother of Ellen Z.. Lauren Z.'s husband abandoned her when Ellen was approximately three years old. Lauren has legal custody of Ellen and has provided all support for Ellen since her husband left. Lauren, as a result of the statute, is forced to be involved with her ex-husband, and forced to communicate with him since he will call her when he receives the notification. She must deal not only with Ellen's emotional distress, but also her own and her other daughters' stress. Lauren will also have to miss another day of work and pay to accompany her daughter to court and the clinic. Minn. Stat. § 144.343(2-7) has undermined and interfered with Lauren's family life and her efforts to raise her

daughter to be an independent and responsible decisionmaker. Plaintiff Lauren Z. wishes to sue under a pseudonym to protect her privacy rights and those of her daughter.

16. Plaintiff MEADOWBROOK WOMEN'S CLINIC, P.A., is a freestanding medical facility whose function is to provide birth control, abortion services, and related medical services to its patients, including pregnancy tests and pregnancy counseling. Meadowbrook Clinic provides abortions to minors and in 1980 provided approximately 2,000 abortions for teenagers under eighteen, over half of whom had the abortion without the knowledge of both parents. Meadowbrook raises its own claims and the claims of its minor patients, among whom are immature minors for whom it would be medically inadvisable to notify both parents; some minor patients who may be considered emancipated under Minn. Stat. § 144.343(4); and mature minors capable of making the abortion decision on their own, for some of whom mandatory notification would be against their best interests and violative of their privacy. This corporation has potential criminal liability under this statute, both in its capacity as an agent for the physician and as an accomplice.

17. Plaintiff PLANNED PARENTHOOD OF MINNESOTA is a non-profit Minnesota corporation which operates eleven family planning clinics throughout the State of Minnesota and a network of 300 private physicians who work under contract and provide birth control and related medical services to patients, including pregnancy tests and pregnancy counseling. The Planned Parenthood clinic located in St. Paul also provides abortion services, and in 1980 provided abortions to 247 teenagers under the age of eighteen, over half of whom received the abortion service without electing to notify both of their parents. Planned Parenthood raises claims on its own behalf and the claims of its minor patients, among whom are immature minors for whom it would be medically inadvisable to notify both parents; some minor patients who may be considered emancipated under Minn. Stat. § 144.343(4); and mature minors capable of making the abortion decision on their own, for some of whom mandatory notification would be contrary to their best interests and violative of their privacy. This corporation has potential

criminal liability under this statute both in its capacity as an agent for the physician and as an accomplice.

18. Plaintiff MIDWEST HEALTH CENTER FOR WOMEN is a non-profit Minnesota corporation located in Minneapolis, Minnesota. At the time of the filing of the original complaint it had a branch clinic, now separately incorporated, located in Duluth, Minnesota. Midwest Health Center provides abortion services as well as birth control and related medical services to its patients, including pregnancy tests and pregnancy counseling. Midwest Health Center provides abortions to minors and in 1980 provided approximately 1,200 abortions for teenagers (including 18 and 19 year olds), over half of whom had the abortion without the knowledge of both parents. Midwest Health Center raises their own claims and the claims of their minor patients, among whom are immature minors for whom it would be medically inadvisable to notify both parents; some minor patients who may be emancipated under Minnesota Statutes § 144.343, Subdivision 4; and mature minors capable of making the abortion decision on their own, for some of whom mandatory notification would be contrary to their best interests and violative of their privacy. This corporation has potential criminal liability under this Statute both in its capacity as an agent for the physician and as an accomplice.

19. Plaintiff WOMEN'S HEALTH CENTER OF DULUTH, P.A. located in Duluth, Minnesota was formally a branch of Midwest Health Center for Women. Through a separation agreement with Midwest Health Center for Women it became an independent clinic and was organized as a Minnesota professional and Minnesota non-profit corporation in March of 1983. The center provides abortion services as well as birth control and related medical services to its patients, including pregnancy tests and pregnancy counseling. The Women's Health Center provides abortions to minors and since March '83 has provided approximately 92 abortions for teenagers, approximately 50 of whom went to court so as to avoid notification of their parents. The Women's Health Center raises its own claims and the claims of its minor patients. This corporation has potential

criminal liability under this Statute both in its capacity as an agent for the physician and as an accomplice.

19. Defendant RUDY PERPICH is Governor of the State of Minnesota and, as such, is empowered to administer and enforce the statute. He is charged under the Constitution of the State of Minnesota to take care that the laws of the State of Minnesota are faithfully executed, including Minn. Stat. § 144.343(2-7), which are challenged here for conflicting with the Constitutions of the United States and Minnesota. Defendant Perpich is sued in his official capacity.

20. Defendant HUBERT H. HUMPHREY, III is the Attorney General of the State of Minnesota who, as such, is responsible for interpretation, enforcement, and implementation of the laws of the State of Minnesota, including Minn. Stat. § 144.343(2-7), which are challenged herein. Defendant Humphrey is sued in his official capacity.

IV. CLASS ACTION ALLEGATIONS

21. Plaintiffs Michelle Roe, Alice Roe, Diana Roe, Nadine T., Janet T. and Ellen sue on their own behalf and on behalf of the entire class of pregnant or potentially pregnant minors who are mature and capable of making a well-informed decision, in consultation with their physicians, to have an abortion, but whose right to privacy will be unduly burdened by Minn. Stat. § 144.343(2-7). The class includes those minors for whom it is unclear whether or not they are "emancipated" as excepted under Minn. Stat. § 144.343(4); those minors who have hostile home situations and for whom notification would not be in their best interests or those of their families; those minors who have health problems which any delay would exacerbate; and those minors whose physicians find it medically inadvisable for both parents to be notified.

22. Should Minn. Stat. § 144.343(2) be enjoined by this Court, Plaintiffs Michelle Roe, Alice Roe, Diana Roe, Nadine T., Janet T., and Ellen Z. sue on their own behalf and on behalf of the entire class of pregnant or potentially pregnant minors

who are mature and capable of making a well-informed decision in consultation with their physicians to have an abortion, and for whom the procedure set forth in Minn. Stat. § 144.343(6), is on its face and as applied, burdensome, and an obstacle to the exercise of their right to privacy, as well as a danger to their lives and health because of the delay created thereby.

23. This action may be maintained as a class action on behalf of the class of minors under Rule 23(b)(1)(A) and under Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure; because the prosecution of separate actions by individual members of the class would, as a practical matter, be dispositive of the individual interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; and there is a risk of inconsistent or varying adjudication with respect to the plaintiff class which would establish incompatible standards of conduct for the defendants who are presently obligated to enforce this statute if it is not enjoined.

24. Prosecution is proper under Rule 23(B)(2) because the parties opposing the class have acted or will act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

25. The class of minor women is so numerous that joinder of all members is impracticable.

26. The named minor plaintiffs will fairly and adequately represent the interests of the class of minors. Their lawyers have extensive experience in litigation involving constitutional rights, particularly in the field of family planning and abortion. Plaintiffs and their attorneys are prepared to carry forward the claims of the representative parties to final judgment and to protect the interest of all members of the class of minor women.

27. The questions of law and fact which named plaintiffs seek to litigate, in particular the legality and constitutionality of Subdivisions 2-7 of Minnesota Statutes § 144.343, on its face

and as applied, are common to the class of minors they seek to represent.

V. FACTUAL ALLEGATIONS

A. *History of the case*

28. In May, 1981, the Minnesota Legislature amended Minnesota Statutes § 144.343, adding Sections 2-7, which require, under criminal penalty, that doctors who perform abortions on unemancipated minors in Minnesota, with certain exceptions, must notify both parents of the minor in writing of the pending operation.

29. On September 18, 1981, Judge Alsop granted an order for class certification to include all unemancipated pregnant mature minors seeking abortions in Minnesota who have adequate capacity to give informed consent to abortion but who do not want to involve their parents. The court also granted an order for intervention of Janet T., an unemancipated minor suing under a pseudonym. (Alsop, J., 9-18-81)

30. On July 31, 1981 this court granted a temporary restraining order enjoining the enforcement of Minnesota Statutes § 144.343(2) (*Hodgson v. State of Minnesota*, 3-81 Civ. 538 (D. Minn., July 31, 1981). And, on August 31, 1981 this court granted an order, (Alsop, J. - 9-18-81) for intervention of Nadine T., an unemancipated minor suing under pseudonym.

31. On March 22, 1982, this court granted in part and denied in part plaintiffs' motion for a preliminary injunction. The court enjoined and prohibited defendants from enforcing the provisions of Minn. Stat. § 144.343(2), except insofar as it was enforced in accordance with subdivision 6. *Hodgson v. State of Minnesota*, 3-81 Civ. 538 (D. Minn., March 22, 1982).

B. *The Statute*

32. Subdivision 2 of § 144.343 requires both parents be notified, unless both have consented, even if the parents are divorced or separated. Subdivision 2 severely restricts minors'

access to safe, legal abortion in Minnesota, and interferes with the privacy and First Amendment rights of single-parent families.

33. No parental notification is required for minors who seek medical treatment other than abortion for their pregnancies, including caesarean sections or other major surgery. No parental notification is required for treatment of venereal disease or drug abuse.

34. Minn. Stat. § 144.346 authorizes physicians to give notice to parents of minors, if the doctor feels that failure to inform the parent would jeopardize the health of the minor patient. This Section is repealed by Sections 2-7 of § 144.343 insofar as abortion services are concerned but is still applicable as applied to all other minors giving consent to health services pursuant to Minn. Stat. § 144.342, or § 144.343(1).

35. The legislative purpose of these amendments was to restrict minors' access to abortion services to the greatest extent possible in order to protect fetal life.

36. Minn. Stat. § 144.343(2), requires that no abortion shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed until 48 hours after a written notice of the pending operation has been delivered in a certain specified manner. If delivery is by certified mail, the 48 hours is to run from 12:00 noon on the next day on which regular mail delivery takes place, subsequent to mailing (Minn. Stat. § 144.343(2)(b)). This waiting period of 72 hours or more adds on to the delay that minors may experience in seeking help for their pregnancies, coupled with the delay caused to minors living in rural areas who must travel to the Twin Cities or Duluth areas for abortion services. The forced waiting period presents an undue burden upon minors' right to abortion services by increasing the health and life risks to plaintiffs and, for some minors, foreclosing the abortion option altogether.

37. Implementation of Minn. Stat. § 144.343(2-7) has added to the cost burden upon the plaintiff class since delays can cause

increased cost for the procedure; costs of second trimester procedures exceed those for first trimester procedures, and some minors have to pay the expense of two separate trips. Implementation has increased stress and anxiety and, for some teenagers destroyed the privacy of their decision, or foreclosed the abortion option altogether.

38. Although Minn. Stat. § 144.343(4)(c) provides that a pregnant minor who declares she is a victim of intra-familial sexual abuse, neglect, or physical abuse which has been reported will be an exception to the notification requirement, this statute does not exempt members of plaintiff class who may have reason to believe that their parents will abuse them, but whose parents have never been reported for such. Nor does this statute exempt members of plaintiff class who are victims of rape, even if it has been reported.

39. Although Minn. Stat. § 144.343(4)(a) provides that a doctor may forego notification if the doctor can certify that the minor would die within three days, it is impossible to make this type of certification with any degree of certainty. It will certainly not help those members of plaintiff class who have health problems that would be exacerbated by the delays caused by Minn. Stat. § 144.343(2-7).

40. Subdivision 6 provides that, if Subdivision 2 of the law is ever enjoined, a court bypass option for those minors who elect not to have both parents notified will become operative.

41. Minn. Stat. § 144.343(6)(c)(i) holds that a court of "competent" jurisdiction can authorize a physician to perform the abortion if the judge determines that the pregnant woman is mature and capable of giving informed consent to the abortion. If the judge determines the pregnant woman is not mature or capable of giving informed consent, the judge may authorize the abortion without notification to her parents if her "best interests" would be served.

42. Although this section provides that proceedings should be in a court of "competent jurisdiction," no court is specified to have such jurisdiction. Although this section states in para-

graph (c)(iii) that proceedings shall be confidential and given precedence over other pending matters, no specific provisions for the maintenance of confidentiality or the establishing of such precedence are specified.

43. Although this statute guarantees an expedited, confidential appeal if a woman is denied an order authorizing an abortion, the statute contains no language implementing this guarantee, and in fact the Supreme Court of Minnesota ordered that the only appeal is to a district court judge, making the right to appeal a nullity since in most instances such appeal would be only to a court of the same level.

44. The court procedure outlined in Minn. Stat. § 144.343(6) has not been implemented or enforced by the Minnesota State Office of Court Administration. The following facts have been observed: although this statute provides that, for the purpose of filing the petition or bringing an appeal, the court shall be open to a pregnant minor 24 hours a day, seven days a week, such access has never been provided. Minors' petitions are in fact heard in only 3 of the 87 counties, only two or three days a week, with no access on nights or weekends when minors have a higher assurance of privacy. Upon information and belief, in some counties on certain days a member of plaintiff class would have to travel over fifty miles to locate a sitting judge. In some of the counties in Minnesota, there are no legal aid or public defender offices, nor is there any court-appointed counsel apparatus to provide representation as required by the statute. No extension of the regular court hours of 8:30 to 4:30 has occurred to comply with Minn. Stat. § 144.343(6).

45. Although plaintiff doctors desire to give complete, safe, confidential and proper advice and treatment to their teenage patients regarding the abortion decision, they are prevented from doing so and are restricted in their right to practice medicine consistent with their best medical judgment by the challenged sections.

46. Plaintiffs Planned Parenthood of Minnesota, Meadowbrook Clinic, and Midwest Services for Women of Minneapolis, and Women's Health Clinic of Duluth, desire to give

complete, safe, confidential and proper advice and treatment to their minor patients regarding the abortion decision. They are prevented from doing so by the challenged sections. Many of the patients of these clinics will not seek abortion services if the confidentiality of their relationship with their physician will be breached by clinic personnel acting under the statute.

47. Plaintiff physicians and plaintiff clinics and their employees may be harassed, threatened, and injured by some parents who have been notified of the impending abortion, and who will take such steps to prevent the procedure. They also may be subjected to civil liability or criminal charges if they do not reveal the patient's whereabouts or the time and location of the abortion procedure. Mandatory parental notification will have a chilling effect on the willingness of doctors in Minnesota to perform abortions for plaintiff class and will reduce access to this medical service.

48. Plaintiffs Diana Roe, Michelle Roe, Alice Roe, Nadine T., Janet T. and Ellen Z. and the class they represent have had increased health and life risks due to delays, have been forced to carry their unwanted pregnancies to term, have had to seek illegal abortions, or to go through a traumatic and burdensome court proceeding, increasing risks to their lives and health.

49. Plaintiff Lauren Z. as the mother of a pregnant minor and single parent head of a family will be forced to communicate with her ex-husband, to bear the burdens of the stress caused to her other children, and to miss work and suffer financial loss in order to go to court to avoid notification of her ex-husband.

VI. FIRST CAUSE OF ACTION: FEDERAL DUE PROCESS CLAIMS

50. The challenged sections deprive plaintiff doctors, clinics and their patients, and plaintiff class of minors of the following liberties without due process of law, in violation of the Fourteenth Amendment to the United States Constitution:

(a) Minn. Stat. § 144.343(2-7), on its face and as applied, unduly burdens the rights of minors to freely make and effectuate a decision to terminate a pregnancy, a fundamental right of privacy protected by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

(b) Minn. Stat. § 144.343(6), on its face and as applied, unduly burdens the rights of minors to freely make and effectuate a decision to terminate a pregnancy, a fundamental right of privacy protected by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

(c) Minn. Stat. § 144.343(2-7) unduly burdens the right of physicians to give, and of women to receive, medical treatment and advice in accordance with accepted medical standards, with regard to the decision whether to terminate a pregnancy, rights guaranteed by the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution;

(d) Minn. Stat. § 144.343(2-7) unduly burdens the right of plaintiff family planning and abortion clinics, to give confidential counseling services to minors, to treat and refer patients to doctors and to provide abortion services to minors as guaranteed by the Fifth, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution;

(e) Minn. Stat. § 144.343(6) is vague and overbroad in that it fails to give sufficiently detailed judicial procedures. Minn. Stat. § 144.343(6) is overbroad in that nearly 100% of the minors utilizing the procedure are mature or best interests' minors, both of which categories are entitled to full abortion privacy guaranteed under the Fourteenth Amendment to the United States Constitution;

(f) Minn. Stat. § 144.343(2-7) is vague, particularly as to what constitutes "emancipated minor"; "reasonably diligent effort" (Minn. Stat. § 144.343(3)); or "evidence sufficient to convince a careful and prudent person that the

representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true" (Minn. Stat. § 144.343(5)); so that plaintiff doctors, clinics, and clinic personnel are subjected to criminal penalties without clear knowledge of what the law requires in violation of the Fourteenth Amendment to the United States Constitution.

VII. SECOND CAUSE OF ACTION: FEDERAL EQUAL PROTECTION

51. The challenged sections deprive plaintiffs' class of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution:

(a) Minn. Stat. § 144.343(2-7) unreasonably singles out and requires parental notification for members of the plaintiff class solely because they seek an abortion, without a compelling state interest, and without requiring parental notification for minors who seek to carry their pregnancies to term or who seek other health care services, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(b) Minn. Stat. § 144.343(2-7) unreasonably and without a compelling state interest discriminates between those pregnant minor women who are mature and fully informed and capable of making the decision to terminate a pregnancy, and those women who may be deemed emancipated by the state, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(c) Minn. Stat. § 144.343(2) deprives plaintiff class of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, in that it unreasonably and without a compelling state interest discriminates between minors aged 17 and under who do not have authorization by both parents and who do not fall within the exceptions, by imposing on them a waiting

period of at least 72 hours and probably more, while not imposing a waiting period on all other similarly situated women in the State of Minnesota seeking abortion services.

VIII. THIRD CAUSE OF ACTION: VIOLATIONS OF PARENT PLAINTIFF'S FIRST AMENDMENT AND DUE PROCESS RIGHTS

52. Because Minn. Stat. § 144.343 requires both parents be notified, and makes no exception for one parent families or estranged families, forces communication between parents in violation of the First Amendment, and violates family privacy since in many instances the one parent has legal custody, the statute is unconstitutional. Moreover, it is overbroad since any state interest which arguably exists can be furthered through a one-parent notification requirement.

IX. FOURTH CAUSE OF ACTION: MINNESOTA STATE CONSTITUTIONAL CLAIMS

53. The challenged sections deprive plaintiffs of their right to due process and privacy as enumerated in paragraphs 53(a) through (f) and equal protection as enumerated in paragraphs 54(a) through (c) under the Minnesota Constitution, Article 1, Sections 2, 7, 8, and 10.

54. Minn. Stat. § 144.343(6) delegates to state courts of "competent jurisdiction" the authority to hear petitions for abortions. Such hearings, because they are non-adversarial, are essentially administrative. This delegation of administrative powers to the Minnesota state courts violates Article 3, Section 1 of the Minnesota Constitution.

WHEREFORE, plaintiffs pray that this Court:

A. Assume jurisdiction of this action;

B. Certify a plaintiff class of minor women in Minnesota who need to obtain abortion services in accordance with their physician's decision that they are mature and fully informed about the abortion decision, and for whom notification to their parents would violate their right to make this private decision;

C. Issue a temporary restraining order, preliminary injunction and a permanent injunction, restraining defendants, their employees, agents, and servants from enforcing subdivisions 2 through 7 of Minn. Stat. § 144.343;

D. Declare the challenged statutes violative of the United States Constitution, the Minnesota State Constitution, and therefore void and of no effect;

E. Permanently enjoin the operation of Minn. Stat. § 144.343(2-7);

F. Award plaintiffs their costs and attorneys' fees pursuant to 42 U.S.C. Section 1988; and,

G. Enter such other and further relief as the Court shall find just and proper.

Respectfully submitted,

JANET BENSHOOF
SUZANNE M. LYNN
NAN D. HUNTER
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

LINDA OJALA
Minnesota Civil Liberties Union
628 Central Avenue
Minneapolis, Minnesota 55414
(612) 378-7627

FRANZ P. JEVNE, III
1600 Twin City Federal Tower
121 South Eighth Street
Minneapolis, Minnesota 55402
(612) 333-1341

Attorneys for Plaintiffs

Amended Answer of Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Court File No. 3-81-538

JANE HODGSON, M.D.; GORDON DITMANSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z., MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

v.

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

Defendants State of Minnesota, Rudy Perpich and Hubert H. Humphrey, III, for their joint and Amended Answer to the Amended Complaint herein, admit, deny and allege as follows:

1. With respect to the allegations of paragraphs 1 and 2, admit that this is a civil action in which Plaintiffs seek declaratory and injunctive relief from the provisions of Minn. Laws 1981, ch. 228, Minn. Stat. § 144.343, subds. 2-7 (hereinafter the Notification Act), but deny that Plaintiffs possess any claim for relief under 42 U.S.C. § 1983, the Constitution of the United

States or the Minnesota Constitution. Insofar as these paragraphs purport to paraphrase or characterize the Notification Act, Defendants refer the Court to the official text thereof. Insofar as paragraph 2 purports to paraphrase or characterize a prior Order of the Court in this action, Defendants refer the Court to such Order.

2. With respect to the allegations of paragraph 3, admit that the Court has jurisdiction to hear cases and grant relief in accordance with the cited federal statutes, but deny that Plaintiffs have suffered deprivations under color of state law of any right, privilege or immunity secured by the Constitution or laws of the United States, deny that they possess any claim for relief thereunder and deny that pendent jurisdiction exists with respect to claims asserted under the Minnesota Constitution.

3. With respect to the allegations of paragraphs 4, 5, and 6, admit Jane Hodgson is a citizen of the United States who resides in and is licensed to practice medicine in the State of Minnesota. With respect to the remaining allegations of said paragraphs, allege that they are without knowledge or information sufficient to form a belief concerning the truth or falsity thereof.

4. Allege that they are without knowledge or information sufficient to form a belief concerning the truth or falsity of the allegations of paragraphs 7, 8, 9, 10, 11, 13, 14 and 15.

5. With respect to the allegations of paragraphs 16, 17, 18 and the first paragraph designated 19, admit that Planned Parenthood of Minnesota, Women's Health Center of Duluth, P.A., and Midwest Health Center for Women are Minnesota non-profit corporations, and allege that they are without knowledge or information sufficient to form a belief concerning the truth or falsity of the remaining allegations therein.

6. With respect to the allegations of the second paragraph designated 19, admit that Rudy Perpich is Governor of the State of Minnesota and has, *inter alia*, the general responsibility to take care that the laws of the state are faithfully executed, but deny that he has any direct or specific responsibility for

administration or enforcement of the Notification Act challenged herein.

7. With respect to the allegations of paragraph 20, admit that Hubert Humphrey, III, is Attorney General of the State of Minnesota, but deny that he has any direct or specific responsibility to enforce, implement, or interpret the Notification Act challenged herein.

8. With respect to the allegations of paragraphs 21, 22, 23, 24, 25, 26 and 27:

a. Deny that Plaintiffs Roe, Nadine T., Janet T. and Ellen Z. have the capacity to sue on their own behalf or to act as legal representatives for others.

b. Deny that Plaintiffs are properly representative of all minor women as alleged in paragraphs 24, 25 and 26, and deny that the relief sought by Plaintiffs is in the best interests of all minors.

c. Allege that purported class or classes referred to in paragraphs 21 and 22 are unduly broad and vaguely described, deny that Plaintiffs are representative of all persons so described and deny that the relief sought by Plaintiffs is in the best interests of all persons so described.

d. Deny that this case is a proper class action or that Plaintiffs have met the requirements of Rule 23 of the Federal Rules of Civil Procedure.

9. With respect to the allegations of paragraphs 28, 29, 30, 31, 32, 33 and 34, admit that Minn. Laws 1981, ch. 228, was passed into law in May, 1981, and to the extent that these paragraphs purport to explain, describe or paraphrase the provisions of Minnesota statutes and the Orders of this Court, refer the Court to the official texts thereof.

10. Deny the allegations of paragraph 35.

11. With respect to the allegations of paragraphs 36, 37, 38, 39 and 40:

a. To the extent that these paragraphs purport to explain, describe or paraphrase Minnesota statutes, refer the Court to the official texts thereof;

b. Deny that the Notification Act imposes an undue burden upon minors' rights to abortion services;

c. With respect to the remaining allegations in those paragraphs, allege that they are without knowledge or information sufficient to form a belief concerning their truth or falsity;

d. Allege that the purported difficulties, inconveniences, costs and consequences complained of in said paragraphs result primarily from actions, inactions and decisions of Plaintiffs themselves and of others over whom Defendants exercise no control.

12. With respect to the allegations of paragraphs 41, 42, 43, 44:

a. To the extent that these paragraphs purport to explain, describe or paraphrase Minnesota statutes, refer the Court to the official texts thereof;

b. Deny all allegations which state or imply that the procedures required by Minn. Stat. § 144.343, subd. 6, have not been properly implemented or enforced, that court procedures pursuant to Minn. Stat. § 144.343, subd. 6, are unavailable, or that Plaintiffs will suffer irreparable harm due to the Notification Act.

13. With respect to the allegations of paragraphs 45 and 46:

a. Allege they are without knowledge concerning the general desires of Plaintiff doctors, Planned Parenthood of Minnesota, Meadowbrook Clinic, Midwest Services for Women of Minneapolis and Women's Health Clinic of Duluth;

b. Deny that the Notification Act prevents such Plaintiffs from offering necessary and proper advice, providing

necessary treatment or from exercising any legal right to provide such advice or services.

14. With respect to the allegations of paragraph 47, allege that they are without knowledge concerning potential voluntary actions of Plaintiffs or third persons not under control of Defendants.

15. With respect to paragraphs 48, 49, 50 and 51:

a. Deny that the Notification Act violates the United States Constitution in any respect.

b. With respect to the remaining allegations in those paragraphs, allege that they are without knowledge or information sufficient to form a belief concerning their truth or falsity.

16. With respect to paragraph 52:

a. To the extent that it purports to explain, describe or paraphrase Minnesota statutes, refer the Court to the official texts thereof;

b. Deny that the Notification Act violates the United States Constitution in any respect.

17. With respect to the allegations of paragraphs 53 and 54:

a. Admit that Minn. Stat. § 144.343, subd. 6, authorizes Minnesota courts, in certain circumstances, to hear petitions for abortions;

b. Deny that Minn. Stat. § 144.343, subd. 6 violates the Minnesota Constitution and allege that the Court is without jurisdiction to determine the claims made in paragraphs 53 and 54.

18. Except as above admitted or qualified, deny each and every allegation, matter, fact and thing contained in the Amended Complaint.

SEPARATE DEFENSES

19. Allege that the Court is precluded by the Eleventh Amendment to the United States Constitution from asserting pendent jurisdiction over the fourth cause of action set forth in the Amended Complaint and that Plaintiffs lack standing to assert such cause of action.

20. Allege that Defendant State of Minnesota is immune from suit under the Eleventh Amendment to the United States Constitution.

21. Allege that the relief sought on behalf of their minor patients by Plaintiffs Hodgson, Ditmanson, Horowitz, Meadowbrook, Planned Parenthood, Midwest and Women's Health Center does not reflect the legal interests of all such persons.

22. Allege that Plaintiffs Roe, Nadine T., Janet T. and Ellen Z. lack standing and are without capacity to sue in their own names or to act as representatives for others.

23. Allege that Minn. Stat. § 144.343, subds. 2-7, are constitutional in all respects.

24. Allege that Minn. Stat. § 144.343, subd. 6 has been implemented in a constitutional manner.

25. Allege that the Amended Complaint fails to set forth a claim for which relief can be granted.

WHEREFORE, Defendants pray for judgment:

1. Dismissing the Amended Complaint.

2. Refusing to certify any of the classes of plaintiffs claimed to be represented.

3. Denying injunctive relief.

4. Declaring that the Notification Act is in all respects valid and constitutional on its face and as applied.

5. Awarding Defendants their costs, disbursements and attorneys fees.

6. Such other relief as the Court shall find just and proper.

Dated: February 7, 1984.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: /s/ JOHN B. GALUS
John B. Galus

And: /s/ PETER M. ACKERBERG
Peter M. Ackerberg
Special Assistant
Attorneys General

515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2654

Attorneys for Defendants

Stipulation of Facts
for Purposes of Trial—Set II

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-81-538

HODGSON, *et al.*,

Plaintiffs,

v.

STATE OF MINNESOTA, *et al.*,

Defendants.

The parties, through their respective undersigned attorneys, stipulate as follows:

1. From August 1, 1981, through December 31, 1984, 2552 petitions were filed by pregnant minors pursuant to the statutory judicial bypass procedure created by Minn. Laws 1981, ch. 228, codified as Minn. Stat. § 144.343, subd. 6.

2. The State of Minnesota is organized in ten judicial districts.

3. Virtually all of the abortions provided in Minnesota to minors under the age of 18 have been and continue to be performed in the major metropolitan areas of Minneapolis, St. Paul and Duluth.

4. The great majority of all petitions filed pursuant to the statutory judicial bypass procedure have been filed and heard in the major metropolitan areas of Minneapolis, St. Paul, and Duluth.

5. In addition to the major metropolitan areas of Minneapolis, St. Paul and Duluth, between August 1, 1981 and December 31, 1984, petitions pursuant to the statutory judicial bypass procedure have been filed and heard in the following suburban or rural Minnesota counties: Dakota, Goodhue, LeSueur, Sibley, Freeborn, Mower, Olmsted, Rice, Steele, Winona, Lyon, Nobles, Stearns, Todd, Pope, Cass, Koochiching, Crow Wing, Lake of the Woods, Anoka, Washington and Wright.

6. The Fourth Judicial District of the State of Minnesota consists of Hennepin County.

7. In Hennepin County all petitions and proceedings under the statutory judicial bypass procedure are in the Juvenile Division of the Hennepin County District Court.

8. Between August 1, 1981 and December 31, 1984, 1,598 petitions pursuant to the statutory judicial bypass procedure were heard and decided in Hennepin County.

9. Susanne K. Smith is the Hennepin County Court Services Supervisor and administrator of the Hennepin County guardian ad litem program.

10. The Hennepin County Public Defender is responsible for providing representation to minors proceeding under the statutory bypass procedure in the Juvenile Division of Hennepin County District Court.

11. David Knutson is a senior attorney in the Hennepin County Public Defender's Office.

12. The Second Judicial District of the State of Minnesota consists of Ramsey County.

13. In Ramsey County, all petitions and proceedings pursuant to the statutory judicial by-pass procedure are heard by the Juvenile Division of the Ramsey County District Court.

14. Between August 1, 1981, and December 31, 1984, 618 petitions pursuant to the statutory judicial bypass procedure

were filed and heard in the Juvenile Division of the Ramsey County District Court.

15. The Ramsey County Public Defender is responsible for providing representation to minors proceeding under the statutory judicial bypass procedure in the Juvenile Division of Ramsey County District Court.

16. The Sixth Judicial District of the State of Minnesota includes the counties of St. Louis, Carlton, Lake and Cook.

17. Between August 1, 1981 and December 31, 1984, a total of 203 petitions pursuant to the statutory judicial bypass procedure were filed and heard in the Sixth Judicial District, all of them in St. Louis County.

18. The First Judicial District of the State of Minnesota includes the counties of Carver, Dakota, Goodhue, LeSueur, McLeod, Scott and Sibley.

19. Between August 1, 1981 and December 31, 1984, 57 petitions pursuant to the statutory judicial bypass procedure were filed in the counties of the First Judicial District.

20. The Third Judicial District of the State of Minnesota includes the counties of Dodge, Fillmore, Freeborn, Houston, Mower, Olmsted, Rice, Steele, Wabasha, Waseca and Winona.

21. Between August 1, 1981 and December 31, 1984, 46 petitions pursuant to the statutory judicial bypass procedure were filed in the county courts of the Third Judicial District.

22. The Tenth Judicial District of the State of Minnesota includes the counties of Anoka, Chisago, Isanti, Kanabec, Pine, Sherburne, Washington and Wright.

23. The Ninth Judicial District of the State of Minnesota includes the counties of Aitkin, Beltrami, Cass, Clearwater, Crow Wing, Hubbard, Itasca, Kittson, Koochiching, Lake of the Woods, Mahnomen, Marshall, Norman, Pennington, Polk, Red Lake and Roseau.

24. The Fifth Judicial District of the State of Minnesota includes the counties of Blue Earth, Brown, Cottonwood, Faribault, Jackson, Lincoln, Lyon, Martin, Murray, Nicollet, Nobles, Pipestone, Redwood, Rock and Watonwan.

25. The Seventh Judicial District of the State of Minnesota includes the counties of Benton, Becker, Clay, Douglas, Mille Lacs, Morrison, Otter Tail, Stearns, Todd and Wadena.

26. The Eighth Judicial District of the State of Minnesota includes the counties of Big Stone, Chippewa, Grant, Kandiyohi, Lac Qui Parle, Meeker, Polk, Renville, Stevens, Swift, Traverse, Wilkin, and Yellow Medicine.

Dated: August 7, 1985

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: /s/ JOHN GALUS (by PMA)
John Galus
Special Assistant
Attorney General
Atty. Reg. No. 33327

515 Transportation Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-2654

Attorneys for Defendants

By: /s/ SUZANNE M. LYNN
Suzanne M. Lynn

Attorney for all Plaintiffs except Planned Parenthood of Minnesota, Inc.

By: /s/ WILLIAM Z. PENTELOVITCH
William Z. Pentelovitch

Attorney for Plaintiff Planned Parenthood of Minnesota, Inc.

DEPOSITION TESTIMONY EXCERPTS OF SYLVIA P., MINOR

[DIRECT BY MS. LYNN]

[6] * * *

Q You elected not to tell your father at all?

A Yes.

Q And can you tell us why you decided not to tell your father?

A Because he's a political figure and he's very much against anything to do with this place or any other abortion or anything.

Q You say he's a political figure. Is this a political stance that he takes?

A Yes.

Q And what did you think his reaction would have been had he found out?

A I think he would have shipped me out of here or else made me give my baby up for adoption if I were to have it, but I wouldn't have been around here. He would have taken me out of the area so nobody would have known where I was, you know, just like a little vacation.

* * * * *

[8] * * *

Q And she immediately called the court while you were there?

A Yes, tried to set it up for me.

Q And what did you understand from her efforts? What did she tell you about her efforts to set up a court hearing?

A That they didn't want my case.

Q She told you that?

A Yes.

Q And did she tell you why they didn't want your case?

A Because of my father.

Q Can you explain what you mean by that?

A Because of his—him being a political figure, that if it ever got out that I had gone to court I suppose that they probably would have been in trouble or I would have been.

Q How do you know—Why do you think that they didn't want your case? Did they recognize your name?

A Yes, and they know my father.

Q So what happened after she informed you that they didn't want your case? Was there a court proceeding set up?

A What do you mean court proceeding to see if I could get my case on?

Q No. What happened then? What steps did Tina take to the best of your knowledge?

A She fought for it. She said I was no different from anybody else who came here and a name doesn't mean anything or [9] a person or anything, that everybody should be helped, not excluding people.

Q And did she tell you this?

A Yes.

Q She told you that this is what she said to them?

A Uh-huh. (meaning yes)

Q And did she succeed in setting up a court hearing for you?

A Yes, she did.

* * * * *

[16] * * *

Q What do you think you would have done if you had had to tell your father?

A I wouldn't have. I would have either left the area—I thought about suicide and that got right out of my head as soon as I came down here and these guys talked to me. Tina and Sherry. I would have either left the area or done something drastic.

* * * * *

[20] * * *

Q During your court appearance did anyone acknowledge that you were the daughter of a political figure, local political figure?

A Did anyone by meaning who?

Q Anyone in the court proceeding.

A Well, the judge knew me. I knew him.

Q How did you know him?
A From seeing him on the TV and reading the papers.
Q How did he know you?
A Because as soon as my father's name was mentioned he knew who I was right away.
Q How do you know he knew that?
A Because he told me so.
Q During the proceeding?
A Well, yes.

* * * * *

DEPOSITION TESTIMONY EXCERPTS OF NATALIE C., MINOR

[DIRECT BY MS. OJALA]

[4] * * *

Q Okay. Did you talk to anyone about the fact that you were pregnant?
A Yes, my boyfriend.
Q You talked to your boyfriend. Okay. What did you talk about when you talked to him about your pregnancy?
A I told him I was and what should we do. And we talked about it and we decided, yes, that I should get an abortion. So I called here and got an appointment.
Q How old was your boyfriend in September?
A Eighteen.
Q Was he also in high school?
A No, he graduated.
Q He had graduated but lived in Duluth?
A Yes.
Q Could you tell me why you came to the decision? It was a mutual decision?
A Yes.
Q How you came to the decision to have an abortion, what were your reasons?
A Well, my step-dad, he's got a bad temper and I'm scared of him and I was just afraid he'd knock me around. And my mom once said I would be kicked out if I got pregnant if she

ever found out I'd be kicked out—I'm too young. I'm not **[5]** financially set to have a child.
Q So basically you talked to your boyfriend and the two of you agreed that that would be best?
A Yes.

* * * * *

[7] * * *

Q And why is it that you didn't notify your parents about the fact that you were having an abortion?
A Because of my step-father and I'm just afraid of him knocking me around, going after my boyfriend.
Q So you're saying you were afraid of your step-father and you were afraid he would physically abuse you?
A Yes.
Q Had he ever physically attacked you before?
A Yes.
Q He had.
A (Witness nods head affirmatively)
Q How about the situation with your mother? Were there reasons why you didn't tell your mother?
A Yes. She would have kicked me out of the house.
Q What made you think that she would do that?
A She once told me that.
Q She told you?
A She said if I ever were to get pregnant and she found out I would be kicked out.
Q So you decided that you wouldn't tell your parents and that instead you would go to court for those reasons?
A Yes.

* * * * *

[11] * * *

Q How did you feel when you went in, when you were in the court with the judge?
A Very nervous.
Q You felt nervous?
A Yes.

Q Was there anything else that happened in there that you can remember?

A My neighbor.

Q Who's your neighbor? You saw your neighbor in there?

A Yes.

Q Who was that?

A X

Q And what does he do?

A Type.

Q He does the court reporting?

A Yes.

Q So you saw him in there and he knew you?

A Yes.

Q How did that make you feel?

A Nervous, very nervous.

[12] Q Because you saw somebody that you knew?

A Yes.

Q So you were asked by the attorney what, to state your reasons why you weren't telling your parents?

A Yes.

Q And did the judge ask you any questions at all, do you remember?

A No, I don't think so.

Q Okay. Do you remember about how long the whole thing took?

A Ten, fifteen minutes. Not very long.

Q And, when it was over the judge made a decision?

A Yes.

Q And what was that?

A Yes, that he felt I was mature enough to make my own decision on my own.

* * * * *

DEPOSITION TESTIMONY EXCERPTS OF FRANCIS H., MINOR

[DIRECT BY MS. LYNN]

[10] * * *

Q Did you tell your boyfriend?

A The next day I did. I called from Meadowbrook. I couldn't get a hold of him that evening.

Q Had you tried to get a hold of him?

A Yeah.

Q Now, proceeding to the next day, the next morning, can you tell us what you did?

A Well, we went into Meadowbrook. They took—they—my mom gave them the death certificate and my adopt—or, my papers of me being born, and then they asked me to fill out some forms and then go sit in the waiting room until I was called. And I went and sat in the waiting room. They called me the first time and I went and I watched the film on the procedure. Then I went in the second time with a nurse and she—she asked me about my father, and stuff, and I said, "Well, as you can tell, that isn't my real father. My real father—well, this man was my mom's first husband. They were married and we don't want my father brought into this."

Q Let's backtrack a little so that we can make this a little [11] clearer. You went in and you saw somebody that was a nurse; is that right?

A Uh-huh.

Q And what did she say about—did she say something to you about you and your father and the death certificate?

A She asked me some questions about it and then I just knew what she was talking about.

Q What do you mean you knew what she was talking about?

A Well, it's very plain. You can see the three years' difference.

Q Explain what you mean by "the three years' difference."

A My mother—or, me being born three years after he died.

Q When were you born?

A I was born in '66.

Q And what is the year of the date of your—that's listed on your father's—or, so-called father's—

A '63.

Q So the nurse asked you about that three-year difference?

A Yes.

Q And what did you say?

A I just—I said I didn't want my father brought into it because he had never had any contact with me since I was born, or anything, so I didn't want him contacted.

Q Were you aware of who your father was?

A Yes, I was.

[12] Q And had you ever—how long had you been aware that your father was not the man that your mother was married to?

A I was aware of that—well, I was—my mother actually told me that yes, I do have a different father, when I was in 7th grade; that was five years ago.

Q Under what circumstances did your mother tell you this?

A I was in counseling. A lot of things had been happening in my family. I was in counseling and I wanted to know about my dad. I thought I was adopted and I guess that's what brought it on was I wanted proof, you know, that I wasn't.

Q That you were not—

A —adopted.

* * * * *

[15] * * *

A She gave me the phone number of my father's office. I called him at work because I wanted him to come up because they wanted me to talk about my dad, and stuff. They wanted me to get a relationship with my dad, and stuff. You know, be friends, whatever.

Q Who's "they"?

A The counselors. And they—

Q Do you remember where this program was that you were in?

A It was out—I think it was Fairview.

Q Was it part of your school or—

A No, Fairview Hospital in Minneapolis. They have a crisis unit there and they have something like with the A.L.T.P.; something like that.

Q What's A.L.T.P.?

A It's—it's just a place where—well, the place that—I don't know what the initials stand for. I'm not sure if those are the correct initials either. But it's a place for people with depression and had problems that kept reoccurring all the time, that weren't good for you. And my mom put me in there because I was having a lot of problems.

Q And it was on the advice of your counselors in that program that you tried to contact your father?

A Well, no, but yes.

Q What do you mean, "No, but yes"?

[16] A They thought that a lot of my problems were not knowing about my father and still having feelings for somebody I didn't know at all.

Q So what happened?

A I just—I tried to call my dad and he says, "Well, yeah, I'll come up and see you tomorrow." The next day is a visiting day; and that day, I waited and I waited and I waited and he never came. And then I called him the next day and I asked him why he didn't show up and I don't remember the reason why, but he says, "I'll come up and see you next visiting."

Q Was this an inpatient program?

A Yes.

Q Were you staying—residing in that place?

A Uh-huh. He never came neither one of the times I wanted to see him. After the second time he didn't show up, I didn't call or bother him again.

Q How did it make you feel when he didn't show up?

A Sad, but I was also angry at him for not showing up; for saying something that he said that he'd do and he never did it. It was a broken promise.

Q Now, getting back to the morning that you went to Meadowbrook: I believe you were talking about how you had talked to the nurse and she asked you about your father.

A Uh-huh.

[17] Q Did you explain to her about the difference between the dates on the birth certificate and your birth—on the death certificate, excuse me, and your birth?

A Yes, I did.

Q And what did she say?

A She said that my father—is there any way we could get in touch with my father to have him sign the papers or I'd have to sit—I'd have to go through Court.

Q What did you feel about the Court—the possibility of going to Court?

A I didn't—I didn't want to go to Court.

Q Why?

A It was delaying it and I just—I didn't know what would happen in Court, you know. I didn't know what the Court would be about so—I just—I didn't want to go to Court. There was no way. I didn't want to have to go through waiting until I went through Court to go through and have it—then have it done after that because I could have changed my mind.

* * * * *

DEPOSITION TESTIMONY EXCERPTS OF CYNTHIA J., MINOR

[DIRECT BY MR. JEVNE]

[CROSS BY MR. ACKERBERG]

[7] * * *

Q I'm going to direct your attention to December 7, 1982 and ask if that was the date upon which you first went to the Planned Parenthood Clinic?

A Yes, it was.

Q What happened? Generally describe what happened at that first visit to the Planned Parenthood Clinic?

A I filled out many forms giving them information, history, and they—I made another appointment to come back later.

Q You advised them as to what your concern was?

A Yes.

Q And did they give you an appointment?

A Yes, they did.

Q Did you then return to the Planned Parenthood Clinic on December 15th?

A Yes.

Q What happened?

A I had a pregnancy test.

Q Anything else?

A It was negative.

Q Did they give you a complete physical at that time?

A Yes.

Q And other tests such as a PAP test?

[8] A Right, yes. There was some concern whether that test was correct or not, if it was negative. It showed negative but we thought otherwise.

Q We're talking about the pregnancy test now?

A Right.

Q Now, the test showed negative. Why was there some concern as to the accuracy of the test at that time?

A Because it might have been too early and that I had missed my period in December.

Q So you felt that because you had missed a menstrual period that there still was a likelihood you were pregnant?

A Yes.

Q And Planned Parenthood, even though the chemical test was negative, recognized this possibility?

A Yes.

Q So what arrangement was made in light of that question that was still unresolved?

A I was to come back again.

Q All right. And how soon did they tell you to come back?

A A couple weeks. A week or so.

Q Did they tell you to come back if you missed another period?

A Yes.

[9] Q And did you make another appointment to go back to the Mankato Planned Parenthood Clinic?

A Yes.

Q Did you in fact return to the Mankato Planned Parenthood Clinic January 27, 1983?

A Yes.

Q Will you tell us what happened at that visit?

A I had another pregnancy test and this time it was positive and they said I was seven plus weeks.

Q To go back to your very first visit, at the time that you had your first visit and physical, were you seen by a physician at that time?

A Yes.

Q Were you also seen by one or more nurses at that time?

A Yes.

Q And the physician reviewed the results of that first pregnancy test?

A Yes.

Q The second time, on January 27th for your second physical, were you also seen by a physician?

A Yes.

Q And he examined you physically?

A Yes.

Q And also examined the results of the pregnancy test?

A Right.

[10] Q Did they perform other physical examination tests on that second visit other than just the pregnancy test?

A No.

Q Now, what did you do after you were advised that you were indeed pregnant at that point?

A I received a pamphlet of alternative services for pregnancy and I looked at the pamphlet and called up to Planned Parenthood. After deciding that I was going to have an abortion, I call the Planned Parenthood in St. Paul.

Q Now, did you do that on the same day that you went to the Mankato Planned Parenthood Clinic?

A Yes.

Q And when you decided to call Planned Parenthood up in St. Paul were you at the Mankato clinic in Mankato or not?

A I was at home.

Q So you made that call from your home?

A Yes.

Q Out of curiosity, this pamphlet they provided for you which described what you said were alternatives, they covered all kinds of alternatives as to how to resolve a pregnancy?

A Yes.

Q Such as having the child, adoption, those kinds of [11] alternatives?

A Yes.

Q Now, tell us what happened when you telephoned Planned Parenthood in St. Paul?

A I told them that I had a positive pregnancy test and I was seven weeks or more and they told me that—they asked my age

and I told them seventeen and they said I would have to have parental consent or consent by a court.

Q Do you remember who you talked with when you called the Planned Parenthood office in St. Paul?

A Sherrie was her name.

Q Now, when you called Sherrie did you discuss things other than this court business?

A Yes.

Q What other things did you discuss with her?

A About my decision to have the abortion and alternatives, cost, that kind of thing.

Q Did you go into some detail with her as to the basis for your decision to have an abortion?

A Yes.

Q Did she discuss with you the basis for that decision?

A Yes.

Q And the validity of that decision?

A Yes.

[12] Q Did she discuss with you whether or not you should consult with your family about that?

A Yes.

Q And what was discussed in that regard?

A Just why I would not tell my parents and what I wanted to do about that.

Q And you discussed that fully with her?

A Yes.

Q Did she give you the benefit of her—give you counseling on those different issues over the phone?

A Yes.

Q With respect to this parental notification had you ever heard about this parental notification law before that day when you went to the Planned Parenthood Clinic January of '83?

A No, I haven't.

Q And the initial information you got about the specifications of this law were from Sherrie in that phone conversation?

A Yes, and a nurse had mentioned it in the Mankato clinic.

Q That there was such a law?

A Yes.

Q Now, with respect to this parental notification what did you decide to do—

[13] A I decided—

Q —in that conversation or during that conversation?

A I decided to go to court to waive my parents' permission.

Q And what steps did you take then to go to court? What is the first thing you did?

A First of all, Sherrie advised me after we had discussed everything where I could call to get this and I called the clerk of court in Mankato and they had no idea. They had no case like this before.

Q First of all, when did you call that clerk of court in Mankato?

A That was the same day.

Q Still on January 27, 1983?

A Yes.

Q And by this time I take it it would have been sometime late in the afternoon.

A Right.

Q Did you make one call or more than one call to the clerk?

A I made two calls.

Q What happened during the first call?

A First call I told them my situation and what I needed to know and they knew nothing and they had to call around and find out information of where to go for [14] myself and that. So I called them back.

Q I want to talk a little more about that first call. When you first raised this question of wanting to get a court order so that you could avoid notification of your parents, what specifically did they answer to you when you said that is what you wanted?

A They acted confused. They were confused because they did not know of anything like that ever before.

Q Did they tell you to call back some later time?

A Yes, they said call back next week and I told them that I couldn't call next week because I was going to be farther along then and it would cause complications.

Q What did they say to that?

A Then they took care of me right then.

Q Is that when they told you they would check around and see what could be done about this?

A Yes.

Q Did you tell them you would call them back at that point?

A Yes.

Q So then you hung up the phone?

A Right.

Q How long was it before you called them back?

A Twenty minutes.

Q What happened? Did you talk to the same person when [15] you called back?

A Yes.

Q Do you remember the name of that person by any chance?

A No.

Q You do know to the best of your recollection it was somebody from the clerk's office?

A Yes.

Q What did that person tell you when you called back the second time?

A I believe they talked to Judge Mason.

Q Do you remember specifically that they mentioned that?

A Yes. And they said they had nothing like this before in Mankato and that I would have to go up to Hennepin County to get a waiver or consent from court.

Q Anything else that you remember from that conversation?

A No.

Q What did you do then?

A Okay. By this time it was close to five o'clock so I couldn't call up anymore. I called Sherrie back at the clinic and told her what had happened in Mankato.

Q Did you make that call the same day or was that the next—

A Yes, the same day.

Q Was that the last call you made on that day relating to this abortion?

[16] A Yes.

Q What did you tell Sherrie?

A I told Sherrie the situation with what happened, what I did and she said that she would check around and I could call her back the next day. She was going to check around and see if she could arrange something in Mankato.

Q Did you call her the next day?

A Yes, I did.

Q And when did you call her? What time of the day? Do you remember?

A Afternoon.

Q It was after school?

A Yes.

Q Now, what took place during that conversation?

A I told her—okay. She said she called around down here for me and they could not arrange anything in Mankato. She gave me information of the St. Paul Detention Center in which I would have to make an appointment and go up to court there.

Q When you say St. Paul Detention Center, are you referring to the juvenile court facility?

A Yes.

Q And did Sherrie give you specific information as to how to arrange that contact with the St. Paul juvenile [17] court facility?

A She just told me of the place. That's about it.

Q Did she give you a phone number to call?

A No, not that I recall.

Q What did you do at that point?

A I called the St. Paul Juvenile Detention Center and I made an appointment which was the following Wednesday, I believe, for my court hearing and that was approximately two or three in the afternoon.

Q Was there any discussion about how often or when they would hold these hearings?

A It was Monday through Friday. No weekends. Saturday or Sunday court could not be held.

Q But they could take you Monday through Friday at any time during those days?

A I believe so.

Q And the time that you selected was two or three in the afternoon?

A On Wednesday. It was a Wednesday.

Q Do you remember specifically the date of that court appointment?

A Wednesday the 9th of February.

Q Now, first of all at this point, let's go back to the time when you first found out that you had to go to court if you did not want to advise your [18] parents. Why did you feel that you were uncomfortable advising your parents about your predicament?

A Because this was my situation and it's my decision. It would have caused tension in my family. They had enough things going on, I didn't need to tell them about this. It was my own decision.

Q Do your parents—are you aware that your parents had certain religious or political feelings that would have made the subject of abortion uncomfortable for them?

A My parents are Catholic. I'm Catholic. But if I had decided—told them and decided what I had decided, it would have been too big of an obstacle.

Q Their political feelings on the subject?

A I don't know.

Q At any rate, you definitely concluded that you felt you did not want to involve them in this problem.

A Right.

Q Do your parents have any other relatives that are strongly involved in anti-abortion activities or lobbying?

A Yes, I have relatives in St. Paul that are very strong about this. They're active.

Q Are they relatives of your father or mother?

A Father.

Q Are they like sisters or brothers of his?

[19] A Yes.

Q Now, when you found out about this, the fact that you would have to go to court if you did not want to tell your parents, how did you feel about that when you heard about that?

A I knew it was going to be an inconvenience and I was afraid to go because if it was in Mankato, because I know a lot of people in Mankato, and I was afraid that my identity would

be known. Other people would know about it yet my parents wouldn't.

Q Why were you afraid that your identity would become known if it were in Mankato?

A Because the courthouse is in Mankato, I'm from Mankato, I have lived here eighteen years and I know a lot of people because I have been involved in a lot of things and there just is a chance that my identity would be known.

Q Do you know people that are employed at the courthouse in Mankato?

A Yes.

Q Familiar with them?

A Yes.

Q Did the idea that you would have to go to court then cause you some concern at that point when you initially found out about it?

[20] A Yes.

Q Did it cause you additional concern when you found out that you were going to have to go to the Cities to accomplish this court hearing?

A Yes, definitely.

Q What were the problems caused by the fact that you were going to have to go to the Cities for this court appearance?

A First of all, I had to have transportation up there. I took a Greyhound bus for $20 round trip there. I missed a day of school, of my school which is unexcused which is on my record; the cost for it; going up to the Cities all by myself, all on my own. It was a scary experience.

Q You arranged this all by yourself?

A Yes.

Q And you didn't have any help from anybody else?

A Right.

Q You paid for it all by yourself?

A Yes.

Q How much total funds would you say you expended with your bus fare and meals and so forth in this trip up for the court hearing?

A Probably 30 to 35 dollars plus working. I had to get off work.

[21] Q You missed work as a result of having to do that?

A Yes.

Q How much work did you miss?

A Six hours of work.

Q How much were you paid at that time for your work?

A Three fifty per hour.

Q Now, when you missed school you indicated it was an unexcused absence. What do you mean by that?

A There was no parent's call in for me missing school so I went to detention and had to make that up.

Q So it was just as if you were truant for that day, as if you had just taken off to have fun or something like that?

A Yes.

Q Just out of curiosity, what kind of detention do they make you stay in for that?

A It was after school. A week after school for an hour, 45 minutes after school.

Q Every day for a week?

A Per class period, one hour.

Q So did that involve—are you talking about a week?

A Yes. Five days.

Q Five days you had to stay after school every day?

A Yes.

Q For 45 minutes or an hour?

[22] A Yes.

Q And I take it this probably also caused some irritation on the part of your teachers or whatever when you missed that day.

A Yes.

Q Was that expressed to you in any way do you remember?

A No.

Q Now, I want you to tell me exactly how that day went from the time you got up in the morning until the time you got back with respect to the day of your court hearing.

A Okay. I woke up approximately 4:30, got ready, walked down to the bus depot which was a good mile and a half from my house. Then I caught the bus at six o'clock in the morning; rode the bus up to St. Paul stopping in every town on the way. I arrived about ten, 10:30 to St. Paul and lucky for me the Detention Center was right next to the bus stop because I had no idea

where I was in the Cities. I don't know my way around at all. So I was lucky that it was right next to it.

So my appointment was approximately two in the afternoon so I had four hours to waste. I went to the mall, walked around shopping a little bit, had lunch and then went over to the Detention Center and I did homework for two hours and then this was about my [23] appointment time and I talked to a lawyer—I had a guardian also and they just prepared me for what the judge was going to ask me.

Q What happened?

A And then they talked to me for about 20 minutes and prepared me for this. Then I went to my—they were going to set me off for another hour because another girl had come before me but I told them I was going to miss my bus so they took care of me right away. And so, let's see, we went through the court procedure and it was in my way. It came out good for me. I got permission by the court and that's it.

Q Did they give you a document then so that you could take that so you could secure your abortion?

A Yes.

Q And you had a hearing actually before a judge?

A Yes.

Q Did that take place in the judge's chambers?

A Yes.

Q And your guardian and your attorney were there with you?

A Yes.

Q Then what happened after that?

A Then I went and took the bus home and I arrived home at eight o'clock at night.

[24] Q When you left to walk to the bus early in the morning, you did that without the knowledge of your parents?

A Yes.

Q Because you obviously did not want them to know where you were.

A Right.

Q And you had to hide that from them also when you returned?

A Yes.

Q How did you feel during that day when you had to go through that long day by yourself?

A I felt that it was not necessary because of my—it was my decision in the first place what I was going to do. It was a very big inconvenience, and I felt down on myself because I was missing school, et cetera.

Q Did you have any fears or concerns during that day?

A Yes. The whole day was—it was a fearful day. All the strange people I didn't know, you know. It was a different atmosphere for me totally.

Q Were there a lot of strange people in the bus station and that sort of thing?

A Yes, definitely.

Q Was that scary for you?

A Yes.

Q Where did you get the money to pay for this particular [25] trip?

A Savings account.

Q Savings from your jobs?

A Yes.

Q So now you got back and to the best of your recollection this would have taken place February 9th?

A Right.

Q And before your deposition today you looked at a calendar for that year, didn't you, to try to figure out what would have been the day?

A Yes.

Q Now, after getting back February 9th and now having the court authority, what was the next step?

A I called Sherrie in St. Paul at Planned Parenthood and told her that I had the okay.

Q Did you call her the next day after the hearing?

A Yes, the next day.

Q And then what?

A Then we made an appointment for my abortion.

Q And do you remember what day that appointment was for?

A The 16th of February.

Q That was an appointment for you to be at the St. Paul clinic on Ford Parkway?

A Yes.

Q What arrangements—before we leave the subject of [26] telephone conversations, when you had that initial flurry of conversations with Sherrie about the court procedure and your abortion decision and so forth that you already told us about, what would you say was the total period that you talked with Sherrie on the phone in that initial flurry of conversations?

A I would say an hour.

Q Do you remember how many conversations there would have been when you were trying to resolve that initial court appearance difficulty?

A Different phone conversations which I had to keep confidential from my parents which was another concern.

Q And how did you keep those confidential from your parents?

A Well, the first few times I called I called and it would show up on my parents' phone bill, but then Sherrie told me to call collect which I did.

Q So that was another thing you had to worry about was your parents picking this up on the phone bill?

A Yes.

Q Now, you arranged this appointment for February 16th. What happened then with respect to that appointment?

A February 16th a girlfriend and I drove up to St. Paul and went through all of the informative sheets I had to fill out and history and then they told me that I was [27] too far along. I was 15 weeks and three days in my pregnancy so I was in the second trimester.

Q What did that mean?

A That meant that Planned Parenthood could not give me an abortion. They could only go up to 14 weeks.

Q What was the result?

A They referred me to another clinic in Minneapolis.

Q Did they give you several alternative places to go to get an abortion past the first trimester?

A Yes, they did, but they told me one specific doctor.

Q And that was Dr. Hanson?

A Yes.

Q Mildred Hanson?

A Yes.

Q Now, with respect to getting up to the clinic, you said a friend went with you this time.

A Yes.

Q Did you arrange with her to do that in advance of the appointment?

A Yes.

Q And she drove you up?

A Yes.

Q Did you help pay for any expenses or anything like that with respect to the trip?

A Yes, I paid for all of the gas expense, transportation, [28] lunch, et cetera. I paid for everything.

Q Do you remember how much in the way of expense was involved on the trip on the 16th?

A I would say $25 worth of gas and up to 15, $20 for lunch and dinner, et cetera.

Q What time did you have to leave on that day?

A We left approximately 7:30 in the morning.

Q Was this also a school day?

A Yes.

Q Did you have an excuse to miss school on that day?

A No.

Q Did you also miss work on that day?

A Yes.

Q Did you miss the same amount of work?

A Yes.

Q Now, you left at 7:30 and you got up to St. Paul fairly reasonably early in the morning I guess.

A Sure.

Q Then you went through—you said you filled out some forms.

A True.

Q Did you meet Sherrie, this person you talked to on the phone? Did you meet her in person at that time?

A Yes.

Q Did she give you some counseling about the abortion?

[29] A Yes.
Q What was involved in that decision?
A Yes.
Q And what medically was going to happen and that sort of thing?
A Yes.
Q And then did you have a physical examination?
A Yes.
Q Was it at this physical examination that a determination was made that your pregnancy was too far advanced for Planned Parenthood to do the abortion?
A Yes.
Q Was that examination performed by a physician do you remember?
A Yes, it was.
Q Now, what time was it that you found out that Planned Parenthood could no longer perform the procedure?
A I would say eleven approximately.
Q Had you brought with you sufficient funds to pay for an abortion to Planned Parenthood?
A Yes, scarcely.
Q And do you remember how much money that was?
A It was $175 for Planned Parenthood.
Q Now, when they told you they could not do it and they gave you Dr. Hanson's name, what did you do then?
[30] A They called to Dr. Hanson and told her the situation and asked her if it would be possible that I got in and Dr. Hanson said just to come over to her clinic and she would see what she could do.
Q Did you do that?
A Yes. And I had to be back by a certain time that evening so my parents would not know what was going on. So I had to just go there and see what would happen, you know, see if—when I left Planned Parenthood, I didn't know if I would be able to go through the abortion that day or not.
Q What was your emotional state first of all when you left first to go up to Planned Parenthood that day. How were you feeling?
A I was scared and kind of depressed.

Q What about? What was your emotional state when you found out that you now were too late to have a first trimester abortion?
A I just couldn't believe it. I was very scared. I was crying. I was very shook up.
Q And what happened when you got to Dr. Hanson's office?
A I signed in and they knew my situation and they told me to wait. I was so nervous I couldn't do anything so I just tried to go to sleep. I fell asleep for about four hours and then Dr. Hanson saw me.
[31] Q Did Dr. Hanson take steps to begin the procedure?
A Yes. It was a D and C abortion and I had to have insert laminaria sticks.
Q Laminaria?
A Yes.
Q And that is a preparatory step for an abortion of the kind that you were going to have?
A Yes.
Q And she wanted that done as part of good medical practice for your abortion?
A Yes.
Q And she explained that to you at the time?
A Yes.
Q And the purpose for doing so?
A Right.
Q What were you advised then that you were to do after these laminaria were inserted?
A She gave me medication to take that evening. I was supposed to come back the next day for the abortion.
Q So now you had to return back to Mankato that evening?
A Yes.
Q Did you do so?
A Yes.
Q And your friend drove you?
A Yes.
[32] Q What time did you get back to Mankato?
A I would say approximately nine. Eight or nine o'clock.
Q And how were you feeling at that time?

A Terrible. Absolutely the worst. I have never felt so bad in my life.

Q In what ways were you feeling badly?

A I was sick to my stomach constantly. That's why it took so long to get back to Mankato. We had to stop every two miles it seemed like. I was depressed about having to go back to the Cities the next day. I had to miss school again.

Q Was this illness, your nausea, was that related to your psychological state rather than your physical state?

A It was physical state.

Q You were physically nauseated?

A Yes.

Q What I'm getting at, I mean was that caused by the laminaria?

A Yes, that is what caused it.

Q Did Dr. Hanson say that was an expected effect from doing this?

A Right.

Q I understand then. And what did you do when you got home?

A I went right to bed. My mother came up to talk to me. [33] I couldn't even talk. I just rolled over and went to sleep and she thought that was really weird.

Q Were you concerned about having to go back yet another day?

A Yes.

Q Why were you concerned about that?

A Because I was going to miss school again and school calls your house every time you miss school. Every class period you miss. So my parents work until six at night so they missed a call this day and the second day I had to have someone call from Dr. Hanson's office to clear me from school. Otherwise my parents would find out that I have missed two full days and I wouldn't get away with that. They'd want to know everything, where I had been.

Q Now, the next day did you go back to Dr. Hanson's office?

A Yes.

Q How did you get up there that time?

A My girlfriend drove me.

Q Same as the day before?

A Yes.

Q And what time did you leave that day?

A About 9:30 in the morning.

Q Did you again participate in paying expenses for her [34] driving you?

A Yes. She helped me out but I reimbursed her.

Q Did you find out that the cost of having the abortion, second trimester abortion done by Dr. Hanson, was going to be extremely greater than you were prepared to pay to Planned Parenthood?

A Yes.

Q Do you remember the difference in cost?

A Probably about $125.

Q What did you do about making the payment for the additional cost?

A I gave her all the money I had so my girlfriend helped out with expenses of getting to the Cities and back and I had an I.O.U. of $80 to Dr. Hanson.

Q Did you eventually pay that to her?

A Yes.

Q You went up to her office and you had the procedure that day.

A Yes.

Q And what time did you return to Mankato that day?

A We left at about 5 o'clock and returned about seven.

Q So the total time that was spent in securing this abortion from the first time you found out you had to go through this court procedure up to when you had it was three full days away from Mankato?

[35] A Yes.

Q And had you not had to secure the court permission and go through all that resulted in that and was involved with that, would you have been able to secure your abortion in the period of one day?

A Yes.

Q Would you have been able to secure the abortion at Planned Parenthood, a first trimester abortion?

A Yes.

Q All right. Finally, Cynthia, were there any periods of time when you were concerned about whether or not you could really get through this whole procedure from start to finish in light of the difficulties that you had?

A I was in doubt a lot because of the court case kind of thing, but I decided that this is what I'm going to do and that they can't stop me from doing this.

Q So you very firmly decided you were going to overcome all of these obstacles?

A Yes.

MR. JEVNE: I have nothing further at this time.

CROSS EXAMINATION
BY MR. ACKERBERG:

Q Cynthia, January 27, 1983 I think you've testified you [36] discovered that you were pregnant at least seven weeks.

A Yes.

Q Did you have any more definite word from Planned Parenthood on how far along in your pregnancy you were?

A Seven plus weeks. That's what they told me.

Q Did that mean to you it could have been any period after seven weeks or was it in the area of seven weeks?

A Any time after seven weeks.

Q So you didn't know definitely how far along you were?

A Well, my last regular period was October, October 30th. So from that time it would be ten weeks.

Q So did you think you could have been up to ten weeks pregnant?

A Yes.

Q You made an appointment for your court hearing for February 9, 1983; is that correct?

A Yes.

Q When did you make that appointment?

A On January 27th or the next day, the 28th.

Q So on January 28th you made an appointment for February 9th?

A Yes.

Q Did you try to make an appointment for an earlier court appearance?

A Yes, but I couldn't get around work or school and that [37] was the time that I could get up to the Cities.

Q So an earlier court date was available but you could not make it?

A I don't recall. As far as I know. But I believe that—they set me up with this appointment. That's what they told me. They had an appointment on a Wednesday.

Q Did you ask for an earlier appointment?

A No, I didn't.

Q Did you ask for an appointment during the weekend?

A Yes.

Q What was the response?

A They couldn't do that. When I did ask for an earlier appointment, because Saturdays and Sundays were the days I could go up to the Cities with no problems of school or work, and that was not possible so Wednesday—

Q Who told you that?

A The girl I talked to up in the Detention Center who made my appointment. The secretary.

Q By Detention Center you mean the juvenile court?

A Yes.

Q Did you ask whether weekend hours were available in an emergency situation?

A Yes.

Q What was the response?

A They didn't—no, they couldn't.

* * * * *

[44] * * *

Q Let me try to clarify which court you appeared in. The county seat of Hennepin County is Minneapolis. The county seat of Ramsey County is St. Paul. Did you appear in court in St. Paul or Minneapolis.

A St. Paul Juvenile Detention Center I believe it's called.

Q Before appearing in court you did not visit—did you visit Planned Parenthood in St. Paul?

A No.

Q You were concerned about an unexcused school absence?
A Yes.
Q On the 9th then, the day that you appeared in court, did you appear at Planned Parenthood at all?
A No.
Q While you were waiting to appear in St. Paul court, you were concerned about missing your bus back home?
A Yes.
Q What time did your bus leave?
A Five o'clock I believe.
Q And what time did you—was your court appointment?
A It was at three o'clock.
Q And did you tell somebody that you were concerned about missing your bus back home?
A Yes.

* * * * *

[47] * * *

Q Can you tell me how that date was arranged?
A February 16th?
Q Yes.
A No, I don't know. It was just the appointment that I made.
Q Did you seek an earlier appointment?
A I don't recall.
Q Do you recall any discussion with Sherrie about the time factor, the importance of having an abortion as quickly as possible?
A Yes, Sherrie knew that.
Q But you can't recall why a week went by between the time you called and—
A Probably because I had to work. I was scheduled to work. That was the soonest appointment I could make.
Q Was the abortion performed?
A Yes.
Q By Dr. Hanson?
A Yes.
Q Was it performed safely?
A Yes.

* * * * *

DEPOSITION TESTIMONY EXCERPTS OF BONNIE L., MINOR

[DIRECT BY MR. JEVNE]

[CROSS BY MR. ACKERBERG]

[5] Q Did the doctor tell you approximately how far along you were in your pregnancy?
A Yes. They said I was 13 or 14 weeks along.
Q When you went to that clinic, what time of the day was it that you went?
A Planned Parenthood of Minneapolis?
Q Right. Minneapolis.
A It was in the evening.
Q Now, they referred you to the St. Paul Clinic, correct?
A Yes.
Q When did you make contact with the St. Paul Clinic, if you did?
A I contacted the St. Paul Clinic on Wednesday after school.
Q That would be the very next day?
A Yes.
Q That date would be March 14, 1984?
A Yes.
Q Who did you talk to when you called there?
A I talked to Sherry.
Q Is she a counselor at Planned Parenthood?
A Yes, she is.
Q You later met her personally, did you not?
A Yes, I did.

[8] * * *

Q So you were talking to her on Wednesday now?
A Yes.
Q She was hoping you will get a court hearing on Thursday?
A Yes.
Q Did you call the number that she gave you?
A Yes, I did.
Q When did you call?
A I called Wednesday. Right after I talked to Sherry.

Q And did you get somebody down in Hennepin County Court?

A Yes, I did. I talked to a lady and told her my situation and she said she didn't have an opening until Monday morning. And I told her that that would be too late, and asked if she had any other openings. And she said she didn't. I called back Sherry and told her that. Sherry tried contacting them.

Q Before we get to Sherry contacting them, when you talked with this woman, did you explain the reason it was important for you to have a hearing **[9]** before the next week?

A Yes, I did.

Q What specifically did you tell her?

A That if I didn't have it within the week, it might be too late to have the abortion. I needed the court hearing and the counseling within the week so I could have the abortion on Friday, and maybe Monday at the very latest.

Q Now, then you called Sherry back you said?

A Yes.

Q And you explained to her what happened, I take it?

A Uh-huh.

Q Then what happened next?

A She called them to try to get an appointment and she didn't. She must not have had any luck. She called me back and gave me the Ramsey number or the courthouse.

Q When she called you back, did she explain to you that she hadn't been able to get a hearing either?

A Yes. She said she didn't have any luck either. Then I called Ramsey and I told them the exact same thing I told Hennepin County and they said they could get me in on Friday at 2:30.

* * * * *

[14] * * *

Q Now, did you have an appointment at Planned Parenthood to go ahead and have the abortion procedure?

A Yes. I did on Monday.

Q Go ahead and tell us what time the appointment was for.

A The appointment was for 9:30 and I went in and had a little more counseling. I had a checkup and just their basic exam and I went in there to get it and Dr. Hanson sized me again,

sized me and said I was too far along and I wouldn't be able to have it at Planned Parenthood.

Q What do you mean by too far along?

A I was over the 14 weeks that Planned Parenthood would do. They do up to 14 weeks pregnancy.

Q Did she propose some alternative to you?

A She said I could go to her clinic and have it done there.

Q That would be a second trimester procedure down there?

A Yes, it would.

Q And did you go through, first of all, when **[15]** you went down there on Monday, did you miss the whole day of school on Monday?

A Yes, I did.

Q How did you, what excuse did you develop for that day?

A I called the school as my mother saying I was sick and that I wouldn't be in school and that excused me for the whole day.

Q Again you had to tell a lie to the school, in effect, to get out of school that day?

A Yes.

Q Did that also have the effect of making you nervous and have to worry about whether you might get caught?

A Yes.

Q Then, did you go through this procedure at Dr. Hanson's?

A Yes, I did.

Q Tell us what happened next, then?

A I had to go Tuesday, to get the sticks put in.

Q The sticks?

A Yes.

Q By the sticks you mean laminaria sticks?

A Yes.

[16] Q That is a procedure that Dr. Hanson uses as kind of a preparation for having the abortion, correct?

A Yes.

Q When on Tuesday did you go down to Dr. Hanson's office?

A Tuesday, I left school at 1:30 and we got down there at about 2:40 and waited around until I was called in.

Q Again, how were you getting around in and out of the city on these occasions?

A The bus or cab.

Q How about when you went to Planned Parenthood on Monday?

A We had a friend of John's take us down there.

Q Now John is your boyfriend, I take it?

A Yes.

Q Did you have to miss school time on Tuesday when you went to Dr. Hanson's office?

A Yes, I did. I had to miss the last hour.

Q How did you manage that?

A It's a study hall and I went down and I checked in and I said I was going to some classroom to work and so they thought I was there the whole hour. After I checked in, I left.

Q Again you were deceiving the school [17] authorities and you might have been caught?

A Yes.

Q After the laminaria sticks were inserted on Tuesday, then what happened?

A I had to go back Wednesday at the same time. And I did the same thing for study hall and then I waited around then until the procedure happened.

Q Now the procedure has been complete?

A Yes.

* * * * *

BY MR. ACKERBERG:

[21] Q Do you know who the woman is you contacted at Hennepin County?

A No, I don't.

Q Do you know what the telephone number was or what office it was?

A No, I don't know.

Q Did you or Sherry make any effort to contact the judge in Hennepin County directly?

A I didn't. I don't know what Sherry did.

Q You received court approval on Friday afternoon from Ramsey County?

A Yes, I did.

Q Why wasn't the abortion performed on the Friday after that?

A I don't think they had abortions on Friday afternoon. I don't think I could have. I don't think I could have gotten in on Friday.

Q Why didn't you have it on Saturday?

A I don't think they are open.

Q Why didn't you have it on Sunday?

A They aren't open on Sunday.

Q When Dr. Hanson sized you and said that you were over 14 weeks, did she say how many weeks you were?

A She said I was probably about 15.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. STANLEY HENSHAW, DIRECTOR OF RESEARCH AT ALAN GUTTMACHER INSTITUTE

[DIRECT BY MS. LYNN]

[19] * * *

Q And how accurate is the Alan Guttmacher Institute data on fertility-related subjects generally considered in the demographic statistics community?

A Our statistics are considered the best available and are actually quite accurate as regards abortion. They are accepted by the United States Department of Commerce for publication in the Statistical Abstract of the United States and in fact the Centers for Disease Control, it often uses our total numbers of abortions for scientific purposes.

* * * * *

[20] A I wouldn't be able to identify factors specific to Minnesota that were different from the country.

Q What about the numbers of abortions and/or abortion rate for Minnesota women under 18?

A That also peaked in 1980. I don't have the rate, but I have looked at the numbers and the numbers peaked in 1980 and have declined since then.

* * * * *

[30] • • •

BY MS. LYNN:

Q Dr. Henshaw, can you tell us what this table shows?

A I think the interesting part of the table is the percent change from 1980 to 1982 in the abortion rates. It shows a decline of 25 percent in abortion rate to women under 18 and the decline of 11 percent in the abortion rate to women 18 to 19.

Q Now why did you pick the two age groups, under 18 and 18-19 for the purposes of comparison in this table?

[31] A Well, we were interested in what happened as a consequence of the law. The law would affect women under 18 primarily and many factors may influence teenagers. Aside from the law abortion rates might change over a period of time so the 18 to 19-year-old group was the most appropriate group to compare to the minors under 18.

Q All right. Now you testified earlier that abortion rates for all Minnesota women in the years, in the early 80s, that is 1980 through '82 declined and that the rate of decline was much greater for women under 20 and that the greatest decline occurred among women aged 15 to 17, is that correct?

A That is correct.

Q Can you identify any factors that in your opinion may have contributed to this trend?

THE COURT: When you say "this trend" are you talking about the minus 25 on the third line?

MS. LYNN: I am talking about—yes.

THE COURT: What trends are you talking about, Dr. Henshaw?

THE WITNESS: I haven't answered the question yet.

THE COURT: She is giving you a question about what contributed to the "trend" and I don't know what trend you are talking about.

THE WITNESS: There are a number of trends. One is the decline overall and the other is the decline among the [32] minors and the 18 to 19-year-olds.

I can only name some factors that can change reported numbers of abortions.

First I would like to point out that the statistics are not perfectly accurate. These numbers of abortions are based on the State Health Department numbers. We at AGI do our own count of abortions. In each state there are some differences between our count and their count and we do ours accurate enough to know it means theirs are not completely accurate, neither are ours.

I have tried to compare and can see that they have missed some providers that we know about and we have missed some that they know about so that there is some degree of error in the number of abortions here.

• • • • •

THE WITNESS: Another factors is that a number of Minnesota women go out of state for abortions. For example, a clinic opened in Fargo, North Dakota, in 1981 that would—that could affect the changes here to some degree, would probably affect women of all ages.

Then I think it seems likely that the law had some effect on reducing the number of abortions reported here for the minors.

[33] Now as far as the 18 and 19-year-olds, I can't say what probably caused the decline except that some influence evidently has been affecting teenagers, probably the minors as well as 18 to 19-year-olds.

The fact that the rate dropped more for minors suggests that the law might have had some effect.

• • • • •

[38] • • •

BY MS. LYNN:

Q All-right. Dr. Henshaw, what is this Table 2, that is Exhibit 28, show?

A Okay. That table has birth rates 1981 and 1982 for Minnesota women age 15 to 17 and 18 to 19. It shows a decline in the birth rate of the 15 to 17-year-olds of about 3½ percent and a decline in the birth rate of 18 to 19-year-olds of 6.1 percent.

Now down below we have an average of four neighboring states and I have shown the same calculations and those states, the birth rates for the 15 to 17-year-olds declined 5.2 percent and the 18 to 19-year-olds declined 4.7 percent.

Q All right. Dr. Henshaw, can you identify any factors that may have contributed to these, to this—these trends, that is a decline in their fertility rate for the applicable age groups in both Minnesota and the four states—

THE COURT: Fertility rate and birth rate are the same thing?

THE WITNESS: The same thing in this context because we are referring to specific age groups.

All I can say is that there are—appear to be some [39] regional influences on the birth rates of teenagers in these age groups.

Now the reason we are looking at the table is to see if the Minnesota law may have had an effect on the minors in Minnesota.

Would you like me to go through that analysis?

BY MS. LYNN:

Q Yes. Would you discuss a little bit what you think what impact if any the law may have had on these fertility trends?

A Well, we were interested in the fact that the birth rate went down for the 15 to 17-year-olds after the implementation of the law. So I was—I did this comparison to try to see what the effect of the law might be separated out from other trends that were occurring, and if you compare the 15 to 17-year-olds to 18 to 19-year-olds in Minnesota, the decline was less for the 15 to 17-year-olds by a small amount.

Similarly, the decline in Minnesota for the younger women was less than the decline then in the other states, in the other four states.

Q Now would you explain why you chose to compare Minnesota with these four states?

A These were all neighboring states, three of them border on Minnesota. The fourth, Nebraska, is very close. I omitted one other state which borders on Minnesota, North Dakota,

because it had a similar kind of law that was implemented [40] during this time period.

THE COURT: What are you telling me this shows?

THE WITNESS: This shows that if—if the minors had had the same trends in birth rate compared to the 18 to 19-year-olds as occurred in other states their birth rate would in fact—would have gone down about three more percentage points than it did. So the suggestion is if the law had any effect it appears more likely that the effect was to slow down the decline in the birth rate rather than to encourage a decline in the birth rate of the minors.

THE COURT: What is the effective date of the law, to your understanding?

THE WITNESS: I understood that it would affect births starting around February 1982. The law went into effect August 1st, 1981, according to my understanding. Births in 1981 would not be affected.

THE COURT: All right, go ahead.

BY MS. LYNN:

Q Okay. Did you have occasion, Dr. Henshaw, to look into the fertility rates for unmarried versus married teenagers in this same time period?

A Yes. I also looked at national rates by numbers of births to married and unmarried teenagers.

Q And what do those numbers show?

A I am afraid you have my notes on that.

[41] MS. LYNN: Pardon me, Your Honor.

THE WITNESS: What the numbers show is that the decline in births occurred primarily among married teenagers 15 to 17; that the number of births to unmarried women 15 to 17 declined only 3 percent between 1981 and 1982.

The number of births to married teenagers declined 22 percent and in fact if you look at the absolute number decline of births there was a decline of 41 births among

unmarried teenagers, a decline of 119 births among married teenagers.

BY MS. LYNN:

Q What does the fact that the numbers of births went down for married teenagers much more than unmarried teenagers in 1981 to '82 suggest to you?

A It suggests that there is a trend toward, a desire for postponing childbearing and that that is reflected in the trend among the married teenagers having fewer births. Among unmarried women there was little change in—there was no essential decline when you took the population into account. I couldn't do a rate because I don't know the proportion of women who were unmarried in the two years, but we know that overall the number of teenagers is declining each year by 4 to 6 or 7 percent and the decline in the number of births to unmarried women is actually less than the probable decline in the number of unmarried teenagers in this group in the **[42]** population.

Q Does this different rate of decline among births between married and unmarried teenagers suggest anything to you about the possible impact of the parental notification law?

A Well, it is—if the law—we were interested to see whether the law may have had the effect of encouraging some women to carry pregnancies to term rather than having births (sic). Assuming those would have been the unmarried women—

THE COURT: Say that again: you were trying to see if it had any effect on what?

THE WITNESS: On encouraging teenagers to carry their pregnancies to term.

THE COURT: Rather than—

THE WITNESS: Rather than having abortions; I am sorry.

THE COURT: I thought you were comparing the same thing for a moment.

THE WITNESS: I was; I misspoke.

Now given that there was a trend toward fewer births, it appears that the unmarried women did not participate in

this trend toward fewer births and it is possible, it can't be proven, but it is possible that one reason is that some of them carried pregnancies to term who otherwise would have had abortions.

* * * * *

[43] * * *

BY MS. LYNN:

Q Dr. Henshaw, could you explain the concept of abortion need?

A Yes. We at the Alan Guttmacher Institute have tried to estimate the number of women who need abortions in each part of the country. The purpose is to assess the adequacy of abortion services. By "need" what we mean is the number of women who would obtain an abortion if services were readily available to her.

Q And can you make any statement about Minnesota's abortion need and its performance in meeting that need?

A. Yes. We have estimated that the need for abortion services in Minnesota in a year, say 1982, is something over 30,000 women. Now we might want to deflate that a little bit **[44]** because Minnesota is quite a rural state. Rural states more than average anyway a non-metropolitan state. So maybe a little under 30,000 would be my estimate of the number of women in Minnesota who we would estimate have an unintended pregnancy in a year—well, in 1982—and if services were readily available would obtain an abortion.

The number of abortions that actually occurred was on the order of 19,000 in 1982. Our conclusion is that there is a significant amount of unmet need for abortion services in the state.

THE COURT: How did you arrive at an estimate of unintended pregnancies?

THE WITNESS: What we do is assume that the use of abortion services in a state where services are readily available is a good indicator of how many women would need abortion services if they were available. We took the five states where 80 percent of the women lived in a county

with a big abortion provider and assumed that in those states services are available.

Then we applied the abortion rates from those states specific by age and race of the women to the populations of other areas to estimate how many women in those areas would obtain abortions.

THE COURT: All right, that tells me how you are doing it.

BY MS. LYNN:

[45] Q All right. Have you made any determination about the degree to which abortion services are accessible to women in Minnesota?

A Well, there are two things we look at in terms of availability of abortion services. One is a number of counties with an abortion provider and in Minnesota 6 percent of the counties have an abortion provider as compared to the country as a whole where 22 percent of the counties have at least one provider. Now both of these figures may be missing a few counties because we know that we miss a few physicians who do abortions privately in their offices to their own patients. We think that this covers substantially all the providers who do a large number of abortions so that they are well-known to women and really visible and accessible.

The second measure is proportion of women who live in a county with a provider. In Minnesota 44 percent of women 15 to 44, this is for 1982, lived in a county with an abortion provider as compared to 72 percent in the country as a whole. So by these measures Minnesota is lower than the country as a whole in terms of accessibility of abortion services. It is primarily, I would say, probably because Minnesota is somewhat more nonmetropolitan than the country as a whole.

THE COURT: Give me what you perceive to be the standard for each of those two methods?

THE WITNESS: Well—

[46] THE COURT: 6 percent—

THE WITNESS: Versus 22 percent average U.S. Now we think the average U.S. is low, it should be higher than that but this just gives you a standard.

THE COURT: And the percentage that live in the county?

THE WITNESS: 44 percent versus 72 percent.

THE COURT: All right.

BY MS. LYNN:

Q Where are the abortion, Minnesota abortion providers that you identified located?

A The clinics are located in the major cities, Duluth, then the Twin Cities areas. There are some other providers which are relatively less important in a couple of other counties.

Q Does the fact that virtually all of Minnesota abortion providers are located in the two major metropolitan areas of Minnesota have any impact on the ability of Minnesota women to obtain abortions?

A Well, it means that many women would have to travel long distances to obtain abortion services. For example, a woman who lives in the center of the state say, Brainerd, needs to travel at least 200 miles, I think over 200 miles round trip to either Duluth or Minneapolis to obtain services.

* * * * *

[49] * * *

BY MS. LYNN:

Q Yeah. Well, what effect in your opinion does delay have on abortion for women?

A I have just been editing our International Fact Book on Abortion. One part of that fact book is on complications from abortion and I have worked with CDC and made the calculation that for each additional week of gestation between eight weeks and 20 weeks the probability of mortality increases by about 30 percent. The probability of mortality is very low in any case but it does increase with each additional week during that gestation period.

THE COURT: 30 percent, did you say?
THE WITNESS: Yes.

BY MS. LYNN:

Q Have you ever done any study on accessibility of abortion services and how that accessibility relates to delay?

A Yes, we did one study in which we looked at the gestation of women obtaining abortions who obtain their abortion inside the county of residence versus outside the county of residence. We found that those who were outside their county of residence **[50]** had their abortions on the average of 4.7 days later than women who had their abortions inside their home counties. This was based on a regression analysis which took into account other demographic differences between the women who may have traveled outside their counties and those who obtained abortions in their counties.

Q And then in your opinion does this relationship between the accessibility and delay hold true in Minnesota?

A I would think it would probably hold true in Minnesota.

Q How does Minnesota compare with the nation as a whole in terms of the gestational age at which women get abortions?

A Well, looking at the Minnesota Health Department statistics, compared to the U.S. total, it looks as if Minnesota women are obtaining their abortion a little bit later than the country as a whole. The latest year for which I have data from both the U.S. as a whole and Minnesota is 1981 and in that year 13½ percent of Minnesota abortions were obtained past 12 weeks gestation as compared to the U.S. total figure of 9.9 percent.

* * * * *

[53] * * *

1980 in particular is a year in which a higher proportion of women seem to get late abortions so to try to even out some of these fluctuations I have calculated an average for three years, 1978 to 1980 as the "before" period; 1982 and 1983 as the "after" period.

Now if you compare the averages for women under age 20 for 1978 to 1980 an average of 16.9 percent of them obtained abortions past the 12-weeks gestation. For the average of 1982 to '83 18 percent obtained their abortions past the 12 weeks. Now to see whether these other fluctuations or some systematic change may have helped to account for that increase I looked at the same figures for women aged 20 and over, the proportion who obtained abortions past 12 weeks for the 1978 to '80 period was 9.4 percent and for the later period, '82 to '83 9.5 percent.

So there is a tiny increase for the women 20 years and over, but a much larger increase for the women under age 20.

Q What does the fact that the proportion of teenagers who got abortions after 12 weeks increased much more than the pro-**[54]**portion of older women getting abortions after 12 weeks in 1982 to '83 suggest to you with regard to the parental notification law?

A Well, it suggests the possibility that the law may have caused some delay in the women obtaining abortions after the law went into effect.

* * * * *

[58] * * *

MS. LYNN: Based on all the figures that he has testified about in his testimony can he draw any conclusions or can he make any inferences from those figures as to the possible effect of the parental notification law, based on the figures that he testified about, not in general?

THE COURT: Do you have an opinion in that regard?

THE WITNESS: I have opinions about the possible effect of the law.

THE COURT: I will overrule the objection. You are going to tell me your opinion after the possible effect or the effects?

THE WITNESS: If I have an opinion as to the effect, all opinions have degrees of certainty and doubt.

THE COURT: You bet they do. Do you have an opinion to a reasonable scientific certainty as to the effect of the law?

THE WITNESS: Not to a scientific certainty.

THE COURT: This is just your thought as to the possible effect of these numbers?

THE WITNESS: What direction the numbers point to. I don't think you can be sure. I think if you look at the evidence you have to think, well, there it is more likely than **[59]** not a certain effect based on the facts. But we don't have all the facts. We certainly can't prove it.

* * * * *

[61] Q What about the effect that the impact of the law with regard to the number of abortions or the abortion rate?

A I would say that the law appears to have resulted in a decreased abortion rate among the minors. However, it is difficult to know what that really means. Some of the decrease would have been women going out of state for abortions or perhaps passing as age 18 or, I would think, I would say it is more likely than not that that resulted in decreased abortions.

However, I wouldn't say that we know to what extent that that is true.

Q And do you have any opinion about the possible effect of the law with regard to the birth rate?

A My opinion would be that the law has induced some of the minor teenagers to carry pregnancies to term who would otherwise have obtained abortions.

Q And do you think that the law may have had a different impact, differential impact on different classes of minors within the state?

A I think the minors who would have carried to term instead of having the abortion would be those who would have been relatively late in obtaining abortions anyway.

* * * * *

TRIAL TESTIMONY EXCERPTS OF PAULA WENDT, CO-ADMINISTRATOR OF MEADOWBROOK WOMEN'S CLINIC

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[6] * * *

Q So you have been seeing teenage pregnant patients for 15 years, is that correct?

A That is correct.

Q About how many women have you personally done abortion counseling with, both adult and minors?

A Since 1971 I probably have personally counseled about 10,000 women who were seeking an abortion. The minors would probably be about 3000 and then I supervise the rest of the clinic staff in seeing the minors in the last three to four years as an administrator.

Q So before counseling over 10,000 women you have supervised the counseling of about how many more?

A Say that again?

[7] Q You stated that have personally counseled over 10,000 women—

A Right.

Q —seeking abortions?

In your supervisory capacity—

A Oh—

Q —how many more women have you had that counseling influence over?

A Probably another twenty or twenty-five thousand women.

* * * * *

[14] * * *

Q And then what happens to a patient?

A If they checked all the wrong things on here?

Q No, if they want an abortion, and they want to proceed.

A Oh, okay. Then she would be taken with whoever she comes with to the film and watch the film that describes how we do the abortion and what the aftercare instructions are.

Q Does the film include medical risks, or what does the film include?

A The film talks about, procedure-wise, how we do the abortion; and it talks about what it feels like, what the experience is like, what to expect afterwards physically; a little bit emotionally, and talks about what are the symptoms of complications and what do so if those occur.

Q What happens after the film?

A Then she will have her blood drawn, leave us a urine sample. One of the nurses will take her into health history and pelvic exam, breast exam, basic GYN kind of things and they will then give her consent forms and a post-abortion book. She will go back to the lobby and be with whoever she came **[15]** with and read over those forms and then one of the counselors will call her and review what has gone on so far, see if she has any questions on the film, on the consent form, on the post-abortion book; you know, take care of some of those kind of details; where she is going to go for her two-week checkup, who is with her, does she have a ride, and then they will do, you know, the counseling session at that time also.

Q Who do you decide does the counseling with the particular patient?

A It is a random thing; it is whichever counseling is next for a patient.

Q What happens during the counseling session;

A That is always basically determined by what the woman's requests or needs are. But basically what we are doing is talking about why she has decided to have an abortion, why she feels that would be her best decision; how she feels about that, what has been her experience with abortion in the past, what kind of support systems does she have. For some people they want to talk about their religious or moral feelings, for some they want to talk about their relationships, whether it is with parents, boyfriends, husbands, sometimes there is some other things that come up, abuse kind of things. We run into a lot of women telling us that they are unhealthy—

MR. GALUS: Excuse me—never mind, I withdraw it. Proceed.

[16] THE WITNESS: —that they are in unhealthy marriages or dangerous situations. So we talk about the abortion, but we also do referrals back to the community as indicated by the particular patient.

* * * * *

[33] * * *

Q Prior to August 1981 what was the Meadowbrook policy on minors notifying their parents?

A We didn't require them to notify their parents. We encouraged them to certainly leave that as an option for them but they didn't have to do that in order to come to Meadowbrook and have an abortion.

But again if the counselor who was dealing with her, and it would usually end up with me also, felt she wasn't able to take care of herself after the abortion or be responsible if she was going to go, if we just didn't feel she was going to be aware of any possible complication and she could deal with them, she didn't seem to have a handle on all of that, and we were worried about her leaving the clinic and worried about her after the abortion, we would require that she leave and come back with an adult.

It didn't have to be a parent but an adult person who then would know about the abortion and would agree to help her get medical care if she needed that post-abortion.

Q I am looking at Plaintiffs' Exhibit 65 now and I notice at the bottom you have a form for the counselor to fill out about minors?

[34] A Right.

Q I see you have parent or adult advocate?

A Right.

Q What is the genesis of this form and is it still used since we now have the law?

A Well, what we did with that was we would, if you saw a minor whose parents did not know about the abortion I would discuss with her now if you have any problems after the abortion what will you do to take care of yourself. If she would say to me, well, I would never tell my parents and if I got sick I would just not do anything about it, then what we would talk

about was that was not an option. In order to be responsible for herself as far as this decision went, she had to understand that in case of an emergency she had to tell somebody. Generally if she lived at home with her parents it would be her parents, so we would discuss that to the point where she would agree and she would tell me who she was going to tell if she got sick in the middle of the night and then we would sign this as a way of sort of cementing the contract.

Q Do you sign this anymore?

A No, we don't.

Q So subsequent to the change in law the nature of your counseling insofar as seeing that they had someone there is changed, is that true?

A It has changed in a lot of ways. We still talk about [35] this but it is not done as formally as we did it before because with the parental notification law a lot of that is sort of taken care of or it appears to be even though it is really not.

Q Why did you not require parental notice or consent from minors?

A Well, the doctors that I worked for had had a lot of experience with women before abortions were legal in the United States and they had dealt with all ages of women and so this was not a really new thing for them to start doing and they had some very strong feelings about women of all ages having access to this kind of medical care without being forced to involve other people.

They also had had a lot of experience with young women and they felt that in their medical opinion, their expert opinion, these women were able to consent for this procedure and that indeed they had a right to consent to this procedure.

Q Ms. Wendt, you have talked about the doctors you work for but you also said earlier that you set the policy at the Meadowbrook Clinic on many issues.

Is it in your professional opinion as a counselor, as a nurse, as a teen clinic person, as a director of the clinic, in your professional opinion why would you not require parental notice or consent?

[36] A Because I think that minors are capable of making that decision on their own without being required to tell a parent or an adult.

Q Do you think it is bad counseling or medical care to violate that privacy?

A I do.

Q Why?

A Because I think that the decision to have an abortion is uniquely private and personal and that truly nobody else can be involved in pressuring you one way or the other to make that decision. I sort of feel about it the same way I do about teenage women are not required to get anybody's consent to have a child and go on welfare and live away from the family they are with now. This is the opposite end of that kind of decision. It is still a pregnancy-related decision, it is still a decision that is going to affect her life in many ways for the rest of her life and I have talked to a lot of these young women over a lot of years and I feel very strongly that they are capable of making this decision and making a good decision and they will tell the people they feel are necessary for support, counsel, information.

They go to the people who are going to be the most supportive for them and they seek out those that they need.

Q Do you encourage them to tell one or both parents?

A Well, I talk about what their family situation is like and [37] what they think would happen if one or both parents knew about the pregnancy and the abortion and based on what feedback I get then we discuss it further.

Q Do many teenagers, let's say before the law, voluntarily tell one or two parents?

A I would say that before the law probably about 25 percent of them told one or both parents.

Q Why didn't they tell both parents?

A They have a whole lot of reasons for not telling their parents.

Q In the course of your business have you compiled those reasons for any official—

A I did. I did.

Q Who for?

A I compiled them for Suzanne Smith.

Q Who is she?
A The woman in charge of the guardians.
Q Guardians where?
A Hennepin County.
Q She asked you to make this list?
A Yes, she did.
Q And you made it in the course of your regular business at Meadowbrook?
A Yes.
Q To give to Smith to the Hennepin County Juvenile System?
[38] A Yes.
Q Could you read that list for the Court, please?
A We took these off of patients counseled and from patient interviews. These are why the minors told us, probably in a month's period of time, that they didn't want to tell both parents:

Feels she would be punished and not get to go to college as promised.

Parents are against abortion.

Mother has heart problems and there are family problems.

Lived with boyfriend for six months. Just moved back home, doesn't want to disrupt anything.

They are both in their sixties and have heart problems.

Mom opposes abortion—does not get along with parents, states none of the kids do, because of their beliefs on abortion. Has placed a child for adoption. Feels mom would have made her stay pregnant and raise the child. Just moved in with dad—afraid he would send her back to live with mom. Parents are strict and religious. Parents are going through a divorce.

Lives with stepmom. Father lives somewhere else.

Mother killed self ten years ago.

Disowned older sister because she got pregnant.

[39] Does not want to ruin a good relationship.

In family counseling, her psychologist sent her to Meadowbrook.

They would oppose the decision.

They would make me stop seeing my boyfriend.

Would be kicked out of the house.

My mother would not stand for it in her household. We have not been on speaking terms since age 12. This young woman is 17.

Has one year left at home and thinks it would be very uncomfortable.

Father deceased—mom only concerned with self and her new husband.

Sister was pregnant at the same age and caused a lot of family hurt.

Boyfriend closer to her dad than she is—would hurt his relationship with her family.

Father is a doctor, she works for him, knows he is anti-abortion. They have all talked about it and says her parents would never allow her to have an abortion.

These are common reasons why they would tell us they don't want to tell either parent.

Reasons why one parent is aware:

Told mom because, you should have parents during this time.

[40] Sees dad but they have poor communication so did not want him to know.

Q These are reasons why they don't tell the other one?
A Right, right. Father lives in Alaska, no contact for years.

Name on birth certificate only for child support reasons. Tried to locate dad, he was in prison. Went to court. She missed three days of school and mom missing two days of work.

Did not tell dad because he would hassle mom.

Father out of state.

Father sees her about once a year. He has promised to pay for her college and she is afraid he would change his mind.

Parents thought it would be good for her to go through court.

Dad not very understanding. None of the six kids like him. Mom is thinking of getting a legal separation.

Father would be disappointed and sometimes he is violent.

Father unaware, alcoholic.

He would get overly angry.

Says father is extremely fond of her and this would be hard for him.

Doctors orders not to tell father.

[41] Father not an active member of the family, unstable.

Didn't tell him because he couldn't handle it.

Couldn't get ahold of one parent.

Dad would hassle mom and blame her if he knew.

Father in another state. Says brother has little problems and she is anorexic because of dad.

Okay, mother was abusive and she chose to live with her father. She has had minimal contact with her mother since that time. Mother has undergone psychiatric treatment and has been hospitalized several times.

This was one who chose to tell neither parent and she said that three years ago her father found her older sister in a somewhat compromising situation with her boyfriend. She said her father became so enraged over this that he took her sister to a bar on Hennepin Avenue in downtown Minneapolis and forced her to sit and watch the prostitutes the way they were picked up by men. She said that he told her sister that if she were going to act like a whore she should see the way they live. This young woman felt strongly neither one of her parents should know she was pregnant.

Q Ms. Wendt, you have talked to thousands of teenage women in Minnesota. Do you think their fears are genuine?

A I think their fears are genuine and I think they don't even tell us half of what is going on in their families.

Q Why do you think that is, is that your professional [42] assessment as a counselor, that you don't even see half of what is going on?

A This is my professional opinion counseling women of all ages for a whole lot of years, women who are emotionally, sexually or physically abused tend not even to think of it as something they would tell you about. So you will always find under-reporting and people who work in medical clinics are real aware of that.

Q So if there is a situation of emotional or sexual abuse or battering that doesn't come right out, they don't—

A It often does not come right out. When I work as a nurse and do the physical exams, what we learn to pick up then is any unusual bruises or marks on women's bodies and if you generally—if you say to a woman tell me who hit you or tell me

what happened they will say nothing. They will say nobody did or nothing happened. But if you look at her and say tell me who hurt you like that or, you know, it looks like somebody did this to you on purpose, why did that happen—it is always the way you phrase it, then she will say that she has been abused or that she was assaulted or whatever.

So we see it in two different ways. I see it as working as a nurse and I see it working as a counselor. We learn different ways to pick up the abuse in the clients that we see and a lot of times it is sort of under the surface a little bit, you have to know what you are looking for in order [43] to be able to find it.

So the answer is yes, they don't always come right out and tell us that they have been abused or are being abused.

Q So you think that teenagers' assessments of their family situation or reaction are pretty genuine?

A I think they are genuine and I think they don't even know the extent that it is happening to them in their own families sometimes.

Q In your counseling, individual counseling sessions, or your work at the teen clinic, do you run into a lot of families in Minnesota where there is a battering situation?

A Run into it quite a lot. We have a format at the teen clinic we use where we ask them to check for us whether or not they have ever been physically or sexually abused and it is always amazing to me how many of them will check yes because—

Q This surprises even you?

A It does, it really does. And then I will also talk about it, I say, well, now, tell me, you checked yes here, tell me what this is all about and a fair number of them are currently in a situation where they are in danger and of course, at Meadowbrook and the teen clinic once I hear that then I am responsible to report to Child Protection, which just adds a whole other part to all of this.

Q How does, if you report to Child Protection something you hear from a minor at Meadowbrook, doesn't that compromise [44] her abortion privacy?

A Well, we are never quite sure about that. It seems to depend on the county we report to. I have gotten angry phone calls from parents who are furious because they find out I

reported a problem in their family and they just want me to know there is no problem here and the people I reported to will occasionally say to me, oh, the Smith family, we know them well, we have been dealing with them for a long time.

But by law in Minnesota we have to report when we hear that things like that are going on.

Q So if you report to Child Protection then doesn't the family find out that the daughter was at your place for an abortion?

A Sometimes they do.

Q Isn't this a conflict?

A It is very difficult for us.

* * * * *

[47] * * *

Q As if you could waive that?

A Right, right. They are very frightened about the court bypass. They are very nervous about that. They don't understand. Even those who have been in court before have been in court because they have been in trouble with the law or they have been involved in their parents' custody or divorce so either they know nothing about the court or their experience has been pretty negative.

So we want them to know that they have a true option that they can either tell one or both parents or they can go to court.

Q Do they understand the biological parent distinction?

A Not always. Not always. We will say over the telephone this means both of your biological parents. Do you live with both of your biological parents and if a mother calls or a [48] father calls then they are going to bring consent from the other parent. We say this is her biological father and mother, and it has totally changed the way we make appointments going over all of this.

* * * * *

[53] Q Is it your professional opinion that the physical abuse exception in the law does not really except those kids who are subject to physical abuse?

A That is correct.

Q The law doesn't require that it have been reported but does Meadowbrook have any internal policies on that?

A Well, can I read this phrase in here?

Q Yeah, read the phrase in the law, refer to the law. In fact, that would be very helpful to the Court, I think.

A Well, it says if the pregnant minor woman declares that she is a victim of sexual abuse, neglect or physical abuse as defined in Section 626.556, notice of that declaration shall be made to the proper authorities.

On the next page, "A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman are bonafide and true."

Well, that doesn't say a lot about what kind of information we need and we never felt that if she just said on the telephone she was a victim of sexual or physical abuse that that would be enough to satisfy the law. When we see women who are pregnant from rape or from incest our policy is that we do an abortion at no charge for these women if it has been reported to the police or a rape counseling center. So [54] we already had a policy on sort of how we defined this.

Occasionally we have had a young woman come in who is like pregnant by a father and the case is in litigation and clearly it has been reported to child abuse authorities and, you know, that is all we do.

But as far as those young women who are physically or sexually abused we don't—we do require that they go to court in order to satisfy the law.

* * * * *

BY MS. BENSHOOF:

Q Why is that?

A Because I feel that that sentence is very unclear, that it says that I can let her go through without either telling her parents or going to court if I have reason to believe that she has been physically or sexually abused and if it has been reported to the proper authorities, but by whom, by her, by me, you know,

how much abuse, what are the constraints here, what is the definition of this.

Q Have you discussed this Meadowbrook policy with your doctors?

A A lot.

[55] Q And how do they feel that you should interpret this?

A They feel that I should always act as conservatively as possible.

Q Why?

A Because they feel that they are liable if they do not uphold this law.

Q What happens if a minor comes in and says here is a note from my mom, notarized, and my dad is dead or a minor and her mom comes in and says dad is dead. What do you do then?

A If they tell us one party is deceased we ask them to bring us proof of that which is either a death certificate or some other mention of the death like in the paper or from the funeral home.

Q Well, when you require minors or mothers who have lost husbands to bring in death certificates or funeral home certificates, isn't this a little traumatic?

A It is for a lot of them. They are very upset that we won't take their word for it. The reason we don't take their word for it is that in the beginning of all of this we had cases where a parent would come in with a daughter for a pregnancy test and say they wanted an abortion. We would say the biological father has to consent or you go to court and the mother would say, but he is dead, and I would say, well, you know, when did it happen or I need some sort of a notice of this and then she would say to me, one woman said to me, well, [56] he is in Louisiana, and then I said, we have to send a letter of notice to him or you need to go to court or you need to get a notarized letter from him and then she told me that he lived on Portland Avenue. So we had enough of those cases occur that we didn't feel that we could always take our parents' word for what the situation was and my doctors always look over the charts and they always look to see how this law has been upheld and they felt that we needed some verification of this in the chart.

But it is a difficult thing to bring up with people especially sometimes, I think especially mothers more than anybody, it is like they are dealing with this problem with their child now and then we ask them to revert back to another kind of problem.

Q Give an example.

A It is hard on the minors too, they will bring in death certificates, like, you know, mother murdered, found dead in field.

Q Is that a real story?

A It is a real story. Or father suicide, shot his brains out. They will come in with these things and it is like you can't just put it in the chart and never comment on it so then most of the counseling session we talk about what happened in the family and then how everything is going now and how has everything gone since.

[57] Q So often instead of focusing on the minor and abortion you have to give therapy for the suicide or death?

A It gets all brought up for them.

Q Do you find that has changed the nature of counseling?

A It does. Sometimes, I mean, this whole law, in a lot of ways has changed the nature of what we did. If she is going to be a court person we spend most of our time in the morning talking about going to court, getting to court, what it is going to be like, what kind of things she needs to know.

Q Just back up a minute; you say in the morning, you mean those minors who are going to court must come at 7:30?

A Right. The judges in Hennepin County want the minors to be counseled by Meadowbrook staff or abortion clinic staff before they go to court.

Q Is that the legal requirement?

A That is not a legal requirement—it is a request they make.

* * * * *

[60] * * *

Q And as a counselor how do you feel about this? What is your professional opinion about this change in counseling of pregnant minors for their emotional and psychological health?

A I think in a lot of—in a lot of ways they are being shortchanged now and it is very different for them than it was before

we had this law. Even when they come back from court between 1:00 o'clock and 2:00 o'clock they have been up for a long time and they have been busy for a long time and they still have—wouldn't have had the abortion done yet. We feel we can't burden them anymore by taking more of their time and energy and doing this huge counseling session again. So what we do is we move them all ahead to the cashier and we move them all ahead to procedure. They do see a counselor again when they come back, but they are hungry, tired, sick, a [61] lot of them, and they just want to do this and get this over with. They have been very burdened for a day, a couple of days because of this. So it has changed from the way it was before. We don't have the kind of time to spend with her talking about her relationship with her parents, her relationship with her boyfriend, how she feels about sexually active at 16, what are her thoughts about contraception. We still do it all but we used to have more time to do it before. I think that we used to establish more of a relationship with her.

I think that part of what we do is we are sort of role models and teachers for them because they are young women who are sexually active and they got pregnant and they are having an abortion and some of them aren't very good contraceptors yet and they are good medical consumers yet so we try to do a lot of them with our young women and the law makes it a lot harder for us, makes it a lot harder for her to get what she needs.

Q When you counsel a minor at 7:30 in the morning, who might have been up driving for two hours, are her concerns in counseling on the abortion or the court?

A Her concerns are not on the abortion until she comes back. It is like they put it on hold until they come back. They will go to court and be very determined about that but they are very afraid they are going to denied and they always want to know what the judge is going to ask me and is he going to let [62] me have the abortion.

Then when they come back it is all of a sudden they will be overwhelmed by this fear of what they have to do next because the next thing they have to do is go in there and have the abortion. All of a sudden they realize, oh, I have to go do something

that is going to be painful. Now that I have done all this, this is now, I have to do this too.

Q Are they often physically ill in the morning from being pregnant?

A They are. A lot of our patients are and they are too. It is just that our other patients get to come in, get the abortion done a lot sooner.

Q I mean, I guess what I am asking is a medical question, is morning sickness really in the morning?

A For a lot of women it is.

Q So that the counseling to get them to court and getting to court is the time of the pregnancy sickness time?

A Uh-huh. And we always hold food for our patients. With our minors we have to always remember to say, now on your way out of the building stop at the coffee shop and buy a roll and a glass of milk because she will not be back until 1:00 or 2:00 in the afternoon, she will be dizzy, sick, and the procedure will be harder on her and a lot of times she will say I don't want to eat in the morning, I don't eat in the morning. I will say please eat a roll and drink a glass of milk because I am thinking of what she will be like when she comes back.

* * * * *

[65] * * *

BY MS. BENSHOOF:

Q Ms. Wendt, since August 1st, 1981 and to the present, how many minors have been patients at the Meadowbrook Clinic?

A Up until December of 1985 we have seen 2895.

Q And how many of these minors went to court?

A About half of those minors went to court.

Q Do you have the exact figures?

A 1160.

Q Out of those 2895 minors, do you know how many came from Hennepin County and how many from other parts of Minnesota?

A The number of patients who come from counties other than Hennepin and Ramsey was 1880.

Q And how many of those patients were second trimester patients, those minor patients?

A Of the total number of minors seen, 672 were second trimester abortion patients.

Q Ms. Wendt, getting back to where we were stopping your testimony yesterday, you stated that your clinic requires that when a minor chooses not to go through the court bypass system **[66]** or have mailed notification, she brings in a letter from both parents or brings both parents to the clinic with her, is that correct?

A That is correct.

Q What kind of letter do you require?

A We require a letter consenting to the abortion that the parent signs and has notarized.

Q Why do you require that this letter be notarized?

A We feel that that is the best way to know that these are indeed her biological parents.

Q Do you send minors back out of the clinic if there is improper compliance with this requirement?

A Yes, we do.

Q How often does that occur?

A It happens about once a week.

Q Do you know how many minors you sent back in the month of January because of improper compliance?

A In the last two weeks of January I think it was two.

Q Do you know the circumstances of those two minors?

A Yes, I do. Let's see—well, let me think—one was a young woman who came in with a father and did not bring a notarized note from the mother so we had to send them back to get the note from the mother notarized.

Q Do you know how much travel time was involved in that particular minor?

* * * * *

[73] But that happens sometimes when we send these letters, so—

BY MS. BENSHOOF:

Q Did they understand why they couldn't have the abortion that day?

A No, not really. They didn't quite understand that there is a time delay that we have to adhere to or that we feel we have to adhere to.

Mom, as a custodial parent, was very upset that dad had to be notified at all. They had the option of going to the court but they did choose to send the letter. They didn't think they would have to end up speaking to him about it.

Q How pregnant was this young girl?

A She was eight weeks pregnant.

Q So the delay in this instance didn't cause a change in the cost of the abortion?

A No, it didn't cause that. It did delay her four days and it upset the mother and daughter very much and upset the man in Detroit also very much.

Q How far did they have to travel?

A They came from Plymouth, so probably about 30 miles.

Q You stated that one of the options under the law is that your minor patient can choose to mail notification to both parents.

About how many of your minor patients choose this option under the law?

[74] A About 4 percent choose to mail letter of notice to a parent. They could mail to both parents, usually it turns out to one parent and it is usually an absent parent; someone who has been absent for many years.

Q So this option is really chosen by those minors in two biological parent families?

A Correct.

Q You stated 4 percent. Do you know about how many a year then choose this option?

A Probably about 20 or 24 a year will do this.

Q Do you know about—if you don't—if you could give an educated approximation, how many of your minor patients actually live with both biological parents?

A I think about 25 percent live with both biological parents.

Q Live with. You testified earlier that about 25 percent tell both biological parents. Do you know how many live with both biological parents?

A Oh, it would be about 50 percent live with both.

Q In contrast to the timing for a minor who chooses mailed notification, how is the time for adult women different?

A Adult women have no time constraints at all. They can call—

THE COURT: Excuse me for interrupting; you say she said 25 percent tell their parents, I understood her to say [75] that before the law 25 percent of the minors told their parents.

MS. BENSHOOF: Right. She said before the law 25 percent told both parents. More told one before the law, she testified 25 percent told both.

THE COURT: I didn't get both. I got parents. Is that what you are telling us?

THE WITNESS: Uh-huh.

* * * * *

[76] * * *

Q When you tell minors, and you have done this personally hundreds, thousands of times, that there will be a three-day or more delay once the letter is mailed, what are their reactions?

A Well, they don't quite understand why that has to be. We just tell them that it is arbitrary, the law has built into it this amount of time that is a waiting period. It is a difficult decision for them to make whether or not they want that letter sent in the first place because, of course, there is a chance that it will reach that parent and sometimes that is the only contact that they will have had in years and they are very mixed about it. So on the one hand they would like some [77] contact with the parent but they are embarrassed and ashamed that it is a pregnancy-related kind of contact.

Q How do the mothers that accompany the minors who have to have a mailed notification to an ex-husband or a never husband react to this statement by you that they must mail and then wait?

A They generally react with anger and frustration and irritation and then tell us—tell me the stories of their various separation, child custody battles and money problems. So we get into all of the things that happened when that relationship split up and a lot of it comes back again. I have to talk to mothers who were interested in pursuing child support with the absent father and use this as a way to find out where that man is through other relatives and it is, you know, that is not even what is happening with her minor daughter and being in our clinic, but that is like a secondary thing that starts because of that.

Q You say the focus then goes away from the minor to the whole family problem.

A It goes back to the marriage.

Q What reactions, if any, has Meadowbrook gotten from parents who received the mailed notification?

MR. GALUS: Objection, hearsay.

THE COURT: Objection overruled. It is admissible not for its truth but just what was said, it seems to me—I [78] guess it does, its truth is the significance of it. You may answer; go ahead.

THE WITNESS: Okay. I am the one who gets the telephone calls when the parents who receive the letter are very angry about getting the letter, finding out that their daughter is pregnant and being notified of the whole situation.

We have a letter we send that has the minor's name and the date of the abortion and then in the body of the letter is something about, you know, a teenage pregnancy is difficult for everybody and we ask you give her your love, care and support at this time. We thought we would soften it a little bit when we send these letters and we don't hear from them very often, but when we do the absent parent is usually very angry and it has to do with their not feeling we have a right to do an abortion at all on their daughter.

They are not sure they want her to have one, even though they haven't seen her for years and they are really angry with the custodial parent who usually is the mother for letting this happen, letting the daughter get pregnant.

Occasionally we will be threatened by an absent parent. There was a big family argument a few years ago where a mother brought a young daughter to the clinic for an abortion. The father received a notarized letter—I mean, a certified letter informing him. He called the clinic, was anti-abortion, was going to stop the abortion from [79] happening. We told him he could not.

Q You spoke to him?

A My former boss spoke to him and I sat in her office because the patient was my patient. As the administrator of the clinic she spoke with him. We told the mother that we couldn't see her daughter for an abortion until all of this calmed down because this whole extended family was getting involved in this and the mother said don't worry, I will take care of it. She drove over to the father's house and shot her gun through his door and came back and said he will not bother you again.

Q The mother had shot the father?

A She didn't shoot the father, she shot the door.

* * * * *

Q Was this reported to the police?

A I don't know.

Q Did you then proceed with the abortion?

A Yes, we did.

Q Was there a delay because of this?

A There was some days delay there.

Q You have stated that you have gotten reactions to Meadowbrook from mailed notifications. Do you have any [80] personal knowledge as to what effect the mailed notification has on the minor or her parent that is in your charts?

A From talking to some of them, when they come back for their checkups—

Q How long after the abortion?

A Two weeks after the abortion, after talking to some of them when they bring their girlfriends back from abortions, I don't know of one instance where contact with the absent parent has been reestablished because he or she got the letter; even when there was contact at that time. So I feel badly for the kids because that is something that they want and yet, you know,

over a short period of time after the abortion I know from them that that has not happened.

Q By contact do you mean—what do you mean by that word, "contact"?

A That the parent would call again to see how she was or would say, you know, I would like to start seeing you again or spend some time with you. That is what the minors tell me that they would want from sending that letter or from having some sort of a forced contact with him or her.

* * * * *

[85] * * *

Q As a counselor and nurse do you believe that some of this parental notice that you have just described, is that detrimental to the minor's health?

A I think it is detrimental to her emotional, psychological, primarily those two aspects of her health and also her physical health if it delays her getting the abortion.

Q Has a parent contacted pursuant to the law ever contacted the minor to help with medical information on a minor?

A I have never had a parent contacted to give me medical information on a minor.

Q When a parent comes to the clinic with a minor do you take the medical history with the parent present or not?

A We always see our patient alone when we do the medical history, we feel that—

Q Why?

A We feel we get more accurate medical history if there is nobody else there, particularly with the minors because they will have some aspects of their medical history that their parents do not know about and we want to know those things; like drug use, problems with drugs, suicide attempts, accidents, other kinds of thing that they have been involved in. They generally won't tell us all of those things if there is a parent in the room.

[86] Q You said suicide attempts. Are you saying that you find out about suicide attempts that the parents don't know about?

A Yes, we do. We ask—we check that out with all our patients. When women call and we make the appointment we

ask each patient if she has ever seen a counselor, a psychiatrist, attempted suicide, or been hospitalized for depression. For women who have had those kind of histories we want to make sure before they come that they have access to psychological help and support if they need it and then the nurse asks it, then we ask her also to fill it out on the self history sheet and the nurse will ask it again when she does the exam. We find lots of women of all ages who have had varieties of emotional problems or problems with depression or suicide attempts and a lot of teenagers make suicide attempts that nobody ever knows about.

Q Does this surprise you?

A I don't know if it surprises me, I think after all this time it doesn't surprise me. I think what I get concerned about is nobody knows about it and if these things haven't changed in her life, then I am afraid that she is at risk for having it happen again.

Now this shouldn't be a secret that she carries by herself.

Q When you find this out do the counselors discuss the problem with her?

[87] A We always discuss when it was, what happened, what she did about it. It is pretty common for—well, when people make suicide attempts if they have to go to the hospital they will be seen in the emergency room but never see a counselor-therapist or psychiatrist. So we have lots of women who try to kill themselves who have never seen anybody therapeutically which I think is amazing and our requirement is that if somebody has attempted suicide within the last three to five years and it was a true attempt, like they took enough pills to truly kill themselves, then we require a psychiatric evaluation before we do the abortion.

Q So you find out from your interviews with the minors that they have not told their parents about the serious problems in their life?

A Those personal emotional feelings that they have, yes.

Q When you have minor patients who come in with one parent with them, does that one parent come in and sit down and talk to you and tell you why they think the other parent shouldn't be notified?

A Yes, they often do that. We also see the patient—

Q Could you just describe what process you go through in talking to the other parent and what reasons they give you?

A We always talk to the patient alone first, and in this instance the minor patient, and then when we have the mother sign the consent form or the father sign the consent form, **[88]** then we talk to them about how all of this has been going, do they have any questions, and generally we don't solicit their feelings about the law or their feelings about going to court or notifying a parent, they tell us how they feel about all of this.

The basic feeling is that they feel it is a real infringement on their privacy and their rights as custodial parents. A lot of mothers or custodial parents who have been through a bad divorce, I think that the divorce means that the absent parent has no legal rights at all to that child and they don't understand that it has to be "termination of parental rights", and that happens rarely. So they have been believing that the other parent has absolutely no right to know anything about that child that they are raising and then we tell them that either they have to go to court or they have to get a letter of consent or we have to send a letter informing that absent parent, and they are very angry about that. They want us to do something about it.

THE COURT: It appears that you are.
THE WITNESS: You mean right now?
THE COURT: Right at this very moment.
THE WITNESS: Right at this very moment.

BY MS. BENSHOOF:

Q They want you to do something about it. Are some of the women battered?

[89] A Yes, some of the women are battered, they have been in bad marriages and been left with no money and they have been raising these kids and they feel they have been very burdened by these bad marriages.

Q Do some of the battered women feel that notice to their father is going to invoke a battering incident?

A Mostly the ones who are still living with that man, they will—the daughter and the mother will sometimes tell us that

they can't let him know about the abortion because he would be very angry and blame the mother and take it out on mother. I think we find more women who are being battered in these families than we do minors. It is unfortunate that this is another way that the minor gets involved in her parents' marriage because it is—she is pregnant and she is trying to decide whether or not to have an abortion and her parents' marriage shouldn't really affect that.

But what happens is the mother will be so angry or worried or concerned when we all three talk together we end up talking about the marriage and the temper of the father and what he is going to do to the mother and the daughter is supporting the mother in the bad marriage.

Q In your professional opinion, based on seeing thousands of these cases, is the two-parent notice requirement the burden on single-parent families?

A It is a big burden on single-parent families and in a lot **[90]** of ways.

They simply do not understand why it has to affect them at all for a lot of them that marriage or relationship is considered over. There is very little contact with the absent parent, and just the very thought, even if there is a court bypass, just the very thought that they might have to contact that parent or might have had to contact that parent enrages them.

THE COURT: You say a notice, in two-parent families?

THE WITNESS: One custodial parent families.

THE COURT: Okay.

THE WITNESS: they have a very hard time with that and even if there is a court bypass they a lot of times go with their daughter to court, they feel strongly that if the daughter chooses to tell them that they should be the only person involved in this decision and they don't like letting the people at court know their private business, the custodial parent doesn't.

The minors don't either, but the parents have very strong feelings about this.

Q Would you say that counseling of patients has changed since the law was implemented in Minnesota as far as your clinic practice is concerned?

A As far as the kind of counseling I do, before the law, **[91]** if I was dealing with a patient and custodial parent we would talk about their relationship, how they were each doing.

Q You mean—"they" meaning the minor and the—

A The mom and the daughter, how mom was doing knowing about the daughter's pregnancy, how they were getting along what effect it would have on the future and I still talk about those things. But now I have to add in the part about how was court for you and then hear about the marriage and all of those other problems, that sort of get reawakened by having to comply with this law.

Q Have you been aware among your patients of violence to occur within a family because of knowledge of the teenager's pregnancy?

A Yes, I have, in many, many cases.

* * * * *

[92] * * *

BY MS. BENSHOOF:

Q When violence occurs, is this noted in the patient's charts?

A Often it is, especially if it happens at the clinic.

Q And do you have personal knowledge of violence occurring at the clinic?

A I do.

Q Could you tell the Court about that?

A A couple of weeks ago a young woman came in with both of her parents. Her boyfriend wanted to be a support person so he came also with one of his friends and the mother found him in the lobby and told him he had better leave and the two young people said he was not leaving—

MR. GALUS: Excuse me, I would like to move to strike that conversation in the lobby.

BY MS. BENSHOOF:

Q I would like to go back a minute, Ms. Wendt; you stated that a young girl came with two parents. Is this someone who chose not to go through court?

A This is somebody who because of time involved couldn't make it through the court process and out of desperation had to tell her parents.

Q This is someone who tried to go to court but couldn't?

[93] A She wanted to go to court but she couldn't make it. She was trying to go to Ramsey County Court and with the appointment to go to Planned Parenthood and see a counselor and then to see the public defender, to go to court, she ran out of time. She got grounded for some other reason at home and knew she had to tell her parents finally in order to get to an abortion clinic to have the abortion.

Q This is one of your patients?

A This is one of my patients.

MR. GALUS: Your Honor, I would like to move to strike that portion of the preceding answer referring to experiences of this person with the Ramsey County Court system and the public defender in the absence of any foundation as to this witness' firsthand knowledge of those experiences.

THE COURT: Objection overruled and the answer may stand. Go ahead, tell us about the story.

THE WITNESS: So the father went into the lobby and beat up the boyfriend in the lobby.

BY MS. BENSHOOF:

Q Were others of your patients in the lobby?

A There were about 50 people in the lobby and one of the nurses heard the noise and ran out there and told this man he had to stop and he had to leave so he dragged the boyfriend out to the front desk and threw him into the wall a couple of [94] times and then he left.

Q What did you do about this situation? You were in charge then of the situation, is that true?

A I was in charge of the situation. We called hospital security—

THE COURT: Maybe I don't have to know all of the details of it, counsel. What do I care what she did.

MS. BENSHOOF: Okay.

BY MS. BENSHOOF:

Q What happened to the minor after, and her pregnancy, after this violence occured?

A Well, there was so much arguing going on between the minor and the mother that I said they could not have the abortion on that day until things calmed down.

What ended up happening was that the minor got kicked out of her house, went to live with grandma, and got kicked out of grandma's house and the last I heard was living with the boyfriend's sister.

Q When you testified a little earlier that about 1800 of your patients have gone to court, is that the right figure—1160 of your patients have gone through court—

A Right.

Q Do you know approximately about how many of these patients have gotten certified as mature and how many as best interest?

[95] A Well, in the last three months of 1985 51 percent were certified as mature and 48 mature and best interest.

Q So 99 percent were mature?

A Correct.

Q But some were also checked best interest?

A Correct.

* * * * *

Q In this three-month figure that you testified about you said that 99 percent were mature.

[96] How many were found best interest out of that group of minors?

A 1 percent was found in best interest.

THE COURT: Well, now, wait a minute, you have given me percentages, 51 percent and 48 percent of the 200 and then one is best interest?

THE WITNESS: One person was marked in best interest.

THE COURT: All right.

BY MS. BENSHOOF:

Q Are you familiar with the patient file of that one person?

A I am.

Q And have you brought that file with you today?

A Yes.

Q Could you describe that one best interest minor for this Court?

A She was a young woman who was 17 years old who is in school and works. She will be 18 in March. She is a regular contraceptor and she has had regular medical care in the past.

Q Are those all indications to you as a professional of maturity?

A Yes, they are.

* * * * *

[106] * * *

Q Can teenagers get one-day D&E procedures when they have to go to court?

A They cannot.

Q Why not?

A Because they have to be in court at 10:30 in the morning. We insert all the laminaria between 9:30 and 10:00 o'clock in the morning. Once you put the laminaria in the cervix the abortion has begun and we can't insert laminaria and send them downtown to go to court because their petitions have not been approved yet. So for the teenage women who go to court what would be a one-day process for her will become a two-day process.

Q How do the teenagers react to this?

A They are resigned to it. They know that there is no way out of it. They don't have any other options, you know, they

want the abortion badly enough, they will do anything that we tell them that they have to do.

It is very hard for them a lot of times; they will end up delaying even more because sometimes they can't come back the next day to have the abortion done so they will come in, get prepared for court, go to court, and come back and reschedule for another couple of days or reschedule for another day. So it will complicate the whole process for them quite a lot.

[107] * * * * *

Q From your experiences you have described about what teenagers go through, to get to court, and to go through court, they are pretty desperate to have that abortion without parental knowledge; is that your opinion?

A When they went to do it without telling their parents, they feel very strongly about doing that and they will make arrangements that they need to make. I can't believe sometimes that they can actually get to the clinic and make all of these arrangements and carry it all out. It astonishes me. I forget [108] sometimes that they don't have the same—they don't have the same sort of freedoms that I do, they don't have the money, the time, the privacy. They will come, it is not infrequent, to have Methodist security tell me that they found some of my patients sleeping in their cars in the parking lot or they spent the night in the hospital lobby. I forget they sometimes don't have money for food and motel, you know, so they will do anything to get these arrangements taken care of.

Q Do you have a patient example in January in which the patient, because of this law, could not obtain a one-day dilation and evacuation procedure?

A I do. I know of many cases like this but this is one specific case. What the minors will occasionally do when they make their appointment is tell us they are 18 and we will tell them they have to bring identification when they come and in this particular case, of course, she said yes and she came to the clinic and we asked her for her identification and she told us she was 16. They seem to think that if they—

Q What day did she come to the clinic?

A 12/23. They seem to think if they just get there and show up we are not going to turn them away.

Q But do you turn them away?

A We always do. So we told her about court and she got an appointment for January 2nd and we inserted laminaria for her on the 6th and did her abortion on the 7th. So she went from **[109]** being 16 weeks pregnant to being 19 weeks pregnant before she finally got the abortion.

Q How come? Do you have any personal knowledge, or if it is in your records, why she had to wait from 12/23 to January 2nd to get to court?

A I don't know that.

Q Why—how much did the abortion cost increase?

A It increased $100 for her.

Q And there were how many days delay?

A There were—it took her 15 days from the first contact until the abortion was finished.

Q So she had a 19-week abortion?

A Correct.

Q If this law was not in place could she have had her abortion accomplished in one day?

A She would have had it done on the 23rd and it would have been done in one day.

Q Do you know if she had one supportive parent?

A She didn't have either supportive parent.

She ended up telling her sister, who lives in Minneapolis because of our requirement that she spend the night in the city.

Q Based on your experience with this law, with your patients at Meadowbrook, has the parental notification requirement delayed abortions for teenagers?

[110] A It does delay them. It delays them for a whole lot of reasons. This is just sometimes involved in understanding what the law is and deciding what they want to do and then deciding how they are going to carry that out. So really no matter which option they choose there is always a delay. Even if they have two supportive parents we require that they either bring the parents to sign the consent and we check ID on the parents, or she has to bring a notarized letter of consent from each parent.

So, you know, before 1981 she would just come and say, yes, I told my parents and we are getting along fine about it, but now even for those families there is some delay involved plus the original delay in telling her parents in the first place, if you are pregnant.

Q As a counselor and nurse what is the effect of this delay on the minor's physical or mental wellbeing?

A Well, I believe that would she be able to have the abortion as soon as she can make arrangements like a woman of any other age, even a delay of three or four days or a week in my opinion is damaging for her physically and emotionally. I don't believe she should have to go through that to obtain an abortion. There are different kinds of burdens depending upon how she has chosen to satisfy the law which we see repeated over time. It is not really easy for any of them. I think it depends on her individual situation, of course, which **[111]** ends up being the worst; but even in families where the minor lives with a supportive custodial parent and decides to tell that parent they still have to decide and they usually decide together whether to inform the absent parent or whether to go to court.

So there is an increased burden on certainly the minor and her abortion decision, and also on her mother or the custodial parent because it brings in that whole other problem of what happened in the relationship between the two adults. So the minor is definitely burdened by her mom's feelings about all of this and what might happen now with the absent parent.

For those who go to court in some ways it is easier for them because their parents never do need to know, but it takes a lot of planning and a lot of determination for them to do this. There are a lot of arrangements for them to make and they feel very sensitive and embarrassed about letting a group of strangers know that they are pregnant.

Q What do you mean by a group of strangers?

A The people at court. It is a whole new group of people that they need to meet in addition to the people at the clinic and they feel very sensitive and embarrassed by people having to know their personal business. Teenagers tend to feel that way. But to have something like this be so public is very hard for

them. They always are real concerned about what kind of [112] questions are going to be asked them.

The custodial moms who go to court are also concerned about that. They have real negative feelings about having strangers involved in their life with their child in the way they are raising their child, so there is a lot of anger and resentment about that. That is more from the custodial parent. The teenagers are just sort of more sensitive to it and embarrassed and ashamed by all of it.

Q You stated that the teenagers feel shamed. Do you feel this shame at going to court based on your experiences as a counselor is something that will last all their life for some of them?

A I think for a lot of them this whole pregnancy-abortion-complying with the law scenario in their lives is going to be active for them for a long time. What I know from the pa.. is that when they told supportive parents and had supportive parents it could turn into a positive experience for them, but the law makes them do a variety of things. I mean, they can choose one but they still have to do something to comply and it is not really their free will anymore and they are telling people in a lot of ways what is going on for them privately.

It depends on what the experience was like. Some of them are upset about going to court, they feel like they have done something wrong or they have had to prove why they should be able to have an abortion. I used to see that when [113] I sent women out of state, they would try to prove to me they should be able to have an abortion. I was always saying you don't need to have to prove that to me, that is your right and the kids say that about going to court too. Where there is the most negative impact I think is when they tell parents they should not have told.

Q Because court isn't an option?

A Yes. For a variety of reasons they don't believe it is an option, they are afraid of it, they are not sure they could work it out for themselves. So for a lot of them the minute I say court it is like they go deaf, it is no longer something that they hear me talking about. So they tell parents who ordinarily they would not have. This is one of those kinds of things that parents don't

let go of. For some parents once they know their daughter has been pregnant and either had a child or an abortion the whole thing about trust, responsibility, being mature, a lot of times the teenagers have problems for a long time because of this.

THE COURT: Are you suggesting they don't have problems just by virtue of being pregnant and having an abortion? Isn't that traumatic?

THE WITNESS: Yes, it is.

THE COURT: Notification or no notification?

THE WITNESS: I think it is very true it is a very difficult situation for any woman. Sometimes the teenagers [114] seem to do better with it because they know they cannot be a parent. Older women will tend to be more ambivalent about whether it is the best decision. So just being pregnant and deciding what to do is incredibly stressful and the patients have generally used us or the clinic as a way to work that out and as a resource in the future also. So we find that when they tell parents who are not supportive it becomes even more traumatic for them.

BY MS. BENSHOOF:

Q To follow up the judge's question, this is a very vulnerable time, let's say a minor has a support system erected for her; when she goes to the clinic, like she has told her mother or her aunt or her boyfriend's parents, does the notification process—how does that affect this support system that has already been erected to help the girl?

A Well, that same support system stays there and usually we meet those people, but then those people will end up also being involved in the court or the notification process. So it becomes very large for a lot of these young people.

Q Would you say for some minors their present support systems are undermined by this interference by the state?

A I would say—I don't know I would say that compliance with the law doesn't allow them to turn to their best support persons all the time; that where a lot of them would have done it alone with a supportive boyfriend or sister or maybe school

[115] counselor, they are not allowed to do that anymore. They are being forced to involve other people in their decision.

Q Do you believe that forced notification, that is those minors who are either forced to tell their parents because they can't face court, or those minors who have gone to court because the law requires it, do you believe that system has improved the quality of the minor's abortion decision, your patient's—your patient's abortion decisions?

A I believe it complicated their abortion decision and it has complicated it for them even after the abortion.

* * * * *

CROSS EXAMINATION
BY MR. GALUS:

[140] * * *

Q Ms. Wendt, irrespective of any directive from any Minnesota state court concerning counseling, does Meadowbrook in the ordinary course of its business examine minors, cause minors to be examined by a physician before performing the abortion?

A Yes. Every patient is examined by a doctor before having an abortion.

Q And irrespective of any obligation of the statute at issue in this lawsuit, or any directive from Judge Oleisky or any other court, it is true, is it not, that Meadowbrook, in the normal course of its business, explains aftercare procedures to its patients?

A Yes.

Q And it does so in a manner that will make those procedures understood?

A Yes.

[141] Q Irrespective of the statute at issue in this lawsuit, for example, those minor women who were not going through the court process, is it Meadowbrook's standard practice to inform patients of any medical complications that can occur?

A Yes, it is.

Q An attempt to see to it that the patient understands those complications?

A Correct.

Q And I take it that in a normal course of your business even for those minor patients not affected by the obligation to go to court, you take care to see to it a true statement of medical history is given to a physician?

A Yes.

Q I take it irrespective of the statute and irrespective of that class of minors that are going to satisfy the statute by going to court, I take it a physician advises—it is the practice of Meadowbrook to advise each of its patients as to any additional physical risks—I am sorry—that may be present because of any anomalies in their medical history?

A Yes, it is.

Q And I take it that irrespective of any obligation imposed by a court or by the statute it is the normal course of Meadowbrook's business or the normal nature of its counseling to have the minor sign an informed consent form, correct?

A Correct.

[142] Q Including a statement about the physician's liability.

A Correct.

Q And you in the course of—you counsel all of minor patients, do you not?

A Yes, we do.

Q Even those that are not going to court?

A Yes, we do.

Q Irrespective of any court-imposed requirement of counseling, is it the normal course of your counseling to counsel as to pregnancy alternatives?

A Yes, it is.

Q And including abortion, adoption, marriage and single parenthood?

A Yes.

Q Okay. And in the course of counseling you try to draw out the young woman as to whether or not you feel she needs any additional counseling, is that correct?

A We make that assessment, yes.

Q Do you counsel irrespective of any directive from any Minnesota court or any obligation imposed by the statute at issue in this lawsuit? Is it the normal practice at Meadowbrook

to counsel pregnant minors as to possible emotional and psychological problems that she might experience after abortion?

A We counsel all women about those possibilities.

[143] Q And do you counsel as to methods of contraception that are available?

A Yes.

Q Irrespective of the statute?

A Correct.

Q You did that before the statute?

A Correct.

Q Do you determine whether or not that the pregnant minor wants to have the abortion?

A Yes, we do.

Q And you do that irrespective of the statute?

A Yes.

Q You did that before the statute was enacted?

A Yes.

Q And even before the statute was enacted and irrespective of the statute is it Meadowbrook's practice to determine whether the young woman has been coerced by any party?

A Yes, it is.

Q Before the statute was enacted in the course of the intake process or the counseling process, was it Meadowbrook's practice to determine whether or not the young woman lives with her parents?

A Sometimes yes, sometimes no. We didn't ever mark that on our charts as a matter of form.

Q Did you inquiry into that as a matter of practice?

[144] A Generally it would have been discussed.

Q Okay. And if she didn't live with her parents was it your practice, even before the statute was enacted, to inquire where she did live if she didn't live with her parents?

A Yes.

Q Did you inquire as to the source of her financial support even before the statute was enacted?

A No.

Q Okay. Now that none of that information was relevant to billing, or it was—

A We are a fee-for-service clinic so generally not.

Q You didn't inquire as to source of financial support?

A Generally not.

Q Okay. Did you determine in the course of the intake process or the counseling function even before the statute was enacted whether or not she was attending school?

A She would fill it out on her self history form so generally we would know. We wouldn't necessarily inquire.

Q You would know from the form?

A Generally.

Q It was information you would have?

A Uh-huh, generally.

Q And then that—in what cases wouldn't you have it?

A If she didn't fill it out we wouldn't necessarily write it down.

[145] Q Did that also include her grade?

A The last grade completed in school has been on some of our forms.

Q Before the statute—I am sorry—

A I am not sure at what time it was or was not on the forms.

Q Okay. Do you obtain information today as a matter of practice or is the form designed such that that information will be elicited even with respect to those young women who are not going through the judicial bypass proceeding?

A Correct.

Q Through the intake process or the counseling process is it—was it your normal practice before the statute was enacted to determine whether or not a pregnant minor was employed?

A That too sometimes she would fill out on the form but we didn't ask it as a standard question.

Q Well, was the form—was there a question on the form, "Are you employed?"

A There is now. I am not sure when that form was changed.

Q And do you ask that information even of your patients who aren't going through the judicial bypass?

A Sometimes.

Q Well, is the form designed to elicit that information?

A Yeah, but whether or not we talk about it will vary.

[146] Q Okay. In the course of—the nature of your counseling before the statute was enacted did you—was it the practice

of Meadowbrook to speak with the young woman about her plans for the future such as schooling, employment or otherwise?

A Sometimes.

Q What would determine the times you did and the times you didn't if you know?

A It would depend what the counseling session was mainly focusing on, which issues would come up.

Q And it was nondirectional from your perspective?

A Fairly so. I mean, whether she was more confused about whether or not to have an abortion at all or something else—

Q I am sorry, I didn't mean to cut you off.

A I am sorry.

Q Before the statute was enacted you counseled hundreds of pregnant minors, correct?

A Correct.

Q Personally?

A Personally.

Q And even though the counseling was nondirectional, largely nondirectional, did that information tend to be elicited in the course of the counseling, that is future plans?

A It often would be.

* * * * *

[158] Q Some don't come in that week, do they?

A Correct.

Q They come in the following week because an earlier appointment is not consistent with their schedule, correct?

A Correct.

Q And in the case of a first trimester abortion, an apparently healthy young woman, you don't try to urge them to rearrange their scheduling and come in that week, do you?

A No, not necessarily.

Q Is it ever the case that someone who calls on Monday and you are booked for Tuesday?

A Yes.

Q Is it ever the case that somebody calls on Monday and you are booked for the rest of the week?

A No.

Q What is your average backlog, if you can tell us?

A It is generally one or two days. However, if a person, a woman says that she must be seen on a particular day our policy is we will always see her.

Q Okay. What if a young woman doesn't express that type of necessity?

A Then we would negotiate a time that is good for her.

Q In terms of a backlog, I take it it ranges from time to time?

A It generally is about one or two days.

[159] Q It stays pretty constant at one or two days?

A Yes.

Q So a caller on a Monday can typically get in Wednesday or Thursday?

A Yes.

Q And a caller on Tuesday can generally get in Thursday or Friday?

A Yes.

* * * * *

[162] * * *

Q Okay. In that initial inquiry I take it you identify or you learn from the substance of the conversation that some of your patients are not going to be going to court, that they have no problem involving their parents, correct?

A Correct.

Q And they are apparently healthy teenagers, correct?

A Correct.

Q And they have had their pregnancy and they are still within the first trimester?

A Correct.

Q With respect to that group, do you urge them, do you advise them about any particular risk of morbidity or mortality in terms of how soon to get their abortion?

A If they are well into the first trimester, they are not close to 12 weeks—

Q I meant to say well within, if you can't generalize, let [163] me say 9 weeks.

A No, we would not.

Q So if an apparently healthy teenager calls up and tells you she is 9 weeks pregnant according to what her family doctor told her you don't urge her to come in immediately for reasons of medical risk, do you?

A No.

Q And if you have—if you get a call from someone who identifies herself as an apparently healthy teenager who is 10 weeks pregnant according to what her family doctor told her you don't urge her to come in immediately to avoid any medical risks of delay, do you?

A Not immediately, but we won't let her wait past 12 weeks.

Q Between 10 and 12 weeks you really don't press her to come in, do you?

A We don't.

* * * * *

[171] * * *

Q But in the literature you routinely distribute to your minor patients, you do warn them or give them information about possible psychological consequences, do you not?

A About feeling depressed after the abortion, possibly, and hormonal change.

Q You urge them to seek help if they feel the need, don't you?

[172] A Correct.

Q And I take it you give that information and those warning to your patients because those phenomena occur from time to time, correct?

A They do.

Q And they are not trivial phenomenon, correct?

A For some people they are not.

* * * * *

[175] * * *

A We see about a third of our patients back again for a post-abortion checkup but we have no way of knowing where else they might go for that.

Q Okay. So two-thirds of your minor patients you have no way of knowing whether or not they have heeded your advice to seek aftercare?

A Whereas with our adult patients, correct.

* * * * *

[180] * * *

Q Have you, based upon your experience, been able to form an opinion quantitatively as to what sort of delay on average the judicial bypass procedure involves?

A Not exactly.

Q Approximately?

A Well, it depends on when she first calls and we don't keep a record of all those calls, but generally it takes her about three to four days to a week to make all of her arrangements and get it all done.

When she first calls us and starts talking it until when she decides on what she is going to do to satisfy the law.

Q But not all of that, that period of time, is attributable to the statute, is it?

A Sometimes it is.

Q Well, isn't it most common that if somebody calls on a Monday the abortion, even if she is not going to go through court, isn't it the more common situation if somebody calls Monday the abortion will not be until Wednesday or Thursday anyway?

A That is true.

* * * * *

[185] * * *

Q But if they—but if they report—they can't report it then and avoid court?

A And still get an abortion—they could report it to me and I would report to Child Protection and then the investigation would start and then if Child Protection found reason to believe that this was a legitimate concern or accusation then in that case they would not go to court or notify their parents.

Q So in other words, Meadowbrook will make such a victim go to court until and unless there has been some determination made by Child Protection?

A Correct.

* * * * *

[188] * * *

Q Okay. It is your understanding that proceedings under the statute have to be of a confidential nature?

A Correct.

Q To protect the privacy interests of the young woman involved?

A Correct.

Q And there have been literally thousands of such proceedings in the Twin Cities, haven't there?

A Correct.

Q There hasn't been a problem with confidentiality, has there?

A None that has been reported to me.

Q You are aware, are you not, of four instances where a **[189]** petition—where a petition has not been granted?

A Yes.

Q Okay. And one of those instances was a situation where your patient reported in the course of going through the court process, whether to the public defender or the guardian or the judge, that she really didn't want to have an abortion but her mom was forcing her into it?

A Correct.

Q That was a 14-year-old girl?

A Correct.

Q Was that, do you think that was inappropriate for the court to fail to grant permission in that circumstance?

A As far as I understood it the court is determining whether or not she is mature enough to make the decision to have the abortion without telling one or both parents. I don't think that that necessarily has anything to do with her decision whether or not to go ahead with the abortion.

Q Do you think that a 14-year-old girl who says that she wants permission to have an abortion on the one hand, but really doesn't want the abortion but her mom is forcing her into it, do you think that raises any suspicion as to her maturity?

A No.

Q Okay. You are aware of other instances, are you not, where one of your patients—excuse me—one of your patients went to the Hennepin County Court system accompanied by her **[190]** boyfriend and at some point in the process expressed the view, "I don't want to have an abortion, I want to get married."?

A Correct.

Q And do you think it was unreasonable, inappropriate for the court not to grant the permission in those circumstances?

A Again I think the issue here is whether or not she is mature enough to have the abortion without telling one or both parties, not whether or not she has decided absolutely to have an abortion.

Q So you think the court should have granted permission to have an abortion in that situation?

A They are not granting permission to have an abortion, they are granting permission if she chooses to have an abortion she doesn't need to notify one or both parents.

Q And you think the court should have granted such permission in that circumstance?

A I think they should have signed the petition.

THE COURT: Your understanding of maturity, is mature enough so as not to tell their parents?

THE WITNESS: So they can give informed consent to have an abortion.

THE COURT: Mature enough for informed consent, okay.

* * * * *

Q I believe you also testified about your understanding of **[191]** a situation where a minor presented a petition to Judge Farrell and then froze up and couldn't express herself verbally?

A Correct.

Q And after some further counseling you were permitted to go back to court with her and explain her situation on her behalf?

A Not even after further counseling, after a whole lot of tears and anxiety I arranged to get this heard again.

Q Do you have an understanding, and I am sorry that your testimony was of some length, I am sure you said this, but it escapes my mind; did you have an understanding as to the grounds upon which Judge Farrell, the first time, denied the petition?

A Yes, I do understand that.

Q And what is your understanding of the grounds?

A That it would be difficult for him to know anything about a minor who would not speak to him.

Q Do you think that was a reasonable conclusion for him to draw?

A Yes.

Q Do you think the fact that a woman will not say anything raises at least some doubt as to whether or not she is mature?

A No. I think it talks about how afraid she is to be where she is.

Q Well, did the judge have a basis upon which to determine she was mature in light of the fact she wouldn't say anything?

[192] A I think he was nervous because she was 13 and wouldn't talk.

Q 13 and wouldn't say anything?

A Uh-huh.

Q Okay. Do you think that provides—that circumstance provided Judge Farrell sufficient basis to find she was mature?

A No, I don't.

Q Do you think that circumstance provided Judge Farrell with sufficient basis to determine that irrespective of her maturity abortion was in her best interests?

A Very possibly.

Q Could you tell us how someone can determine—someone can determine from a 13-year-old who wouldn't say anything

whether or not the abortion, without notice to her parents, is in her best interests?

A Because her boyfriend was there, he was her primary support person along with his parents and he was the one who was doing the talking and the explaining for his girlfriend so they definitely had a lot of information about her and about her family.

Q In any event, on that occasion, as soon as—how soon did Judge Farrell agree to rehear the situation?

A I think it was about a week.

Q Did that young woman get—thereafter get an abortion from Meadowbrook?

[193] A She did.

Q Without medical complication?

A Without.

Q Now you recall four instances, do you not, in which a young woman, pregnant minor patient of yours, went to Hennepin County Court and indicated that she wasn't sure whether or not she wanted to have the abortion?

A Right.

Q And that was one of your patients?

A Yes.

Q Personally counseled by you?

A I think so.

Q And her petition was denied or not granted?

A Correct.

Q Okay. In that circumstance, do you know the judge in that circumstance?

A No, I don't.

Q Whoever he was in that circumstance do you think the judge had sufficient basis to determine her maturity?

A I do.

Q Despite her statement that she didn't know whether or not she wanted to have an abortion?

A Well, maturity, having to do with her ability to give informed consent, if she made that decision.

• • • • •

TRIAL TESTIMONY EXCERPTS BY JUDGE ALLEN OLEISKY, JUVENILE DIVISION JUDGE OF HENNEPIN COUNTY

[DIRECT AND REDIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[12] Q Approximately how many petitions have you heard since August 1981?

A Over 1000.

Q Would you say that you have heard more petitions than any other judge in the State of Minnesota?

A At least in Hennepin County and I think we do more than any of the other counties.

Q I am referring now to Plaintiffs' Exhibit 10.

A Yes.

Q Were these statistics prepared under your direction?

A Yes.

Q Now this only goes up to April 4, 1984, but it shows that you had in Hennepin County at that time heard 1237 cases.

Had you heard the majority of those?

A Yes. It shows I have heard 59 percent of them as of that point.

Q At the bottom of that form it states that 46 percent of the petitioners were Hennepin County residents and 54 percent were outside of Hennepin County. How come you heard—

THE COURT: I am sorry, counsel, I have lost you a little bit. What Page of 10 are you on?

MS. BENSHOOF: Page 1 of Petitioner's Exhibit 10 (sic) the bottom of the page.

THE COURT: Petitioner's residence, Hennepin—nonresident?

[13] MS. BENSHOOF: 54 percent.

How come you hear so many petitions from outside of Hennepin County?

THE WITNESS: That was a decision we made early on. We found out that most of the clinics were located in Hennepin County and secondly, being a district court we were a court of

statewide jurisdiction and we decided that we would hear these cases in Hennepin County, wherever. The juvenile code states a juvenile court has jurisdiction in one of two places, either where the child resides or where the child can be found and since the child was coming to Hennepin County to have the process we felt that we had statutory grounds to hear the cases.

Q Do you hear petitions from every county?

A Except Ramsey County. We made an informal agreement with Ramsey County that we would not hear children who resided in their county and vice versa.

• • • • •

[14] • • •

BY MS. BENSHOOF:

Q Do you ever ask minors when they come before you why they didn't go to their home counties?

A Yes.

Q What do they say?

[15] A A number of reasons. They are afraid that people will know them in their small counties, that the clerk of court, the people attending there who work in the courthouse; some felt that they didn't know that they had to go to court until they actually arrived at the clinic and as a result they were down here in Minneapolis and then they would have to go back to their home county and it would be a real imposition because of taking time off from school and arranging rides; that whole issue of getting back and forth on school days, that was a real problem for them.

Also some had heard that they couldn't get a hearing in their local counties.

Q Do you think that these explanations given to you were valid?

A Yes.

Q How were the hearings on these petitions scheduled? Could you just explain the process in Hennepin County?

A Yes. What happens is that the clinic, as I understand it, will call our guardian ad litem's office or the guardian ad litem's office will call the clinic, they will tell them there are

hearings, there are children available. We normally have these hearings on Monday, Tuesday and Thursday. Early on we had them on different days but we usually arrived at a consensus to do it Monday, Tuesday and Thursday. The child then comes down to the Juvenile Justice Center, meets with the [16] public defender, is interviewed separately by the public defender and then is interviewed separately by the guardian ad litem. When that is completed they come to see me on an individual basis and I will have the hearing in my chambers with a court reporter present.

Q Who is present in your chambers when you hear the petitions?

A The child, the court reporter, the guardian ad litem, the attorney for the child, usually the public defender, and if a parent or guardian comes with the child we will allow them to sit. We usually don't allow the boyfriends to come in.

Q About how many of these petitions do you hear per day on the days you hear them?

A I think I average about between three to seven. Yesterday I had seven petitions, and I think on Monday I had two or three—no, today is Tuesday—yesterday I had seven so they average between three to five and anytime over that is exceptional.

Q Do you try to set a set number on each day?

A We have tried to maximize it at five or six because when we go over five or six we have problems with time of the public defender, guardian ad litems, et cetera.

Q What did you mean, problems with time?

A Time to interview the child and get it into court. We [17] try to have the hearings at 11:30 in the morning and try to have the child out of there by noon or a little after to accomodate, minimize court time and to minimize the time that the public defender has to come down.

• • • • •

[18] • • •

Q So the minors who come for these hearings sit with the public, in other words?

A Yes.

Q Do you think this a problem for those minors?

A They tend to sit a little further away from the rest of the children who are coming in on delinquency-type cases, but it is being out in the public, obviously, and I don't know if it would—what effect it has on them or not.

Q When you go into the waiting room to get to your office do you know which minors are which?

A I can always recognize the children who are going to have an abortion, they look different than a lot of the kids coming into court on delinquency. A lot of them are with their boyfriends, holding hands, the boyfriends have their arms around them, they dress a little different than a lot of the kids who are coming into court on delinquency matters and for some reason, maybe the vast majority of people we have in court are boys, as opposed to girls, about 80 percent of the delinquency cases are boys, and all of a sudden when you walk out and see a group of girls sitting together in that particular area, to me they are easily recognizable.

[19] Q The girls all know why the other girls are there?

A The people in court certainly do and anybody who attends court on a regular basis, the probation officer, public defenders, county attorneys, social workers, police officers would know why the girls are there and who that group is.

Q You stated that the guardian and the public defender set up the hearings and then they tell you how many there are on particular days?

A Yes. One of my clerks will call about 10:00 o'clock to the guardian ad litem's office to find out the number of hearings we are going to have.

Q Do the number of minors show up for court that are scheduled, usually?

A No. In many cases they will say there is going to be seven or six or whatever the number and in many cases there would be two or three less.

Q Do you personally know why?

A In some cases I do.

Q Why?

A They got lost, they can't find us. I think they will make the appointment with the clinic and then never show up, it is too

long a drive, the weather may be inclement, just numerous reasons or maybe they will go forward and not have the abortion and get parental consent.

• • • • •

[20] • • •

Q I notice that on Plaintiffs' Exhibit 13, which is the report of the guardian ad litem, this is a report given to you at the time of the hearing, is that correct?

A Yes.

Q Refer to the last page of this exhibit. There is a recommendation of the guardian ad litem. I would like to just go through this a little bit with you.

I see that under No. A there is a recommendation that you authorize the minor as emancipated.

What I would like you to explain is I thought the law provides an exception for not having to go to court if you are emancipated. So why is this recommendation in the guardian's form?

A I don't know. I think we just put it in there. I probably could think of only one child who has ever come to court that was married. And it may well be that the clinic will sometimes be very fastidious about bringing the child in. We found certain clinics are very careful and circumspect and any question, if there is any doubt, they will bring the case to court and I think that is the reason.

Q You mean circumspect about breaking the law?

[21] A Yes, and they are very careful that every i be dotted and every t crossed to ensure strict compliance.

Q It states here for B or C that the guardian makes a recommendation as to whether the minor appears mature and capable of giving informed consent or that the minor is not mature but the abortion is in her best interest.

Did you give any training or guidance to the guardian as to how or why they should make those two recommendations?

A We did discuss it numerous times with the supervisors from the guardian ad litem's office and something strike me in my mind that we even did some research on and some writings on this, and that we gathered some information about that, trying to qualify and quantify what we thought would be mature

and capable. But the statute was vague and really didn't give us any clear definition.

Q What did you tell them that they should use as a guidance for "what is mature"?

A I was concerned that the child was not being pressured by someone else to make the decision, that the child had weighed all the alternatives and options available to her; that she was able to make a decision not based upon other's feelings and based upon an independent viewpoint and giving some real thought to it rather than a spur of the moment thing, and her reasons were not just because it was going to ruin her figure or she was going to not be popular or give in to her boyfriend. [22] We were really concerned about the child and as a result if you go back on some of the questions we were real concerned about her post-high school plans, what her goals in life were, et cetera; and those were gauges we felt would measure maturity.

Q The sentence on that report says mature and capable of giving informed consent.

What is the difference between the two, in your opinion.

A I don't think there is any.

Q What standards have you related to the guardians about best interest and what that means?

A Well, one of the things that you quickly learn in juvenile court is that there are a lot of teenage mothers who are not capable of parenting their children, that they end-up in child protection and end up losing their children because of inability to parent. We call it, "Children having children," and we wanted the guardian ad litems to look at some of these girls and determine whether or not all things being considered if it was in their best interest to have a child, a baby; could a 13-year-old girl raise a child, could a 14-year-old girl who had mental or real emotional stability problems make a real informed consent about raising her child or giving it up for adoption. You know, formerly I always asked the children why. Have you ever thought of giving this child up for adoption, [23] there are millions of people in the United States that would love to have your baby and would give it a fine home, and they always tell me if I have this baby I could never give it up for adoption.

So those are some issues we were concerned with, particularly with the younger girls, the 13, 14, 15-year-old girls, that maturity level was a real concern of ours and the statute mandated that we look at it. So those are some of the guidelines we wanted to talk to some of our guardians about and have them talk to the child to inform them.

Q You talked about age when you mentioned 13 or 14. Do you know about what percent of your minors are 16 or 17 years old?

A I think it is in the material that is in the exhibit, but the vast-majority of children that appear before me are 16-17 years old.

They looked—if I could refer to Exhibit 10—

Q Right.

A 55 percent were 17, 34 percent were 16, 10 percent were 15 and I can't tell, is that 1 percent—1 percent were 14 and less than 3/10s of a percent were 13.

I don't ever recall a child younger than 13.

Q Right. So that the best interests is best interest to have an abortion versus going through childbirth; it is not best interest to notify the parent?

[24] A Yes.

THE COURT: I am not very good at math, judge, but isn't the 14-year-old 1/10 of 1 percent?

THE WITNESS: I am sorry, judge, that is right.

* * * * *

BY MS. BENSHOOF:

Q At the judicial hearing could you just describe who questions the minor?

A Normally what goes ahead is that the public defender will give a brief summary of the grounds why she believes the child is capable of giving an informed consent, is mature or is in the best interest and will ask the child some very brief questions.

I don't put the children under oath and I have been very careful trying to take off my—I don't wear my judicial robes at that point. I am usually wearing a suit jacket or in shirtsleeves.

I am sitting at a desk rather than in the courtroom itself so that she will ask the child some questions, verify her **[25]** signature on the petition and the guardian ad litem will usually give her opinion and why she has formed her conclusions and last I will ask the child some questions.

The questions I particularly am interested in is why they can't—the relationship between them and their parents, if anybody is pressuring them to do so, and if they would weigh the alternatives and if they are positive about it.

Sometimes I have asked them are you 95 percent or how much percent are you sure of this and then I will ask them again, reaffirm where the abortion is going to be held and when and then obviously if I approve it I will sign the order, give it to the court reporter who will then take it out to another clerk who will make a photocopy of the order and give it to the child.

Q You ask the teenagers why they can't tell their parents?

A Many times I do.

Q What responses do you get?

A Oh, numerous. Some—a number of them have told their parent, one of their parents. Others will say that they have been told if they ever get pregnant that they will be told to leave the house. Many will be told that there is a lot of strife and stress in their family situation and by telling them that they are pregnant it will just add and accumulate to it.

Others will tell us that there has been an older sister who had an abortion or a baby and it brought all kinds of **[26]** chaotic experiences. Others will tell us that physical and mental harassment by a father, in some cases some have told us they have been sexually molested by a member of the home or the stepfather or the father and that may be the reason that they are pregnant.

Others will tell us that it would create real problems in school, in the community, just a multitude of reasons.

Q Did you keep a list of all these reasons?

A We have—I don't recall if it is—I know we did have tabulated over the years a lot of the reasons and some will tell us also because—I think I may have mentioned this—because of some moral and family reasons that they have.

Q You have had 13 years' experience as a judge. When these minors are relating this to you do you believe them?

A Yes.

Q You stated that you hear these minors in your office with your robe off trying to make this, the setting, quite informal.

Why do you do that?

A I think you put the child at ease. I think it is intimidating to come into a courtroom and see a judge sitting on the bench and the court reporter in a very formal setting and we thought we would get a much better flow of information by bringing the child into the court chambers, making it as [27] comfortable as possible. I have a very spacious, commodious chambers. There is a sofa, there are—there is some arm chairs, there is books, a library-type atmosphere and windows outlooking and the courtroom is very similar to this courtroom that Judge Alsop is sitting in, it is a windowless courtroom that I sit in and we thought that opening it up would make it much more conducive to have a relaxed atmosphere and try to take some of the tension away from the girls.

Q You are trying to make things as good as possible?

A Yes.

Q You say you take some of the tension away from the girls. Do you feel they feel tension?

A I think they are under some stress coming in front of a strange man in a strange situation and in a courthouse in a strange city for many girls who don't come to court. We ran a computer on these girls in '82 or '83 and we found out that like 95 percent had no juvenile court record or had ever been in juvenile court before.

Most of them obviously had never been in a court before.

Q Do you think that experience of a minor going to juvenile court is a frightening one?

A Probably, no question about it.

Q What do you base that on?

A Well, I think any of us coming to court, we are [28] apprehensive and anxiety-ridden and are tense. Having to wait—many of the children arrive at our courthouse by 10:00 o'clock and they can't get to see me until 11:30, quarter to 12:00, even though we try to give them priority.

So there is some tension and anxiety. I know the lawyers are sitting there telling them don't worry, there is no problem, but I can tell questioning some of the girls in court they tense up a little bit, they are a little rigid. I try to make them at ease a bit and I know the public defender does too.

Q You stated you have heard over 1000 of these girls.

In about how many have you found the girls mature and capable of giving informed consent?

A Probably over 90 percent of them.

Q I thought I saw a statistic on one of these, that it was 95 percent, is that—

A I could—I don't quarrel with that.

Q Okay. Have you ever found a minor both immature and no best interest?

A I think maybe one or two cases we have turned down where I think I remember once where the minor came in and she wanted to have the baby and her mother told her to have the abortion and I think I denied on that basis.

Q That would not be a denial that she was not mature?

A No, in her best interest.

[29] THE COURT: I am not sure I understood. You say 90 percent or 94, if that is the figure, is that figure written on Exhibit 10 someplace, counsel?

You mentioned that it was 94 percent on the record and I am not sure where you are getting that.

MS. BENSHOOF: I don't think it is on the record. I think he is just remembering.

THE WITNESS: I think just my recollection, Your Honor, based on I think some statistics I have seen.

THE COURT: These are your cases or Hennepin County cases?

THE WITNESS: My cases. I would say 90 percent.

THE COURT: Where you found either mature or best interest?

THE WITNESS: No, mature itself.

THE COURT: All right. In 90 percent of the cases you have heard you have found it to be mature?

THE WITNESS: Yes.

THE COURT: All right. Now there are some of the additional 10 percent that you found best interest?

THE WITNESS: It is my recollection the other 10 percent would—I would probably go on best interest.

THE COURT: So there is no minor you have turned down as being immature and not best interest?

THE WITNESS: No.

THE COURT: So you are saying of your 1000 cases you [30] have never denied a petition?

THE WITNESS: I think I have denied one or two, sir, but I probably—I take back that earlier answer; I probably denied it on the grounds that she is not mature but I have stricken the mature but said the proposed abortion is not in her best interest because she wanted to have the child and she was being coerced by the parent. One girl I think told us that she wanted to have it, so deny it, so the boyfriend would marry her.

BY MS. BENSHOOF:

Q She wanted you to deny it so the boyfriend would marry her?

A Yes.

Q Did he marry her?

A No. I think later she came back and told the guardian he decided he didn't want to marry her.

Q Did she come through again?

A I think she came through again and got the abortion.

Q So then you found her mature when she didn't get married?

A Right. And I think the girl we denied against best interest was because she wanted to have the baby and the parent told her, the mother told her no, if she had the baby she would have to move out of the house.

Q In that case you were finding the girl mature because you were finding she should make the decision herself?

[31] A Yes.

THE COURT: You denied two petitions?

THE WITNESS: I think there was a third one, judge, I am not positive and I don't recall the circumstances but it can't go over two or three.

THE COURT: All right.

[BY MS. BENSHOOF:]

Q But these cases were not really denials because of a finding of no maturity?

A That is correct.

Q In your experience has the law—when I say your experience I mean in Hennepin County, not just your own cases, if you have personal knowledge of other ones in your experience, has the law resulted in any case where there has been a finding of immaturity and no best interest and the court has then ordered notification and the minor has gotten parental help?

A No.

Q And how many of the cases you have heard are the minors accompanied by a parent?

A I can't really quantify it but I probably—probably at least maybe 10 to 20 percent a parent will come into court. For instance, yesterday, if I might answer, I think of the seven I heard yesterday there were three parents present.

Q Three parents?

A Three of the seven there was a mother present.

* * * * *

[33] * * *

Q Do you speak to the one parent who may accompany the minor to the court?

A Yes.

Q Would you ask them questions?

A Yes, I do. I will ask, "Your daughter has applied to the court for an abortion. What is your position, do you have any feelings about it; do you think it is the right decision for her, do you approve; any comment that you would like to make," and they usually answer me.

Q What reasons do the parents give to you as to why they can't notify the absent biological parent?

A Sometimes they tell us that it may jeopardize the relationship, that there may be some repercussions as far as child support or custody; that the other biological parent may claim you are not doing your proper job in raising our daughter because she has gotten pregnant and is having premarital sex [34] and they are concerned that it will bring the other parent back into their life who has just been absent and they will say things have been going smoothly and by notifying him he is going to become intrusive in our life situation again.

Q Do you have any situations where one of the parties is a battered wife?

A Yes, and we have heard that where the parent will say I am afraid of assault from my husband or if he were to know about this. The child will tell us that too, obviously, in many cases.

Q Do you believe them?

A Yes.

Q You see such cases in your other life as a judge also, don't you?

A Continually, yes. And it is a fact of life that in our cases, 50 percent of my case load is hearing child abuse cases and 25 or 30 percent of my case load is physical abuse of parents and children by spouses and other parents toward the child.

Q So you think that battering is a frequent crime in Minnesota?

A No question it is a frequent occurrence.

Q A serious crime in Minnesota?

A It is a real serious issue because battered children end up battering; have low self-esteem and end up battering their [35] children when they grow up. It is a learned reaction and experience so it is a real concern to us.

Q So some of these batter situations you see the husband and wife are still living in the same house?

A Yes.

Q Since you have had so much experience with this in your opinion is the notification of such a thing as a pregnancy the kind of event that would provoke an incident?

A No question it is going to set the whole thing off again in some cases.

Q You say no question, could you just explain the basis of your opinion?

A Well, I think a lot of parents who abuse and batter their spouses and children are very controlling people and this is something that is coming outside of their experience and something that they don't have control about and they become very upset about it and it is something that is going to set them off.

It has got financial repercussions to them, obviously legal repercussions, the whole issue of control I think becomes a concern. A lot of these people rule by physical force or dominate their families.

Q When the parents come into chambers with you with their teenage daughters, do they express to you any feelings about the invasion of their privacy?

A Some parents are real upset like why do I have to be here [36] and I am giving consent; she has lived with me for 12 years, he hasn't. They are talking about the absent father.

In the vast majority of cases they are women who are coming with daughters and they will say the spouse hasn't had contact with the child for years, hasn't paid support, and why do we have to notify him. I am the one who has raised this child and I have given her consent.

Q What do you say to these parents?

A I tell them it is the law, I have no choice. There is a presumption that it is a valid law in our state and obviously I don't go into any challenges going on. I tell them that is the way it has to be and I try to set them at ease and try to assure them that we are going to make it as quickly and as painless as possible.

Q You testified as to the burden on the single parents or on these battered parents.

Have you made any communications to the legislature regarding this burden?

A Yes.

Q Could you describe that?

A In 1983 Representative Kathleen Vellanga, a legislator, I think from St. Paul, introduced a bill saying if one parent knows and consents that it was not necessary to have the court

hearing and Judge Peterson and I and Suzanne Smith agree to testify and we went over to the legislature and [37] Judge Peterson and I testified and presented some statistical information, et cetera, to a legislative committee.

Q What committee did you testify before?

A I want to say it was a subcommittee of the laws and family law committee or crime and family law.

Q What was the substance of your testimony?

A That in essence what I just said here, that 25 to 30 percent of the children appeared with one parent or one parent had known and consented; that it would be a burden on that single parent to have to come to court, or for the child, and I repeated some of the information that I stated earlier about bringing in unnecessary noncustodial parents back into their lives and I thought it just didn't really make much difference as long as the custodial parent consented.

That was my belief then and now.

Q Based on your observations of the minors, both before you and in your waiting room, do you have any opinions as to the emotional impact on the minor of having to go through the court process?

A I think it has some impact. They sandpaper them pretty well, very frankly, I think the child is well prepared by the clinic and the guardian ad litem and the defense attorney so by the time they get to me they are pretty well prepared.

CROSS EXAMINATION
BY MR. GALUS:

[40] • • •

Q A large number, and I don't have the number at hand, it is in the records, of the large number of children who have gone through the court process in your courtroom, are you aware of any instance in which your court and staff did not scrupu-[41] lously abide by the confidentiality of these proceedings?

A No.

Q I believe counsel asked you in particular about a portion of the petition itself and asked whether the real name of the

petitioner is noted there or not. I understood you to say the real name is noted?

A Yes.

Q What arrangements, if any, after the hearing is conducted, do you make with respect to the confidentiality of the written record of those proceedings, including the petition which has the real name of the minor?

A We take the petition, the guardian ad litem's record and the court record and we file them back in a locked file room in Juvenile Court on the second floor; that is a locking vault and I don't even have access to it.

• • • • •

[42] • • •

Q On those occasions do you ever make exceptions to your normal hours of operation to accommodate the fact that they couldn't get there on time?

A Yes, I have heard them at 1:30, 2:00 o'clock—we are [43] available; in fact if they want to hear it on a weekend, when we first implemented that law we notified the clinics and the public defender and the guardian ad litem's office that they could call the Juvenile Center and they would give the number out and I would make myself available seven days a week and we never were called.

• • • • •

[48] • • •

Q You testified, I believe, that typically these hearings are held on Mondays, Tuesdays and Thursdays?

A Yes, sir.

Q Have you from time to time been asked to hear such proceedings on Wednesdays or Fridays?

A Yes.

Q What has been your experience when you have had those [49] requests?

A I will hear them.

Q In all cases?

A In all cases.

Q You mentioned, I believe, in your direct testimony that you can typically, by viewing the groups of young people in and about the Juvenile Justice Center, identify those who are there for parental notification proceedings, is that correct?

A Yes.

Q And you mentioned the sex of the group as being one clue, correct?

A Right.

Q Is it also the case that that group tends to appear more composed than the other persons at your courthouse?

A That may be one of the factors. I neglected to mention on direct also that that group tends to be not having parents with them. Many of the parties who appear in juvenile court have a parent or an adult with them and that particular group obviously rarely has a parent with them and so they tend to be readily identifiable.

• • • • •

[52] • • •

Q Assuming that where some exigent circumstance where the welfare of the child required action during those periods of time, would you—do you stand ready to hold a hearing at that time?

A Yes. I have heard cases where there has been requests for me to approve blood transfusions for a parent who refused to allow the patient to have a blood transfusion and I have heard these cases on weekends and evenings, so I would certainly make myself available on these.

• • • • •

[57] BY MS. BENSHOOF:

Q Judge Oleisky, do you believe that the statute dissuades some minors from having an abortion?

A Yes.

Q Why?

A Because I think that it takes kind of a forthright courageous youngster to travel two or three hundred miles, to come to a court in an alien city to get permission, and I think sometimes when they call up the clinics and they realize that they have to come to court that it may dissuade some of them from coming.

• • • • •

TRIAL TESTIMONY EXCERPTS OF H. P., MINOR

[DIRECT BY MS. PINE]

[CROSS BY MR. ACKERBERG]

[28] • • •

Q Okay, H., how old are you?

A I am fifteen.

Q And have you ever been pregnant?

A Yes.

Q And did you have an abortion?

A Yes.

Q Did you go to court in order to avoid notifying your father?

A Yes.

Q How old were you at that time?

A Fourteen.

Q So it wasn't too long ago?

A It was July 25.

Q Now just to start, explain to the judge what was going on in your life, did you have a regular boyfriend at that time?

A Yes.

Q Do you remember whether you were using any contraception?

[29] A Yes and no. I mean, when we had it we used it, when we didn't we didn't.

Q Tell Judge Alsop the story of how you first suspected that you were pregnant?

A Well, I didn't really suspect that I was pregnant.

THE COURT: You did not, you say?

THE WITNESS: No.

It was about a month before I found out that I was pregnant. I thought I was pregnant and it was just a close call. Then, one day—it was in the summer now, and I had bronchitis and I had

the flu and I was really coughing really bad so my mom took me into the doctor and the doctor said that I needed an X-ray of my lungs.

So I walked into the X-ray room with the lady, whoever gives the X-ray, and on the wall was a poster saying if you are pregnant or maybe, please notify the doctor because it can harm the baby or something, you know, something like that and I just went, you know, it hit me right there. So then I told the nurse I might be pregnant and I am not sure and she said well, just a minute, I will talk to the doctor.

A little while later she came back and said why don't we give you a pregnancy test, but the doctor said to go ahead and give you the X-ray, you know, just uncover and cover my chest or stomach or abdomen or something. They did that and I went and gave a urine specimen and he came in, told my mom and [30] me—I told him not to tell my mom that I was getting the test because I didn't want her to know at that time and I just—he told me that I had bronchitis, prescribed a prescription and we were walking out of his office and my mom walked out first and he stood right at the door and he flashed a piece of paper to me saying, p-o-s-s, period. I will never forget that—

Q Meaning?

A Positive, I was pregnant, and at that time my boyfriend was there and he happened to be out in the waiting room and I don't remember what was the situation, and I told him and I did not tell my mom at that time.

THE COURT: When is this, in the summer months sometime?

THE WITNESS: Yeah, the summer months, I don't remember the date.

THE COURT: June, May or June?

THE WITNESS: Yeah, June most likely.

BY MS. PINE:

Q What was your first reaction, do you remember the first thing?

A Well, I went out and I told him, I said, I am pregnant, I just went, "I am pregnant," I mouthed it to him so my mom

wouldn't hear it and they got in the car and I just cried, I mean, not out loud, but I just, you know, cried, and I was just [31] really sad and my mom, she kind of noticed something was bothering me and she thought it was because she should have taken me to the doctor sooner to get checked for bronchitis because I was sick, so she didn't really realize it and I was just really—I didn't know what to do at that time, when it hit me there is no way out, I mean, it is either I have to have this kid or I have to get an abortion.

It was just like I would—I didn't know, you know, going through an abortion scared me to death because I didn't know anybody who had been through one and having a baby at my age didn't make any sense to me.

THE COURT: What is your birthdate?

THE WITNESS: 6/12/70, December 6.

BY MS. PINE:

Q Let's talk a little bit about you and your mom.

Can you tell me a little bit about your relationship with your mother? What your relationship with her is like?

A Well, right now we are really close. I talk to her about everything, everything you can imagine. She is just like my best friend.

Q Were you pretty close to her before?

A No, uh-uh.

Q Can you tell me—tell me about the reasons you think you are real close.

[32] A When I was 12 or so, I was younger than that, I was sexually abused by my mom's boyfriend and after it had gone on for every day, maybe two years, and maybe not every day, for a long time, I finally told my mom and she called the police and got him out of our house and stuff like that, and he went to court and got sentenced and everything like that and my mom protected me from him.

She stood by me. We had been through counseling together. We have talked about everything, we have cried together, we have been through—I mean, we have been through just so

much together, and that is what makes us, you know, get along so well.

Q So those are the reasons that made you feel like you could talk to her?

A Yeah. Yeah, because before that we weren't really close and in a way I kind of felt that I am fortunate because that happened to me because I am close to my mom now.

Q You talked to her about—

A I wish that would have never happened, but—

Q You talk to her about things like sex and menstruation and things that are—

A Yeah, yeah, yeah.

Q —personal?

A Yeah.

Q You said that when you first learned you were pregnant [33] you didn't want to tell your mom that you were on that very first day.

Tell me why you started to think about telling her and how that came about?

A I didn't really think about telling her at all. I didn't know what to do. I was so sick because I had bronchitis and all of a sudden I have this morning sickness and I would wake up and throw up every single morning, a couple of times I threw up on my dog, it was terrible, and I hate being sick.

I was really crabby, I thought, hey, if I let it go it will go away and it didn't go away. I kept getting sicker and sicker and one day I was talking to my mom on the phone and she was at work and I thought, hey, this may be the easy way out, you know, because, I mean, I didn't really know if I should tell her or not because I didn't know what she would think of me, you know, I didn't know if she would, you know, think, God, what a slut, you know, I didn't know.

So she was talking to me, she said, H., you haven't had your period in a long time, have you, and I said no, and she said, well, you are not pregnant, she said, when are you going to get it, and I said not for about nine months, and, you know, that was totally ridiculous the way it happened, I mean, I admit I took the easy way out, but I guess I couldn't face her. I could not face her to tell her that. I was really embarrassed.

[34] Q So when you first told her, what did she say, do you remember?

A She was not mad at all. She said, oh, H., oh, H., I am so sorry this happened to you. Why didn't you tell mom sooner, you know, just kind of motherly things, you know.

Q Do your mother and father live together?

A No, my mom and dad were divorced when I was four.

Q How often do you see your father?

A Depending on the year, he is an ex-alcoholic, whatever you want to call it, was an alcoholic when I lived with him, we lived with him. I remember him hitting my mom a couple of times and hitting us kids, not beating us, but when we would get spanked we would get spanked real hard and I guess that that just kind of left something in my head to always not be able to talk to my dad, not be able to feel like he was my parent.

Q Uh-huh.

A And we don't talk.

Q Now can you give the judge an idea of how often you see him now, over the different years, tell us what you can?

A Maybe two or three times a year. He lives in Waseca on the farm, which is not my lifestyle, so it kind of makes it hard to relate, you know, it has been a long time.

Q How does it usually come about when you see him; do you [35] call him, he call you?

A He will call us, I don't call him. He is not a very caring father, in my understanding, he doesn't ever ask about our grades, he just doesn't ask about things that parents would care about, like my mom. My mom is always concerned about our grades, how you doing, how is everything going in school, how has your life been.

Nothing like that. He doesn't even—it is just like he doesn't care to ask and when we would go up to his house maybe for a day or two he doesn't even pay any attention to us.

Q So when he calls to ask if he can see you or whatever, what do you usually feel or think about seeing him?

A I think I say, hi, dad, that would be great, whatever—I am putting on this big act and I tell my mom, "You have got to get us out of this," you know, just don't—make up something, mom, just, you know, but—

Q Has he ever been supportive to you when you have been in trouble or upset?

A He has never been there for me, no, never, and I expect that he probably never will. He just doesn't, you know, he is not around so he doesn't know.

Q And just to go back over something you were talking about a little before, you were saying he was an alcoholic?

A Yes.

[36] Q And can you just describe what little you might remember about his violence?

A He would—I was only four and I remember he would hit her, he wasn't around much, he would spank us for the dumbest things, we are kids, we would go put on our mom's shoes, we are girls, you know, get into that kind of stuff and instead of saying, hey, no, no, it was like come here, I am going to spank you.

Q Was he ever violent toward your mother?

A Yeah.

Q Do you remember any of that?

A Not really. I really don't.

Q Has he remarried?

A Two times, surprisingly enough.

Q Do you know anything about his relationship to his new wife, and wives and new kids?

A Well, the first one after my mom he had three stepchildren and a wife and I didn't—I saw him a lot at first and things started going wrong in their marriage because he was still an alcoholic and I didn't see him for a long time and I guess he put his ex-wife in the hospital, you know.

Q That is what you were told?

A That is what I was told.

Q Were you told that that happened more than once?

A I am not sure.

[37] Q Did you ever think about telling your father you were pregnant? Or about your abortion?

A No. My father doesn't—I don't even think about my dad. My dad is like someone that is not even there. I consider my parent my mom, you know, I think about him maybe a couple of times a year.

Q If you had told him what do you think he would have said or done, if for example, you had been required to tell him in order to get an abortion?

A You see, I have never been through anything like that, never said anything, you know, we have never gotten into anything. My guess would be he probably would want me out of his house, you know, I don't know.

Q What was the first thing that you think he might do to you?

A I doubt he would hit me. I doubt he would hit me because he knows that I am really close to mom and I would tell mom and mom would automatically take him to court or something, even though he is my dad, saying he shouldn't have touched me.

Q He doesn't have custody of you, right?

A Uh-uh.

Q Your mom has custody?

A Yeah, I suppose, yeah.

Q We will talk to her about that.

A Yeah.

[38] Q Do you think your pregnancy and abortion were things he would want to know about?

A No.

Q Do you think he should know about them?

A No, definitely not.

Q Do you think he would have been supportive or helpful to you at all if he had known?

A No, I don't think he would have cared less. I mean, not that he wouldn't have cared less, but maybe he would have cared but he doesn't know how to show it.

He has a real tough way of showing us that.

Q How would you have known if you had to tell him—I asked you before what you think he would have done—

A How I would have felt?

Q Yeah, what would you have felt if you went—

A I would have felt extremely embarrassed; I would have felt scared, I would have, you know, I can't even imagine it.

Q Uh-huh.

A I would just be totally—I would feel like I was being shamed by having to do something like that.

* * * * *

BY MR. ACKERBERG:

[51] * * *

Q I thought you said before that you doubted he would hit you?

A He might have, you see, I really couldn't say that he would or I couldn't really say that he wouldn't, you know, but because I have seen him when he gets abusive then I guess I wouldn't want to chance that.

Q Does he call you occasionally?

A Yeah, maybe when he wants to see us.

Q You were hesitant to tell your mom at first of your pregnancy?

A Uh-huh.

Q Because you thought you didn't know what she would think of you?

A Uh-huh.

Q You thought maybe she would think you were a slut?

A Uh-huh.

Q But when you finally did tell her that was not her reaction, right?

A Right.

Q So you misperceived what her reaction would be?

A I guess I did that because that is the way I kind of felt **[52]** being 14 and getting pregnant, I guess I kind of felt like that after being sexually abused and all of that I guess I really did.

Q You felt like what?

A A slut.

Q You thought your mother would reject you?

A No, I did not think that. I didn't think that she would reject me.

Q You thought she would think of you as a slut?

A She may—I mean, she may have thought that in her own head. She wouldn't have said that, you know.

Q But actually she was very supportive?

A Oh, yeah.

Q And she helped you through this experience?

A Yeah.

* * * * *

TRIAL TESTIMONY EXCERPTS OF D. P.,
MOTHER OF MINOR

[DIRECT BY MS. PINE]

[58] * * *

A I was afraid of him. He never wanted to do anything with the children, he never paid any attention to them.

Q Were those basically the reasons for the splitting up or were there other reasons?

A I think we just didn't communicate. We had grown apart—

Q Uh-huh.

A —from one another.

Q What was the separation process like, was it—

THE COURT: I am sorry, what was the what?

BY MS. PINE:

Q The separation process like, was it very angry, was it, between the two of you—

A Before the divorce, you mean?

Q Leading up to the divorce.

A Leading up to the divorce there were some angry times, yes, there were a lot of angry times. He wanted me to sell the house and I fought him on that and said, no, I am going to get a job and I am going to work and I am going to keep the house to raise the children in and that was our biggest battle, it was over the house.

Q Can you give one example of the kind of abuse that was symptomatic of him and his relationship to you and the children?

[59] A Oh, sure. He not only yelled and screamed at the kids, if we were in the car he would start driving very fast, just

drive, and it just frightened me to death. When he became violent he was violent.

Q Like what?

A Oh, he would abuse—to me, you mean?

Q Uh-huh.

A Oh, he would just hit me all over and throw me down or the same thing to the children.

Q What has your relationship with him been like since you split up?

A We talk on occasion, only if he has anything to do with the children, which is usually Christmastime, he does always make an effort to see the children at Christmastime. Other than that they may see him once or twice a year.

I really have no contact with him.

Q How often would you say you speak to him a year?

A Maybe twice.

Q What is the occasion?

A Christmastime, it is always at Christmastime.

Q Do you share anything about any personal matters with him?

A I will tell him about how the children are doing—he never initiates anything, he never does ask, except would the girls like to come down for a weekend, you know, something of that nature, otherwise, no, we don't get into a lot. Usually **[60]** I will tell him how the girls are doing.

Q Does he ask?

A No. No, he doesn't ask. In fact, I will always say, call the girls and say dad is on the line, why don't you say hello, and, you know, they go like—what do I talk about to this stranger?

Q Why is it that you don't share personal matters about your life with him?

A About my life; I don't think it is any of his business. He has remarried. What I do in my personal life is my business.

Q To what extent do you consult with him about decisions having to do with the children?

A I asked him if he would help me pay for H.'s braces because at the time I didn't have the insurance or dental insurance coverage, and he said no, that he would not.

Otherwise the contact is just, oh, how the children are going to get down to Owatonna, which is where he lives, and how long they are going to be there and when they are coming back.

Other than that we really don't have any communication. When he married, shortly after we were divorced, I did speak with that wife or his wife on occasion because she was always interested in the children and it was after their divorce that she told me what it was like for the girls when they went down to visit.

[64] • • •

Q There were other reasons you didn't want to tell your husband besides not thinking it was his business that you testified.

Can you just summarize those for us, what was it again you were afraid of?

A His violence. His last marriage ended where she ended up in the hospital a couple of times and he also did physically abuse their three children and that just—it just frightens me.

TRIAL TESTIMONY EXCERPTS OF KATHERINE WELSH, EXECUTIVE DIRECTOR OF WOMEN'S HEALTH CENTER

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[156] • • •

Q You stated that you have had one denial. Could you explain the circumstances of the denial?

A The denial was—it was our 100th case that we had taken in and the young woman was in foster care, her father was dead and her foster mother was there and apparently she was a Wisconsin resident and the social worker was also there. So it was the foster mother and the social worker and they did not want, nor did the young woman want to notify the mother. It was like they had had a very difficult time placing this kid and she had been through numerous things and he did not grant permission.

At that time we were going to appeal and the public defender who I think was Heather Sweetland on that particular case, we talked to the young woman and we talked to the social worker and to the foster mother and what we decided to do was that we would just send a letter of notification to the mother. To my knowledge the mother never reacted, you know, to that notification, and there was no harassment to the minor.

I think that is what they were worried about.

Q So you accompanied the minor to this court hearing, did you?

A I went.

• • • • •

[158] • • •

Q You described that you have minors come in at least an hour and a half before you meet the 11:30 or 1:30 schedule, is that correct?

A Yes.

Q Are there any particular days of the week that court is heard or is it any 11:30 or 1:30 scheduling?

A It is any day of the week.

Q And have you ever had the court heard minors outside of those two time periods?

A Yes, we have.

Q And how many times?

A Well, how many times, we had that at 5:00 after the courthouse had closed not long ago.

Q Why did you hear it after the courthouse closed?

A Because the father of the mother, the grandfather of the client was so well-known in the courthouse that there was just absolutely--the mother did not want to go to the courthouse during the working hours nor did the granddaughter, so the judge agreed to meet them after 5:00 o'clock when the courthouse was cleaned out so they wouldn't run into somebody.

Q Are there any other instances?

A Yes. Judge Sweeney not too long ago, we found out a mother was lying to us and what she was was a stepmother and the daughter was not really adopted and so we called up Judge Sweeney **[159]** because Judge Martin was gone and we told him

that we had this problem and we really felt that the only way we could comply with the law was to put her through the court bypass system because they did not want to notify the natural mother and so Judge Sweeney did hear them, you know, within a matter of, you know, an hour or so.

• • • • •

[171] • • •

Q When you get back from court are minors relieved at the decision? Do they expect that some of the petitions would be denied?

A Yes. And, you know, that is one of the things they always ask us, is he going to approve or is he going to deny and we always just say, you know, each one is individual and you know we can't answer that for you.

You see, they are always relieved that they have been granted and we never give them the percentage of how many have been granted because I just think that would be a real false hope for those young women and so we don't do that.

• • • • •

BY MR. GALUS:

[355] Other than the fact that you now go in greater depth with your patients as to why they have elected not to notify their parents, and other than information concerning the source of financial support, are there any other—is there any information that is called for by this report to the court that you did not—that you did not, or that you do not routinely obtain in the normal course as the provider of abortions?

A No.

• • • • •

[371] • • •

Q Okay. You had a hearing on a Friday after Thanksgiving one **[372]** year, didn't you?

A Yes, I did.

Q And the petition was granted?

A Yes.

• • • • •

TRIAL TESTIMONY EXCERPTS OF CYNTHIA DALY,
ASSISTANT RAMSEY COUNTY PUBLIC DEFENDER

[DIRECT BY MS. LYNN]

[CROSS BY MR. ACKERBERG]

[244] • • •

Q And approximately how many minors did you represent during that period of time?

A My guess is between 150 and 200.

• • • • •

[253] • • •

Q Did you always ask her questions about why she didn't want to notify her parents?

A Yes.

Q What sort of questions would you ask about that?

A I would ask her why she didn't and I told her that I was going to have to ask her in front of the judge why she didn't want her parents to know and I think it is really intrusive, but I thought it was necessary for the hearing.

Q Was there a requirement that minors had to have counseling in the clinics prior to coming to the hearing?

A Not initially. Later on we instituted that.

Q And approximately how long would an interview with a minor, prior to the hearing, take?

A Both I and the guardian would have to interview the kid prior to going to court and I would talk to them anywhere between ten and twenty minutes depending on how nervous they were and how long it took me to calm them down and get them to understand what was going on.

[254] • • •

Q So how were you able to recognize the minor that you were supposed to represent that day?

A The girls for these hearings stood out like a sore thumb from the various other people sitting there. They didn't look like the delinquents.

Q Can you—

A You can tell.

Q Can you describe how you could tell?

A They were generally, when I was doing them, almost **[255]** exclusively white middle-class, upper middle-class, always dressed nice and had their hair nice and they looked different from my delinquency clients.

• • • • •

Q And what would you talk to the minor about?

A The first thing I did was try to calm them down and explain to them what they had to go through, what the court proceeding was, who the people were involved; just try to calm them down and get them so they weren't quite so nervous.

Most of these kids had never been to court before and didn't have an understanding of what the court system was like or what a hearing was like or what the documents were, so I really tried to explain things to them, introduce—not introduce, but tell them about the personnel involved, try to tell them Judge Petersen was nice and rides a motorcycle and tried to humanize them so they weren't as scared of the judge.

• • • • •

[257] • • •

Q And at the bottom of that form I noticed that it must be petitioner, that is the minor's signature must be notarized, is that correct?

A That is correct.

Q Did you ever have problems getting that petition notarized?

A Some of the women in the clerk's office would not notarize them because of their opposition to abortion. Finally Judge Petersen's reporter got a notary stamp and then the problem was solved.

Q But there was a time when it might be it was difficult, there were times when it was difficult to find a notary who was willing to sign?

A Correct.

• • • • •

[260] * * *

A Just prior to Judge Petersen's first vacation, the first vacation after we started doing these hearings, I went and I talked to several of the district court judges kind of to sound them out as to whether or not they would be willing to hear these cases.

Some I didn't talk to because I felt fairly confident I knew the answer. Some were willing to do them and some wouldn't touch them with a 10-foot pole.

Q Would you say that you sometimes then had difficulty finding another judge when Judge Petersen wasn't available?

A It would take a lot more time. There was never an occasion where we could not find a judge but it would take a lot of time.

* * * * *

[262] * * *

Q How would describe the emotional state of those minors prior to the hearing?

A Scared. They were scared, most of them had never been in court before so they were facing a court proceeding, they were being talked to about some of the most intimate details [263] of their lifes by a bunch of strangers, and they thought that whatever Judge Petersen did would affect the whole rest of their lives, which it may well have. I think they were very scared.

Q Those parents who accompanied the minors that you talked to, what were their reactions to the court process?

A I think some of them—typically they were mothers—but I think a lot of them were angry, either at the other parent who might not have been involved, that they had to go through this process.

I think they were angry, they were worried about their kid and they were nervous too. A lot of these parents had never been in court. You know, it is a mixed reaction, concern about the kid.

Q Can you describe the kind of minors you saw in terms of where they came from or their socioeconomic status?

A They were typically middle to upper-middle-class kids, most of them, the vast majority of them were in school, the vast majority had plans for the future. Typically they were white.

Q Could you make any general observations about their status in school or their grades or where they were employed, did they tend to be employed in any way or—

A They tended to be really neat kids, actively involved, fairly responsible in a lot of areas of their lives. They [264] were a real contrast from what I saw in delinquency court. It was refreshing to see neat kids. They were typically very bright kids. I don't know whether it was the dummies couldn't figure out how to get to court or whatever, but they were typically very bright kids.

* * * * *

[270] * * *

Q Given your experience representing minors in these parental notification hearings, do you think that the court bypass process benefitted the minors in any way?

A No. I think it was another hoop to jump through and a very damaging and stress-producing procedure that didn't do any good.

Q How did you view your role as a lawyer in these proceedings?

A I would hope that I was able to make it easier for the girls I represented.

I oftentimes felt like a peeping Tom—

THE COURT: I am sorry, felt like what?

THE WITNESS: A peeping Tom, looking into these real private issues that were, of necessity, raised.

I hope it made it easier for the girls.

* * * * *

[279] * * *

BY MR. ACKERBERG:

Q In your experience how has Judge Petersen interacted with the minors who appear before him in these proceedings?

A He has been kind, thoughtful, made every effort to put the kids at ease, but to carry out his role as he perceives it.

He is a fine judge and he made every effort to make that kid comfortable.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. LENORE WALKER, CLINICAL PSYCHOLOGIST

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[296] * * *

Q Dr. Walker, what is the definition in your field of the term violence?

A The term has a number of different definitions in terms of family violence. It would be defined as any kind of physical, psychological, or sexual abuse towards another member within the family.

Q And how would you describe the term battered woman?

A A battered woman would generally be somebody who is in a relationship with a man who commits that kind of violence. My definition is that it has to be physical, very serious psychological abuse that is life threatening, or sexual abuse within that relationship committed by a man to get her to do something that he wants her to do without any regard for her rights or her feelings about it.

Q Are you familiar with any studies about the prevalence of such violence in American families and in Minnesota in particular?

A Yes, I am. The prevalence in American families has been estimated by Murray Strauss, Richard Gillis and Susan Steinmetz in their epidemiological study at occurring in a little less than two million families in the United States.

In Minnesota, studying a report that was issued in 1985, I believe, it estimates that there are on the average 31,000 homes—31,000 women where violence takes place. These data,

as I understand it, appear in a particular report that is **[297]** based on the Minnesota mandatory reporting law.

Q When you said 31,000, you mean 31,000 acts a year?

A They averaged 31,000 incidents per year. So, there could be more than one act within an incident.

Q Do you know how such acts of violence relate to other violent crimes in Minnesota in terms of proportion?

A There is a statement in this particular report that suggests that domestic violence is perhaps the most frequent occurring crime in the State of Minnesota.

Q Are reports such as this regularly relied upon by experts in your field?

A Yes they are, both by mental health professionals and I believe that reports such as this one are also relied on by funding agencies so that they can allocate the distribution of state monies to help combat this problem.

Q Have you, in the course of your work, studied the proportion of homicides that occur between family members?

A Well, I certainly work a lot in the area of homicides. It is very difficult to get the exact numbers that occur within families. The FBI statistics estimate that perhaps as many as 25 to 30 percent of homicides, all homicides, occur between family members.

Q You stated that you did a comprehensive study interviewing 400 battered women. Do you know from that study or from other studies in your field, where there is a relationship with a **[298]** battered wife, how frequently there is also violence to children?

A In our study we found that the women reported in 55 percent of those cases the man who battered the woman also battered the children. When she was living in a violent situation she was likely to batter the children 25 percent of the time. For those women who were out of the relationship, that figure went all the way down. It was eight times higher for violence to occur when they were together in the relationship, against the child, from the woman's point of view.

The violence did not go down, according to the women, for the man to the child, whether they were living together or not.

Q You mean when the man was separated from the family his violence to the child stayed the same, but her violence to the child went down?

A That is correct. In my research, I may add also, my figures are compatible with other researchers in the field, that there is a very high relationship between all forms of family violence.

Q You mentioned in describing your expertise the term dysfunctional families. In your field do people describe families in different ways? Are their categories of families that psychologists in this area depend upon for their classification?

A Yes. In fact there are a number of studies, including one done by a researcher named Gerald Patterson and his colleagues **[299]** in Oregon where they have looked at dysfunctional families, abusive dysfunctional families and normal families, and what they have found is that there is a very different kind of communication pattern in each of those three families.

In the normal family they took a lot of observational periods in these families, they sent observers into the home and they quoted interactions. They found in a normal family the ratio of positive kind of interactions between the members is much higher than the negative interactions.

In a dysfunctional family that switches and there is a much greater rate of negative interactions than the positive kind of interactions between people.

In an abusive dysfunctional family there is still a higher level of negative interactions but there is also the—the pattern is different. There tends to be a blast of negative kinds of interactions and then a period of calm rather than the regular one, two, three, more even tempered interactions and then perhaps a—perhaps a blast of nice kind of loving interactions. That is very similar to the work my research has uncovered, that in battering families there is a three phase cycle with tension building and then an explosive incident which is equivalent to that blast of negative behaviors and then a period of no—either no tension or kind of living behavior.

Q And their definition and category of dysfunctional violent families, and that dysfunctional family, is accepted by others **[300]** in your field?

A Yes, it is.

Q Could you describe the relationship between the husband, wife, and children in a dysfunctional family?

A In a dysfunctional family communication patterns are interrupted in that family, it is probably more negative kinds of communication, but there is also a whole lot of—of just inability for people to understand one another; a lot of misperceptions go on.

In an abusive dysfunctional family the system becomes a very closed system. There is a lot of isolation, there is a great deal of fear that someone is going to find out the terrible secrets that go on in that home, and there is also a lack of—there is a greater sensitivity to each other, but a lack of communication with the outside world. Helpers are not seen as being important in that kind of an abusive dysfunctional family, and they are less likely to seek help.

Q In a violent dysfunctional family there is a difference in the way they communicate not only with each other but with the outside world?

A That is correct.

Q And you stated there is reluctance for family members, even those who are abused, to seek help or to communicate this to the outside world?

A That is true.

* * * * *

[305] * * *

Q Has your research developed a psychological portrait of the characteristics of a batterer?

A Yes. I have done clinical work with batterers. Although I have not done specific research with them, my research has been more what women say about the men, and there is a great deal of overlap between my clinical work and what the women say.

I also work with other researchers in the field who actually do study the men and we are finding great areas of agreement for them, for what we now know about men who abuse women.

Q And what is the psychological portrait of a batterer?

A Batterers tend to have low self-esteem, they tend not to [306] have any self-confidence within themselves. They are described as having more than one personality, often a Dr. Jekyll-Mr. Hyde. It is not a clinical kind of diagnosis like a multiple personality, but rather I see many sides of a batterer and it is because he has what we call emotional mobility, he can go from one mood to another with very rapid mood swings and you cannot often predict how soon his moods will change. In addition he is very jealous, often pathological jealousy. There is a great deal of sexual abuse we are discovering with batterers, also sexual insecurity, a high level of sexual—confusion between sexual intimacy and emotional intimacy.

There is also a lack of boundaries for batterers so that they believe their families are their property and that people within their families are not treated as individuals. In communication patterns within those families, and the communication of a batterer is almost impossible in a human way because he decrees that he has the right to make all decisions and isn't always interested in what other people think or feel or will do.

Batterers tend to be isolates at times, although they can be very charming at work. They range from all different socio-economic classes and have all different kinds of educational levels as well. We have not found any patterns in that particular demographic grouping, but we have in their personality patterns.

Q Is there any—you described the characteristics towards the wife and children. Does this cease when the family, when the [307] husband and wife become divorced or separated?

A No, it does not. In fact that has been one of the most interesting areas in the ten or so years that I have been working in this field. There was a belief at first that if you helped couples to separate that that would end the violence. In fact we have learned that that does not happen, that the violence and the harrassments continue well beyond the divorce, especially when there are children involved.

Q And have you studied any homicides that have occurred during the period of separation or divorce?

A Yes. The most common time for a homicide to occur is at the point of separation. Batterers have a fear of abandonment and when they feel that they are losing their family they are most likely at that point to become homicidal or suicidal or actually both.

* * * * *

[308] * * *

Q Would you say that adolescence, as compared to other stages of childhood, is a particularly vunerable point insofar as a battering home?

A It is really a very vulnerable point, one, because there is a great deal of sexual abuse and a lot of sexual jealousy for the batterer, so just the very being of at that time adolescent sex such as dating, a prom, they don't want their wifes to go out and certainly not their children. They want to keep everybody inside that home and that causes a great deal of violence and conflict in those homes.

In addition, I find that in the violent homes adolescence increases the amount of physical abuse; that when you study families over the life span you find two specific times when violence is the highest. One is in pregnancy and the very early stages of a child's life, the first few months; and the second is at adolescence, two points, and we don't really understand all the causation, but if you plot that all out on charts that is what it shows.

Q Have you or others studied any correlation between pregnancy and violence?

[309] A I have studied some in my research program and we found about one third of our subjects were submitted to terrible violent battering incidents during pregnancy. Richard Gillis (ph) another researcher from Rhode Island also studied it and found a very high rate of violence that increased during the period of pregnancy.

Q You are talking in terms of pregnancy of the wife?

A That is correct.

Q What about pregnancy of the teenage daughter?

A There has been very little research that I have seen about pregnancy during—of an adolescent daughter. However, the theoretical implication would be that it would be very high were we to study it and that would be part of the high figures of child abuse and general high levels of violence that increases when children are adolescents.

Q What would you expect the effect of notice of a daughter's pregnancy to have on a batterer?

A I think it would absolutely enrage him. It would be much like showing a red cape to a bull. That kind of information just plays right into his worst fears and his most vunerable spots.

The sexual jealousy, his dislike of his daughter going out with anybody else, would make him very angry and would probably create severe abuse as well as long term communication difficulties. In some cases the man may not react impulsively [310] and may hold on to that kind of information. But during the next fight it would certainly be used as a weapon and would continue to be used for years.

Q Have there been studies on the kind of information or the kind of incidents that do provoke this family violence?

A Well, most of the research shows it doesn't matter what kind of behavior goes on, that the violence comes from within the man himself; that his inability to control his anger whenever there is frustration or stress will cause a violent episode. It is inability to communicate effectively that causes the violence.

Q But pregnancy is a factor that has been correlated to provoke violence?

A That is correct. There is no—when scientists talk about correlation we don't talk about cause and effect. But the association of pregnancy has been found as one of the factors that causes an increase in violence.

Q Have you done any studies correlating the violence in a dysfunctional family and sexual abuse?

A Yes, I have. I have done most of my—most of my work has been clinical studies in that particular area and I found there is a much higher incidence of child sexual abuse and adolescent sexual abuse in battering families, particularly in those families where the man is known to also have sexual problems with his wife, where he is also sexually abusive towards her, that

he may have a much higher risk for children to be incested upon in those [311] particular families.

Q And you have personally studied families in which there is incest?

A Yes, I have.

Q And does the knowledge of this incest coming out provoke violence in the families?

A Yes, it does. In fact in twelve of the 91 homicides that I have worked on the exposure of incest has actually caused the violence to escalate to such a point that the woman killed the man. In one of those twelve cases, there was actually an incident where the daughter became pregnant and that is how the wife found about the incest and the emotional upheaval in that family pushed the man to come at the woman with a knife and her to take a gun to defend herself against him and shoot and kill him.

Q What was the name of this woman who killed her husband because she found about the incest?

A This particular woman who found out that the daughter was pregnant was Nellie Glenn (ph) and that was a trial that took place in Fort Wayne, Indiana, and she was found not guilty by justifiable homicide. It was a self-defense acquittal.

Q And you testified in that trial?

A Yes, I did.

Q And [illegible] examined this woman?

A Yes, I did.

[312] Q And you found that the knowledge of the incest pushed her over the brink?

A Yes, I did.

Q You found that the pregnancy knowledge pushed her over the brink?

A That is correct. That is how she found out about it.

Q Are you familiar with the Minnesota Statute 144.343?

A Yes, I am.

Q I would like to draw your attention to Subdivision 4, Subsection (c).

Dr. Walker, this section says that there is an exception to mandatory notice or court bypass if, "the pregnant minor

woman declares that she is a victim of sexual abuse, neglect, or physical abuse".

In your opinion is a minor who is pregnant and seeking abortion, and is a victim of sexual or physical abuse, likely to declare that she is when asked?

A In my professional opinion that would be a very unlikely occurrance, that it is very rare for children who are either physically or sexually abused to tell anybody about the abuse in any event. With the addition of pregnancy it would make it even less likely; there may be some who would, but it would be a very small percentage who would tell.

Q So minors who are given this option of exception would not likely be able to take advantage of it psychologically, is that [313] correct?

A I think it would be almost impossible for most of them to take advantage of it psychologically.

Q In your opinion is a minor who comes from a dysfunctional family likely to be psychologically able to choose and carry out the court bypass procedure?

A I think it would be exceptionally difficult.

* * * * *

Q In your opinion is a minor who comes from such a dysfunctional family likely to be psychologically able to choose and carry through the court bypass procedure?

A In my professional opinion it would be unlikely for a minor to be able to carry through such a procedure. The rules of those families are secrecy, and not to tell anyone. Going to court would be an exposure of a risk of—an exposure that would create a higher risk of any kind of abuse and it would be very difficult for a minor to do that.

* * * * *

[314] * * *

BY MS. BENSHOOF:

Q In such families—

THE COURT: Dysfunctional families?

MS. BENSHOOF: Yes.

BY MS. BENSHOOF:

Q —is a minor's judgement that she cannot notify one or both parents because of what would happen likely to be a correct perception?

A In my professional opinion, yes, it is likely to be an accurate perception. In abusive, dysfunctional families particularly a hyper-reluctance to discuss any potential violence develop and that sensitivity is a very acute and real sensitivity and I think her judgement, a minor child's judgment that this might—telling her parents might create a dangerous situation is very accurate.

THE COURT: Do you feel the same way about a functional family?

THE WITNESS: It is less sensitive in a functional family than it is—I think—yes, that minors tend to understand their parents in many situations, particularly in this situation, but their perceptions may be less accurate in function [315] families.

In dysfunctional families it can't be less accurate because that is what saves them from a lot of abuse growing up so they have a much more finely tuned understanding of how their parents will react in a situation.

THE COURT: In the dysfunctional?

THE WITNESS: In the dysfunctional.

THE COURT: In the functional family are you of a mind that the minor could accurately predict the reaction of the parents?

THE WITNESS: I think at times they can but they won't have the sensitivity that a child who grows up in a dysfunctional family would have.

THE COURT: They are not as likely to be correct in a functional family as they are in a dysfunctional family as you understand?

THE WITNESS: I can't say that they wouldn't be apt to be correct, because they might. I don't really know. I just know that the sensitivity in abusive families is much more sensitive and they are correct.

THE COURT: Sensitive to what the reaction is going to be?

THE WITNESS: That is right. That is correct.

BY MS. BENSHOOF:

Q In such dysfunctional families where a mother makes or [316] believes there will be violence if the father learns of the daughter's pregnancy, is her perception likely to be an accurate one?

A Yes, it is, again for the same reasons.

* * * * *

BY MS. BENSHOOF:

Q For those minors coming from dysfunctional families who cannot psychologically envoke the court option, what is the likely reaction in those families when they learn of her pregnancy?

THE COURT: All right, you may give your opinion.

THE WITNESS: In my professional opinion the most likely reaction is a greater dysfunction within this family. Communication patterns will be severed and there is a much higher risk of future violence.

BY MS. BENSHOOF:

Q Do you think that such involuntary notification could result in a positive effect on the family communication patterns?

A No, I do not. There is no evidence, either clinical or research data to suggest that that would happen.

[333] * * *

BY MR. ACKERBERG:

A The best epidemiological estimate is in Murray Strauss, Richard Gillis and Sue Steinmetz study that they conducted that was funded by the National Institute of Mental Health. They knocked on 2,000 doors in a random way according to research procedures, and they simply asked questions about—a lot of questions about the family and one set of questions was on whether or not there was a physically abusive incident; and they

found 28 percent of those homes. Then they, of course, extrapolated from that some kind of sample they can generalize to the American population. They only knocked on married families doors and so in single families where there was abuse, and some of that abuse is still continuing even though they are single, they did not include those data. They also didn't include the data for people who might be living together and not be married, or dating and being abused, and so they say that that 28 percent is a very low estimate of the number of physically abusive families.

They did not ask questions about sexual abuse within the marital relationship so that would add to it; or very severe psychological abuse. In my research we use the definition that Amnesty International uses for psychological torture.

When we talk about psychological abuse that is a low estimate and that is where the figures come from.

[334] MR. ACKERBERG: Thank you.

THE COURT: Do you conclude from that that 25 to 50 percent of the married women are suffering from Traumatic Stress Disorder?

THE WITNESS: No, you can't do that. First of all you can't do it unless you see them you can't diagnose them, that would be unethical procedure. They also say it is at least one abusive incident. For me you need—and you could use Post Traumatic Stress Disorder for that—for me I think you need to have at least two.

THE COURT: To diagnose the Post-Traumatic Stress Disorder?

THE WITNESS: And you also have to see the symptons of it there. It is entirely possible there are people who are battered who we have not seen who don't have the symptoms of Post-Traumatic Stress Disorder and then you couldn't diagnose them.

MR. ACKERBERG: What proportion of the families are dysfunctional?

THE WITNESS: I don't know. I don't know, but we know the divorce rate is up to about 50 percent in this country, so it is pretty high.

* * * * *

TRIAL TESTIMONY EXCERPTS OF JUDGE GERALD MARTIN, FAMILY AND JUVENILE COURT JUDGE OF ST. LOUIS COUNTY

[DIRECT BY MS. LYNN]

[396] * * *

Q And do you know approximately how many you have presided over?

A Personally I have presided over almost exactly 225, it is either 225 or 226. The total number of cases in Duluth has been about 275.

Q So you are in fact the judge with the major responsibility [397] for implementing this statute?

A Yes.

* * * * *

[399] * * *

Q Have you ever talked to somebody from the Clinic about scheduling an appointment yourself?

A Yes. I believe so. That is rare but I can remember one occasion where I was called by the Health Center staff about a girl driving from the Michigan Peninsula and in order to arrange that it would have to be in the middle of the afternoon as a matter of convenience. So she called me directly to see if that was all right. There may have been some other occasions, but I can't remember any other occasion.

Q What was your response to that?

A Yes, we arranged a time that would meet her needs.

Q All right. Under what circumstances will a minor's abortion petition case be referred to a judge other than yourself?

A If I was out of town or on vacation or just not available. Otherwise I would hear it.

Q Are you available for hearings Monday through Friday?

A That is correct.

Q How about weekends?

A No, not as a regular matter.

Q Has anyone ever requested you, or your court, through the court reporter, that a hearing be held on the weekend?

A No.

* * * * *

[407] * * *

Q What is your understanding of the standards set out by Minnesota Statute 144.343 to be used in either granting or denying these petitions?

A We are to decide whether the petitioner is mature and capable of giving informed consent to an abortion. If we find that either of those do not apply, then we have to make a decision as to whether it is in the best interest of the petitioner to proceed with an abortion without first notifying her parents.

Q What is your understanding of the term parents in this statute?

A Well, the statute only refers to parents and I assume they are referring to natural parents, although I would interpret that to also include adoptive parents.

Q Would you include that to—would you interpret that to include a situation where a parent has had their parental rights terminated?

A I have not confronted that. I would interpret it as excluding parents who have had their rights terminated, but it is not clear.

Q What do you think the statute means when it says mature and capable of giving informed consent?

A Well, I don't really know. To be quite frank about it, I [408] think your guess would be as good as mine. I have read U.S. Supreme Court Decisions, this is back in '81, to see if they gave any guidance, and some of the Justices talked about strain within the family relationships as somehow applying to the issue of maturity or whether a petitioner should be permitted to go ahead without first notifying the parents. So, that is a factor I consider, although it is not logically related to maturity.

Beyond that I try to make a subjective judgment as to whether the petitioner is mature, is she articulate, is her reasoning adult like, reasonable. By definition anybody under the age of 18 is immature and yet obviously the legislature presumes that many people below the age of 18 are mature; but they don't know, there is no guidance within the statute to assist the court in determining what the means or how to make that kind of determination.

Q How do you think, or do you think that mature differs from capable of giving informed consent?

A I don't really know. I think that—I think it might be possible for an immature person to give informed consent so I am not sure that they are the same thing.

In the sense that informed consent means that you have gotten the information you need in order to consent—you could argue that maybe someone who does not have maturity cannot give reasonable consent, but the only term in the statute is informed consent, so, you know, I have never had to confront that directly, **[409]** but if I had to I am not sure what the answer would be.

Q What do you think the statute means when it refers to the pregnant woman's best interest?

A That part of the statute could be given either a narrow or broad interpretation. It can mean should she be able to go ahead without notifying her parents, period; or it might mean that the court should make a decision as to whether she should have an abortion or not, and if so, whether she has to notify her parents. It means one of those two things, either the narrow definition or the broad. Which one it is, I don't know.

* * * * *

Q And in the approximate 225 hearings that you testified you have presided over, in how many did you find the minor to be mature and capable of giving informed consent?

[410] A All but one.

Q And in that one in which you found the minor not to be mature—excuse me, strike that.

So in all of the cases that—where you granted the petition you did so on the grounds that the minor was mature, is that correct?

A That is right.

Q And in the only petition that you denied you found that she was not mature and I take it that it was also not in her best interest not to notify her parents, is that correct?

A Yeah. In the one I found that she was not mature and capable of giving informed consent. Then I found that it was

not in her best interest to proceed with an abortion without going through the notification process.

Q Can you describe the circumstances of that one case?

A Well, it was a 14 year old girl and a very immature 14. Her mother had been consulted, was at the hearing, and approved of her decision to go on with an abortion. The father had been out of contact with either the mother or the child for at least seven years. His whereabouts were unknown. The last known address was from about seven years before.

The statute requires that a reasonable effort be made to make contact with that parent in that case.

Q And why did you make a finding that her best interest—that it was not in her best interest not to notify her father?

[411] A Well, this was not against her best interests—wait a minute, you have got—

Q I am sorry—

A I know what you mean anyway.

Q You know what I mean?

A I saw no reason not to send a certified letter, return receipt requested, to the last known address seven years ago. There is no—there was really no doubt in my mind that they would never make contact with the person anyway. There were no reasons given as to why it would be detrimental if contact were made. He was not a threat, there was no past history of abuse or that sort of situation that you normally see in these cases.

Q So when you decided that petition, Judge Martin, you had no reasonable expectation that sending that letter to the last known address would result in actual notification of the father, is that correct?

A That is correct. There was no doubt in my mind that contact would actually—actual contact would not be made.

* * * * *

[412] * * *

Q What kind of reasons do the minors give for not wanting to notify their parents?

A It is almost always a case of very unhealthy family situation. It is frequently a physically and emotionally abusive

father, usually; alcoholic parents, it might be a parent that physically abuses the petitioner, or would blab all over town **[413]** about the situation and we have a lot of small towns around that area. There is often—you see a case where one of the parents is extremely ill, heart condition, or in some sort of nervous situation, receiving treatment for a very nervous disorder, and it is felt that if that parent learned about the pregnancy it would be detrimental or even life-threatening for that person.

You often see a case where one of the parents has had very little contact with the child for years after a divorce, maybe they see that parent once a year for the last five years, and never discusses anything important with that parent and doesn't want to have to consult that parent about this.

Those are the most common cases.

Q Can you give any specific examples of these kinds of situations?

A Well, the ones that would stick out in your mind are the abusive situations and it is probably the most common type one. In one case about a week or two before the hearing the father had broken the petitioner's mothers wrist and had frequently physically abused both the mother and the petitioner. Another case that I can recall from the range, the father frequently beat the petitioner and she had no doubt in her mind that the same would occur if she notified the father about her pregnancy.

Other than that there is no individual cases that stand out, but that, I think, is a very common situation.

Q And when the petitioners tell you that they are afraid of **[414]** abuse from their parents, do you believe them?

A Oh, yes. For sixteen years I have seen a great deal of that and there is no reason for me not to believe that.

Q What have been your observations regarding the minor's reactions to being in court?

A Well, I think everybody, I assume, who has to be a witness in court, it is a nerve wracking experience and I think particularly for these juveniles it is a very anxious time; and particularly with the personal issues involved. I think they find it a very nerve wracking experience.

Q Well, based on those observations do you have any opinions as to the impact on the minor in having to go through this court proceeding?

A I am sure it is an ordeal for them.

Q What have you observed, anything about their reaction after you have signed the order?

A Oh, when the hearing is over they show a great deal of relief and they proceed out of the chambers with a great deal of speed and, you know, that is what I see.

* * * * *

TRIAL TESTIMONY EXCERPTS OF CHAR BAKER, EXECUTIVE DIRECTOR OF MIDWEST HEALTH CENTER

[DIRECT BY MS. LYNN]

[476] * * *

Q All right. What effect do the court requirements have on Midwest's scheduling of minor patients for abortions?

A It always includes a two-day appointment and in some extreme situations maybe even three days because we are **[477]** required to counsel the patient prior to going to court; also do a lab workup and examination, and then the court appointment has to be set and once court approval has been made then she comes back for the procedure.

Typically the young woman would have the counseling session take place one day and then be scheduled to go to court the day of the procedure. So then she would be going to court on another day and then coming back for the procedure.

Q Now you mentioned that sometimes it is a three-day process.

Can you explain when that would happen?

A That would happen if the court situation was such that the minor did not get back in time for the doctor. So then she would have to come back on a third day for the procedure.

* * * * *

TRIAL TESTIMONY EXCERPTS OF MARIA HONKALA, FORMER TEEN ADVOCATE AT MIDWEST HEALTH CENTER FOR WOMEN

[DIRECT BY MS. LYNN]

[CROSS BY MR. GALUS]

[526] * * *

Q Did you ever have any minors that you accompanied to court run into anybody that they know?

A Yes, several times the women would know one of the employees at the court, whether it be the judge or the public defender or the guardians. That was a problem and also, just running into or worrying that the parents worked in downtown, worked in the government center.

I also had one woman, I also had a woman that her school was on a field trip while she was at court and saw her and asked her what she was doing there.

* * * * *

BY MR. GALUS:

[538] Q You mentioned in your direct testimony certain problems you have observed with confidentiality of those of your patients going through the court process in Hennepin County, didn't you?

A Yes.

Q Okay. And I believe you mentioned on one occasion or on more than one occasion, perhaps it was your testimony, that one of your patients, court minors, knew some court personnel?

A Yes.

Q How many times did that occur?

A Just the court personnel or including—

Q Let's take the court personnel.

Let me ask you that first.

A I would say at least 10.

Q Okay, who—could you identify the court personnel who the minor was acquainted with?

A Judge Oleisky, George Widseth, one of the public defenders, a couple of the guardians.

Q Were the majority involving Judge Oleisky?

A No, I would say the public defenders.

Q The majority involved Mr. Widseth?

A And also David Knutson.

Q These were situations where the court minor was acquainted with Mr. Widseth or Mr. Knutson?

A Yes.

[539] Q Do you know what the nature of the previous acquaintance was in connection with Mr. Knutson and Mr. Widseth?

A Neighbors.

Q How about the occasion—when Judge Oleisky had been previously acquainted with the court minor, do you recall that was once or more than once, that occurred, to your knowledge?

A I believe it was twice.

Q And on those two occasions do you recall what the nature of his prior acquaintanceship had been between the judge and those two minors?

A Judge Oleisky friends' daughter was one of them and I believe the other one was a woman just knowing the judge from seeing the judge before for something else.

Q That child had appeared before Judge Oleisky's juvenile court previously?

A Right.

Q And on how many occasions, to your knowledge, have court minors become involved with guardian ad litems with whom they were previously acquainted?

A I would guess about three times.

Q Okay, that is your best estimate, three times?

A Yes.

Q Do you recall the names of the guardians involved?

A No.

[540] Q And do you recall the nature of the prior acquaintanceship?

A Neighbors.

Q On any of the occasions where the minor had a prior acquaintance or acquaintanceship with public defender Knut-

son, do you have any reason to believe that Mr. Knutson violated confidentiality of that proceeding by communicating anything about it to any third party?

A No.

Q On the occasion when one of your—one of the court minors had a prior relationship with public defender Widseth, do you have any reason to believe that Mr. Widseth violated the confidentiality of that proceeding by communicating it in any respect to any third party?

A No. I would do a couple of things: If the women showed up at court and knew them, I would let them know ahead of time that she was concerned about knowing them and also if the minor expressed to me that she knew, say, Judge Oleisky or knew somebody that worked there, I would call ahead of time and make sure that that person, you know, tried to make sure that that person is not seen by that person that she was—

Q I think I may have misunderstood you on the two occasions where the young woman had been acquainted with Judge Oleisky, did you call ahead?

A On those two women I am talking about they—no, they found **[541]**—I found out when we were at court.

Q Okay. So there was no forewarning of the acquaintance?

A Right.

Q And on the occasion involving Mr. Widseth did you know in advance that the young woman was acquainted with Mr. Widseth?

A No.

Q And on the occasion with Mr. Knutson?

A No.

Q So the approximately 10 occasions that you described were occasions where they actually confronted each other?

A Right.

Q Now you are telling me on other occasions you may know in advance that the minor may be acquainted with a public defender or a guardian?

A Right.

Q How would you know that?

A By her asking me, you know, is Judge Oleisky the judge that would be seeing me.

Q Okay. And on those occasions you have indicated yes or probably yes?

A I have called to find out.

Q Okay. And you have inquired of the minor whether she had any objection to proceeding before Oleisky?

A Right.

Q And on occasion there has—had there been an objection?

[542] A Yes.

Q Or—

A We have scheduled her to come in when Judge Oleisky would not be there.

Q Okay. Other than the minor forewarning you about preferring not to appear before Judge Oleisky has any other minor forewarned you about preferring not to be represented by a particular public defender or be involved with a particular guardian?

A Just not somebody specific, but just saying that they know certain lawyers or whatever that worked at the government center and I don't know whether or not, you know, they worked there or whatever.

Q Okay. You mentioned a field trip, the occasion of a field trip where one of your patients was awaiting court when a field trip from her school came by.

Did I understand you correctly?

A Yes.

Q And she was seen by one or more of her classmates?

A Yes.

Q And it happened more than once?

A No.

Q Other than the field trip and the occasion you have mentioned one of your patients was acquainted with a public defender or a judge or a guardian ad litem, have there been **[543]** other problems with confidentiality that you are aware of?

A Other than when the woman is sitting in the lobby and there are other women that are there for the same reason that know each other, feeling uncomfortable and that other woman that is there for the same reason goes to her school.

Q You have clarified for me before on certain occasions you were able to be forewarned about a possible acquaintanceship and would call ahead.

I think I was in the course of asking you whether or not on any of those occasions when the young woman was acquainted with a public defender, do you have any knowledge whether that public defender breached any confidentiality in the sense of communicating the proceedings or any aspect of those proceedings to any third party?

A No.

Q On the occasion when the young woman was acquainted with the guardian ad litem, do you have any knowledge that those, any of those guardian ad litems breached the confidentiality of the proceedings by communicating the proceedings to any third party?

A No, other than a few times, I would say three times that I was there while the women were sitting in the lobby, one of the—this is with the receptionist—one of the employees would walk in and ask why the women are sitting there and the employees would, like, let that employee know why the women are **[544]** there.

Q That is the Hennepin County Public Defender's Office you are talking about, correct?

A Yes.

Q With respect to the guardian ad litem, with whom some of your patients have been acquainted, there has been no breach of confidentiality coming from those guardians, to your knowledge, has there?

A No.

Q Okay. You don't have any involvement with the Hennepin County Public Defender's Office anymore, do you?

A No.

Q At least in terms of—

A Right, the location.

Q —where the young women wait?

On any of the occasions involving a compromise of confidentiality in terms of the court personnel being acquainted with the young woman or someone in Hennepin County the public defenders' reception area inquiring why the young women were

there or on the other occasion of the field trip, in any of those instances to your knowledge have the parents been made aware of the proceedings?

A No.

* * * * *

[547] * * *

Q Okay. And do you know, based upon your observations, what fraction of your patients do in fact come back for two-week checkups?

A I would just say most.

Q More than half?

A Yes.

Q And for the others you have no idea or no personal knowledge as to whether or not they have in fact received a checkup, correct?

A Yes.

* * * * *

[556] * * *

Q Okay. Did you ever—I take it from your testimony that you have been successful on a number of occasions in getting scheduling accommodations from Judge Oleisky, correct?

A Yes.

Q And also from Judge Albrecht?

A Yes.

Q Okay. In a particular circumstance it was exceeding the five or six limit per day?

A Yes.

Q Did you ever ask Judge Oleisky if he would hear these matters at 4:00 o'clock p.m.?

A Yes. He has a couple of times seen women privately.

Q After 4:00 o'clock p.m.?

A I am not sure if it was after 4:00 o'clock p.m. or not.

Q Have you ever asked Judge Oleisky to hold court for these purposes after 4:00 o'clock p.m.?

A No.

[560] * * *

Q Okay. And at one point someone on behalf of the court system indicated that the court was willing to treat anything of a gestational age of 12 weeks or greater as an emergency [561] for scheduling purposes?

A Right, and then they switched it to be 11 weeks because I was asking them—I was trying to figure out who was an emergency patient to them.

Q For purposes of the court deviating from its normal scheduling practices, right, as far as hearings?

A Right.

Q Okay. And they at first said we will treat anything over 12 weeks as an emergency for these purposes?

A Right.

Q And you urged them to make 11 weeks the emergency definition?

A Right.

Q Correct. And they agreed?

A Yes.

* * * * *

[564] * * *

Q Do you ever talk to Susan Smith about getting an earlier date in order to avoid a second trimester procedure?

A I have talked to her a couple of times.

Q Well, how has she responded to requests in those couple of situations?

A She made the appointments.

Q She has accommodated you or accommodated your patients?

A Well, for the last time she didn't return my phone call.

Q When was that?

A I can't find the date. I would say about six months ago.

Q But on a couple of occasions you have actually spoken with her concerning the needs for an earlier appointment to avoid a second trimester situation, correct?

A Right, uh-huh.

Q And on all of those occasions she accommodated you?

A Yes.

[568] * * *

Q Other of your out of town patients have been late to some extent, to a lesser extent?

A Yes.

Q And have you asked the court to fit them in a little bit later?

A Yes.

Q And has the court accommodated that?

A Yes.

* * * * *

[581] * * *

THE COURT: But the average case you would handle by yourself?

THE WITNESS: Right.

THE COURT: What was your age at that time?

THE WITNESS: I believe 17.

THE COURT: What was your formal education at that time?

THE WITNESS: Just the experience of it would have been—I was still in school and—

THE COURT: What was your highest grade achieved?

THE WITNESS: At that time?

THE COURT: At that time.

THE WITNESS: I was still in high school.

THE COURT: What year in high school were you?

THE WITNESS: I was a senior.

THE COURT: You were a senior in high school, 17 years old?

THE WITNESS: Right.

THE COURT: And you were the person who was counseling and advocating for the teenage patient at the Midwest Health Center?

THE WITNESS: Right.

* * * * *

TRIAL TESTIMONY EXCERPTS OF THOMAS WEBBER, EXECUTIVE DIRECTOR OF PLANNED PARENTHOOD OF MINNESOTA

[DIRECT BY MR. PENTELOVITCH]

[618] • • •

BY MR. PENTELOVITCH:

Q Mr. Webber, who testified on behalf of or what organizations had representatives testify on behalf of these bills in the house and Senate, House or Senate?

MR. GALUS: Objection, irrelevant.

[619] THE COURT: Objection sustained.

MR. PENTELOVITCH: Offer of proof?

Would you answer that?

THE WITNESS: The organizations before the Senate included Minnesota Citizens Concerned For Life. Before the Senate and the House organization it tended to be quite similar and Minnesota Citizens Concerned For Life, the Minnesota Catholic Conference and Health Care facilities, the St. Paul—Minneapolis-St. Paul Archdiocesan Council of Catholic Women, the Human Life Alliance, Citizens for Community Action, Minnesota—I can explain who these groups were if they mean anything to you, Citizens for Community Action is a group that opposes Planned Parenthood's provision of abortion care.

Minnesota Citizens Concerned For Life is the largest antiabortion organization in the state.

The Human Life Alliance is much smaller but somewhat more strident antiabortion organization. All of them testified. In addition to them a group, Minnesota Legal Forum, which at that time, 1981 was Minnesota's local affiliate of Phyllis Shafley's group organized to oppose—

THE COURT: ERA? Minnesota Equal Rights?

THE WITNESS: The Minnesota Eagle, the bird, forum, the Minnesota Eagle Forum; CALM, the acronym stands for Citizen Alert for Liberty and Morality; a group organized by the pastor of the Fundamentalist Church in St.

Paul, initially **[620]** to oppose antidiscrimination efforts against gays in public housing in the City of St. Paul—

THE COURT: Citizens Alert for what?

THE WITNESS: Liberty and Morality, CALM, it is a group that effectively repealed the St. Paul ordinance which prohibited discrimination by reason of moral preference in St. Paul.

THE COURT: Whatever happened to that gentleman, is he still—I forgot his name; is he still in St. Paul? I haven't read of him lately.

THE WITNESS: I haven't either.

THE COURT: What is his name again?

THE WITNESS: Richard Angwin; he is a pastor, he did leave his pastorship about a year and a half ago, Your Honor.

Those are the organizations. There were also some individuals, relatively few in number, who gave information in support of the bills. Those are the organizations that presented testimony either before the Senate Health, Welfare, Corrections Committee or the House Social Services Subcommittee on those dates that am giving you.

BY MR. PENTELOVITCH:

Q Now with respect to those groups—I am still on my offer of proof, by the way—with respect to those groups, did any of the spokesmen testifying for those groups, or any of the **[621]** individuals you heard testify in favor of the bill, present any empirical evidence in the way of studies or statistics or offer any opinion testimony based upon studies or the like to the effect that a bill of this nature would in fact enhance and improve family communication?

A None whatsoever.

Q Or family love?

A None whatsoever.

Q Would you—I am still in the offer of proof—would you please tell us who testified against the bill in either the House, Senate or both?

A The organizations testifying against both of the bills included the Minnesota Medical Association, the Minnesota Public Health Association, the Minnesota Nurses Association, Planned Parenthood of Minnesota, the Division of Adolescent Medicine at the University of Minnesota, the St. Louis County Health Department, the American Association of University Women, which introduced a very understanding study into testimony; the Lutheran Social Services—the list went on, it was quite a lengthy list of all of those organizations who did in fact testify along with some individuals.

The opponents of the bill, not all of them would sign the testimony register those evenings weren't permitted to testify because of time restraints. There was a rather substantial list beyond that.

[623] * * *

The Lutheran Social Services testified—it was a long-tenured social worker who represented them that evening—that on the basis of their clinical work with families in trauma that unfortunately the parents of minors that were involved in counseling sessions with LSS often became more concerned with parental reactions, parental desires, than they were concerned with needs and problems of youth, their own youth, their own adolescence, and it was their professional judgment and conclusion based on clinical practice that the law was doomed to failure if in fact the law's intent was to enhance harmony, love, communication and support within the family structure.

* * * * *

TRIAL TESTIMONY EXCERPT OF M. J., MINOR

[DIRECT BY MS. PINE]

[631] * * *

THE COURT: Were your folks separated?

THE WITNESS: No, they were living together. We were very close.

BY MS. PINE:

Q You and your father?

A Yes.

Q What was your relationship with your mother like before your father's death?

A Very distant. We found it very hard to communicate with each other, did so very, very rarely.

As far as close things, as far as deep feelings and things that are important to me were not really said between us. It was basically general conversation, the weather, the food, how it was that night, things that we were going to do that weekend, go to the football game or whatever.

Q Do you remember how you felt when your dad died?

A I was very shocked, it was a sudden thing. I had just lost my best friend which is very painful. I felt very alone and I looked around me and I had my brothers and sisters who were all living out at the house at that time and my mom who was a complete stranger to me.

[632] Q Do you remember how your mom reacted when your father died?

A She was also very deeply hurt as was the whole family but she managed to live through it like all of us did.

Q How did your relationship with your mother change after your father's death, or did it change?

A Oh, it changed drastically in the sense that here is a mother and a daughter living with their father and then one day dad dies and mother and daughter look at themselves and at each other and say who are you, I lived with you for 12 years and now under the circumstances we are forced to get to know each other and to get through this burden together of dad's death; and try to be supportive to each other, try to be there for each other.

Q And it was like starting from scratch?

A Yeah, it really was. I didn't know her at all. We were not very close at all because of her drinking.

Q Why don't you tell the judge a little bit about what your mother was like?

A Okay, my mother was an alcoholic at the time. She had been to treatment prior to my dad's death and was doing very well.—

Q What happened when your father died?

A Then she did hit the bottle, not as much, but did go back to drinking because she just couldn't handle it.

[633] Q Was she ever hospitalized for the drinking problem?

A Yeah, she went to Abbott-Northwestern Hospital, I committed her myself and my brothers and sisters.

Q Was that after your father died?

A Yes.

Q Why did you commit her at that time?

A Because I could not handle living in that situation, for the sake of my protection, also hers. I could see her health deteriorating, I could see her attitudes changing. I could see our communication shutting off because of her drinking.

Q Could you give some examples of things that would happen when your mom would drink?

A Yes, she would take on major tasks, she would want to clean the house, do things that would require good judgment and good movement like vacuuming and such and there have been times, one incident in particular, where I came home early one evening and found that she had taken the window panes out of the window and was washing them and had set them up against her bed and stumbled forward into the glass cutting her hands and wrists and her feet and I had to have my brother come and get her and take her to emergency; and generally things like burning the furniture and things like that have happened too.

Q Were there other times that you can remember taking care [634] of her, sort of picking up the pieces?

A Yes, all the time I was like her babysitter. Many nights I stayed home instead of going out for fear that she would hurt herself because she was already so drunk by the time I was supposed to leave the house I couldn't leave her alone because I knew she would hurt herself or was scared that she would.

Q Up until the time of your pregnancy did you ever talk to your mother about personal matters after your dad died or before?

A No. No, like I said, we did not have a really close relationship. We couldn't—she couldn't tell me things that really upset her and really concerned her and I couldn't either.

Q Were things better at all at the time of your pregnancy?

A No. No, they were pretty distant.

Q Did you ever consider telling your mother about your pregnancy and abortion?

A Briefly I considered it but—

Q And you decided—

A I decided not to.

Q Why did you decide not to? What did you think would happen? What were you afraid of?

A I was afraid that if I told her she would start drinking, getting back to her habits before when my dad died and get back into the pattern of drinking every night heavily and that she [635] might hurt herself in that respect. I was afraid that it would ruin all of the communications that her and I had been struggling for up to that point to get to know each other better.

Q What were the reasons that you thought that those kind of things could happen?

I mean, were there other things that had happened between you and your mom that gave you a reason to believe that things would sort of fall apart if you told her, other times in your life or—

A Well, when my mom was in treatment the first time I went to group therapy with her for a week, every day for roughly seven hours, and was in the room with her and we discussed her problem, her drinking problem, and with the supervision and help from a counselor we were able to get to know each other better and I felt that it would destroy all that we had struggled for, to get to know each other better, as far as why are you drinking, and what can I do myself to be there for you to support you and keep you from drinking, because I don't want you to drink anymore because I see it ruins your health; I see it ruins—I see it ruins our communication with each other and it ruins the family structure.

I felt that if I told her that it would crumble the bridge that we were trying to cross to a better understanding of each other which was very important to me because I love my [636] mother

and I wanted to be closer to her and I was trying very hard to establish a close relationship.

Q Was there ever another time in your life when she found out about things going on for you and instead of reacting supportively things sort of fell apart?

A In high school I had an incidence of chemical abuse which I cured by myself, but when she found that out she started drinking very heavily so I saw her reaction to that and thought if she found out, that she would go back to drinking basically a self-destructive like she had.

Q Do you remember on the morning of your abortion and court appointment how you felt when you woke up in the morning?

A Yeah.

Q How did you feel?

A I was terrified. I was scared first of all because I had to make an excuse to get out of school and—

Q Do you remember what—

A I was wondering if that was going to go through. I had to lie about that, for obvious reasons. And I was worried that I was going to get caught in that and having to explain myself. I was just worried about all the people that I would talk to and what they would say to me and how they would think of me, how their reaction to me would be. I was scared of the actual procedure itself but I was very, very upset about having to go through numerous people to have to get permission to **[637]** have the procedure done. I felt very terrified to talk to strangers about such a personal thing. I felt in a way it was a violation to my personal life and that I was sharing things with somebody that I didn't know at all which made me very terrified.

I was very upset about it all.

Q Did you wait long at court before you saw the judge, do you remember?

A I waited about 45 minutes.

Q What county were you in; Hennepin or Ramsey, Minneapolis or St. Paul?

A Minneapolis.

Q Do you remember any of the things you were thinking while you were sitting there waiting? What did you think?

A I was very nervous. I was wondering if the judge would even give me permission to do this, which made me very nervous and very scared, just anticipating the procedure, having to wait to go through all of this before I could finally go back to the clinic.

I was worried about if I would say something wrong to influence the judge's decision, to maybe say no to my case, for whatever reasons he may have thought, I don't know.

Q Do you remember how long you were in with the judge?

A Roughly twenty minutes to half an hour.

Q Do you remember anything about what the judge asked you?

[638] A He asked me how old I was, what my name was and if anybody had influenced my decision to have the procedure done; if I felt really sure about my decision, which I told him yes and one thing that he said to me which to this day really still upsets me when I think about it, he asked me if I knew who the father was, which tells me what he thinks I am a whore and I sleep around and he didn't bother to ask me how long I had been going out with this guy which had been a year and a half at that time.

I got real cold signals from him like he didn't really think too highly of me because of the situation I was in and that put a lot of pressure on me because I felt that was a violation to me to say that, nobody can pin that on me, and I took it as an accusation that I was a "sleep around" and I didn't know who the father was, which I did. I didn't need that coming from a total stranger, for one thing.

I felt he could have been more sympathetic to my situation, which I didn't feel he was at all. He was a very cold man, made me very nervous, more nervous than I already was.

I didn't feel that was necessary, that question at all, that was a total violation to me.

Q How were you feeling by the time you got to the clinic for your abortion procedure?

A Well, having to go through all of that, my appointment was **[639]** scheduled at around 2:00 o'clock that afternoon and it took all of that time to go through this, just waiting for the judge and getting to the courtroom, getting a legal guardian and

I was a bundle of nerves. I was terrified. I was emotionally exhausted already from having to open up such confidential things about myself, very personal matters, as a female, to total strangers, and by the time it was time for the procedure I was a basket case.

I had been put though emotional stress not only by the judge, but by the time lapse, by strange faces, by accusations that were pinned on me which I felt was unnecessary, which upset me even more and I was worse off that afternoon when I went in for the procedure than I was already in the morning.

Q Did anything the judge do help you with your decision to abort without notifying your mother?

A No.

Q Do you think there is anything the judge could have done to help?

A No.

Q You said you were a bundle of nerves when you returned to the clinic. Did that affect in any way your abortion procedure?

A Yes, it did, very much so. In that procedure you have to be very relaxed.

* * * * *

TRIAL TESTIMONY EXCERPTS OF S. L., MINOR

[DIRECT BY MS. PINE]

[CROSS BY MR. ACKERBERG]

[712] * * *

Q S., how old are you?

A Seventeen.

Q That won't help, you have to talk louder.

A Seventeen.

Q Are you in school now?

A Yes.

Q Do you work?

A Yes, I do.

Q You work after school?

A Uh-huh.

Q Where do you work?

A Midwest Health Center for Women.

Q Have you ever been pregnant?

A Yes.

Q Have you ever had an abortion?

A Yes.

Q How old were you at that time?

A Fifteen.

[715] * * *

Q Let's talk about your mother first.

A Okay.

Q Can you describe to Judge Alsop what your mother is like?

A Well, my mother is a sweet, gentle, caring woman but she is very, very unstable. She has a documented past of severe mental illness. She has been hospitalized several times during my lifetime and many times before I was born.

Q And what is her diagnosis, at least as you understand it?

A There are several labels they have stuck on her; one that sticks with me is schizophrenia, manic-depressive. I try not to pay too much attention to things like that, but those are some that stick with me.

Q What did those—the fact that your mother was—had a history of mental illness, what was—what did that make her like as a mother?

In the family what was your relationship with her like because of that?

A Very unstable. No one could predict how her moods would swing from time to time. There could have been the possibility that she could have reacted totally supportive and caring and **[716]** motherly, but on the other hand it could have just broken her down emotionally and mentally and she could have completely slipped out.

Q Uh-huh. Is she in need of a lot of care at home?

A Yes.

Q In what way?

A She is heavily medicated and that is to prevent severe depression and she needs to be taken care of. She needs to be

reminded to take her medication. She doesn't—she is very—she hallucinates a lot, she hears voices and she is very sure people are out to get her and if she goes out people are staring at her and talking about her when they probably don't even realize she is there, but she is sure of that and she is really sure a lot of people are out to get her.

So she doesn't go out.

Q Have you ever talked to her much about personal matters?

A Sometimes, when there is a time when she is maybe in the mood, but then it is always so hurtful to me because it gets turned around, she will stab me in the back with it later when she is in more of one of her more typical moods.

Q What are her views on sex and abortion and things like that?

A Oh, that is just unheard of. The upbringing that she has had is that it was even taboo to talk about your menstrual cycle. Her mother never explained it to her, it was the curse, [717] when she got it she was terrified, she was bleeding all over the place, that kind of thing, and then when it came a time for me and I was becoming aware and I wanted questions answered I knew you were supposed to go to your mother even though I wasn't so sure I was supposed to go to my mother, I was going to ask her anyway and she just freaked out. She got real angry with me, and said, no, I don't want to talk about that, you are not supposed to know about that yet.

You will learn somehow.

Q Why, given all the things that you have told us so far, why did you decide in the instance of your pregnancy not to tell her about it and not to tell her that you were thinking of having an abortion?

A I knew she wasn't mature mentally enough to handle that situation. It would have been too much for her to concede that her 15-year-old daughter was pregnant.

Q What effect do you think it might have had on her?

A I think it could have easily put her back in the hospital again. It could have upset her and it would have upset my father that I told her and that would have been a conflict between my parents.

* * * * *

[719] * * *

Q Did you ever have a sense that there were things your mother didn't want to know about?

A There were things that my mother didn't want to know about?

Q Did you—was there ever a time that you sort of felt like she didn't want to know certain things, that she would be better off if she didn't know?

A Underlying—yes, because she would say, well, I want to know everything, but I think if she really did, had known like that I was sleeping with my boyfriend it would have been too much for her.

Q Has she ever been helpful to you in dealing with something that was difficult for you in your life?

A My brother's death, we helped each other a lot.

Q Now let's talk about your father for a minute.

What is your father like?

A He is very, very, very overprotective, very caring in a kind of screwed-up, mixed-up way.

Q Does he have a temper?

A He has a violent temper.

Q When you say caring in a mixed-up-screwed-up way, what [720] do you mean? When he is showing his affection how does he do that in a way that is sort of mixed-up?

A When he gets upset about something he will come at me just with a violent angry temper and he becomes an animal. He gets—he likes to kind of show his teeth and he will get real close to my face and he likes to get very violent and physical.

Q What is your relationship with him like?

A Turmoil, constantly. Ever since I entered my teenage years it has been one fight after another.

Some things are more serious issues, we practically fight about what kind of toothpaste to use, just about anything. We are just at each other's throats.

Q Do you talk to him about personal things at all?

A No. I avoid it because I know that he is the type of person that, like I am saying with my mother one time maybe in a mood where he might be sort of understanding to listen to that,

but on the other hand, later he will take it and turn it around and use it against me and put me down because of it.

Q Can you describe in more detail why you decided not to tell your father about your pregnancy and abortion?

What did you think he would have done or said or—

A His initial reaction would have been violent and angry and he probably would have hit me. He probably would have gone berserk. He would have just gone mad to hear that his little **[721]** baby, the youngest daughter could be so—

Q Was there ever another time in your life when he found something, he learned something personal that was going on and that he reacted in that kind of way?

A Yes.

Q Can you tell us about that?

A He is extremely bigoted, extremely prejudiced. He found out that I was dating a black boy and when he found that out he went bananas.

Any little thing, there was $10 missing off the dresser one morning so he decided that I had stolen it from him and he went through my room and he started reading my diary and he slapped me for the first time in my life and he never apologized for it and it went on like that until I ended the relationship.

Everyday there was a threat of physical harm and constant yelling.

Q Do you think—so you don't think your father would have been helpful to you—

A No.

Q —in dealing with things?

* * * * *

[725] * * *

Q When you told the clinic that you didn't want to tell your parents did they explain the court procedure to you?

A Yes.

Q Do you remember anything about what your reaction was that you were going to have to go to court?

A Well, in a way I was relieved that there was some way that I wasn't going to have to tell my parents. I was at least relieved to know that. But I was also very confused because this

word, "court", comes out to you and you think, "Oh, my God, a judge up on a pedestal, and he is going to tell me, yes, he is going to tell me, no." A lot of scarey pictures come into your mind that first moment.

Q Do you remember anything about how long you waited for a court appointment, like between the time you called the clinic?

A I would say about a week, week and a half.

Q What time did you get up in the morning of your appointment?

A The same time I get up for school, 4:30.

Q Did you eat, do you remember?

A I did not eat breakfast, I knew I couldn't keep it down.

Q How did you feel?

A Nauseated.

* * * * *

BY MR. ACKERBERG:

[733] * * *

Q S., what do you do for Midwest?

A I am a pregnancy counselor to teens.

Q When you found out you were pregnant in a certain sense you were glad because you felt that this was confirmation of your ability to become pregnant?

A Right.

Q And you were a little—you were even proud of it?

A It was just a comfortable feeling to know that my body was able to do this, with that confirmation.

Q Before you discovered your pregnancy you were not using contraceptive methods?

A No, not regularly, not consistently.

Q Had you thought about the possibility of becoming pregnant?

A Yes.

Q And what did you think?

A I had always thought all along this is what I am going to do if I ever did get pregnant, there is no way I am going to have a baby when I am 15 years old.

Q Why did you not use contraceptives?

A The idea of going into a drugstore, a pharmacist and a sales clerk and going to a clinic and getting a prescription for birth control pills I think I knew was the only truly **[734]** effective method of birth control, terrified me. The idea of all of these adults, you know, well, look at how old she is and she is doing this—my, my.

Q How long were you sexually active before you became pregnant?

MS. PINE: Objection, Your Honor.
THE COURT: Objection overruled, you may answer.
THE WITNESS: Two years.

BY MR. ACKERBERG:

Q Since you were 13?
A Uh-huh.
Q With more than one boyfriend?
A Yes.

* * * * *

[738] A Well, they have in two years they have witnessed me grow up and just show them a lot of maturity and responsibility. I mean, they gave me a car and I have taken care of that and I have taken care of putting gas in it and I have done well in school, I have been on the honor roll and I have gotten this job and I have done responsible things, concrete proof that I have grown up.

Q So you think that would affect their reaction?
A Right.
Q And how seriously it would affect them?
A Right.

BY MR. ACKERBERG:

Q S., what training did you have to be a counselor at Midwest?

A I am going through training right now with Helene. I watch her and several other counselors go through counseling sessions with minors and other women.

Q Have you taken any courses in counseling?

A No, I have not.
Q And you have no practical experience in counseling?
A No.

* * * * *

TRIAL TESTIMONY EXCERPTS OF SUSANNE SMITH, SUPERVISOR OF GUARDIAN AD LITEM PROGRAM IN HENNEPIN COUNTY

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[13] Q What do you consider the difference between maturity and capable of informed consent to be?

A I don't see there is a difference.

Q Isn't it true that your report to the guardian relies heavily on the minor having been given informed consent counseling by a provider?

A Yes, it does.

Q Now I see on question 10 of the report that you ask whether or not the minor has received counseling as to pregnancy alternatives. What if the minor replies no?

A We haven't had that happen.

I would expect if they couldn't talk about what alternatives were we might have some question about whether or not she was making an informed decision.

Q Have you ever had minors who are pregnant because of incest?

A I recall one situation that I interviewed a teenager who reported that she was pregnant as a result of a rape by a stepbrother.

Q Do you think that it would be appropriate for a minor who a counselor knew was pregnant by incest to be counseled as to marriage?

A No.

Q So that for some particular minors counseling as to pregnancy alternatives such as rape and incest, some of these **[14]** might be inappropriate questions?

A That is correct, it may be.

* * * * *

BY MS. BENSHOOF:

Q Looking at question 14, when you asked if she lives with her parents, do you ask if it's biological parents, or is that made clear to the minor?

A I believe when we asked that question if the teenagers say yes we say is that both of your parents, but I don't think we use the term biological.

Usually they explain yes, my mother and stepfather, whatever, so we have some idea of what the situation is.

[15] Q So if a minor lives with a mother and a stepfather she might consider them to be her parents and answer it yes?

A Yes.

Q And on question 22 the minor elects not to notify her parents because: Is that always filled out in a narrative form by the guardian?

A Yes.

Q On the last page where it states recommendation of the guardian ad litem, is there a section which relates to emancipation?

A Yes.

Q Why is that section in this report if emancipated minors are not required to go through court?

A That is part of the difficulties that we run into. The statute has language that refers to an emancipated minor which leads to many problems that there is such a thing as an emancipated minor. All of the attorneys and judges that have been working with us tell us in Minnesota juvenile court there is no such thing.

However we put it in because of the reference to it and also because when we do have these teenagers who might be married, who have had a child, who are living apart from their parents, it seemed like information that was useful in terms of making a recommendation to the court, things we wanted the court to know about the particular teenager.

[16] Q So that a guardian may check number A that the court should authorize due to emancipation even though technically emancipated minors are not supposed to go through the court process?

A I think that is the difficulty. I think in this situation emancipation is an anomaly in the sense of not being a legal process but a generally understood lay person's term, she is out living on her own. But all the instructions I have been given on this particular issue is there is no such thing as emancipation.

Q If a minor is living on her own, married and has a child, you don't go through this and say you can go home now, you are not required to go to court under the statute, or do you take it to a judge?

A We would take it to the court. Many of the questions we get from the clinics describe these kinds of situations and since we don't have any guidelines they go to court, so that there aren't any chances taken.

* * * * *

[19] * * *

Q About how many minors have you personally acted as a guardian for?

A Approximately 200.

Q How many minors have gone through the Hennepin County system and also through your guardian's office?

A Since August of 1981 through January 31 of 1986 the count is 2264.

* * * * *

[31] * * *

Q And have you ever made a recommendation that the petition not be granted?

A Yes, I have.

Q On what grounds?

A Well, it was a unique situation of a young woman, I believe she was 13, perhaps 14, who insisted on going to court but was not able to talk at all. She was either so scared or so frightened or I don't know what the problem was, but she could not give us any information or answer any of the questions.

Q So that was more that she couldn't participate in the judicial process, would that be a correct assessment?

A Yes.

Q You couldn't find out about best interest or maturity?

A That is correct.

* * * * *

[32] * * *

Q On the guardian's report form in question 22, I am not sure if it is—yes, 22, there is a space there for why the minor elects not to notify her parents.

Could you describe what are some of the general reasons that are noted on that form?

A The minors tell us a number of things. They may talk about being fearful of damaging a good relationship with their parents or having a bad relationship that they fear would get worse.

A number of the teenagers have talked about dysfunctional family situations where there may be alcoholism [33] or marital problems or battering, physical abuse, mental illness, unemployment, a number of different kinds of situations that at that time at least they don't believe that notifying their parents would help the situation at all.

We have had teenagers who talked about the fact that their biological father hasn't been seen for years. They may not know where he is. There may be a very hostile or unsupportive relationship. We have had teenagers who talk about the fact that they have been told specifically by their parents and that they would be kicked out of the house and we have had teenagers who have told us that has happened to them or they have seen that happen to older sisters.

We have had a lot of teenagers talk about older sisters in the family who have become pregnant and what damage that has done to the relationship with the parents.

We have had teenagers talk about the fact that they know that their parents are morally, on religious grounds, opposed to abortion and would not be at all supportive of them in this process; a number of reasons.

Q Ms. Smith, you have been in juvenile court for ten years and dealt with abused and neglected families and minors for ten years.

Do you believe them when they list these reasons?

A Yes, I do.

THE COURT: Believe them in the sense that they [34] think it is true, or it is in fact true?

THE WITNESS: I believe certainly that they believe it is true.

The scenarios that they are describing are not atypical of other kinds of families that we see in juvenile court, and so it seems to ring very true.

Q Are you familiar with the exception in the statute that says that if the minor declares she is a victim of abuse or neglect she should be exempted from the requirement?

A Yes.

Q Do you see teenagers coming to Hennepin County who report that they are victims of neglect or abuse, I guess it would be abuse?

A Yes, yes.

Q Why do they make it to the court system and not just be exempted from the statute, do you know why?

A What I have heard from teenagers that I have specifically asked, as well as the clinics, when the situations have occurred, is that the teens do not want this reported. We deal with teenagers from all counties as well as other states where people are not sure what would happen if something was reported. I think some teenagers are so fearful of their parents' reaction that they don't want this reported and would rather go to court than have it reported which would mean that their parents would find out that they were pregnant and [35] planning to have an abortion.

Q Based on your experience with the abuse field, do you think that child abuse is generally unreported?

A Yes, that is what all the people in the field strongly believe.

Q And you personally believe that?

A Yes, I do.

Q So it is your testimony, is it not, that those teenagers who are in a situation where there has been family abuse are not able or do not avail themselves of that exception in the statute?

A With the teenagers we have seen in court, that is true.

Q Do you have an opinion as to whether you believe going through the court process and seeing the guardian—now you

have interviewed the teenagers personally—is difficult for teenagers?

A It appears to be very difficult for them, yes.

Q What is the basis for your opinion?

A The teenagers that we see in the guardian's office are very nervous, very scared. Some of them are terrified about court processes. They are often exhausted, particularly if they have been driving around Minneapolis looking for the building. There are a lot of problems that they have just in terms of finding us. They are upset about and tell us that they are upset about the fact that they have to explain very [36] intimate details of their personal lives to strangers.

They talk about feeling that they don't belong in the court system, that they are ashamed, embarrassed and somehow that they are being punished for the situation they are in.

I had a teenager tell me last week when I was describing to her the location of the building, when I said the word Juvenile Justice Center she said I feel like a criminal and I think that is pretty typical of the reaction that the kids have when they find out they have to go to court.

They see court as a place for teenagers who have done something wrong.

* * * * *

[37] * * *

Q Do you feel you are seeing a selected group of pregnant teenagers who you described how you instantly can recognize them in the waiting room?

A Yes, we are.

Q Would you say that the select group are the more educated middle class?

A Yes.

Q Wealthier minors?

A One of the things that has been commented on by most of the people working on this calendar is that these are a unique group of teenagers compared to the other teenagers we see in juvenile court and of course in the other guardian ad litem cases. We see a lot of teenage mothers and the differences have

to do with their plans for the future, education, their self image, their self concept, what they want to do with their life.

They are very, very sure that they are doing the correct thing and also very sure that they don't want to involve their parents.

Q So you have been the guardian in situations involving teenage mothers?

A Yes, I have had teenage mothers down who have said I [38] already have one child and I do not want another.

I have had teenagers talk about the fact that they have had a child and placed this child for adoption and do not want to go through that procedure again.

Q Outside of the parental notification, you also see minors or are appointed as a guardian for minors who are mothers and who are mothers themselves?

A Yes. These would be situations that come into juvenile court on the abused and neglect process.

Q You mean these are teenage mothers who abuse their children?

A Yes.

Q Do you find that to be a frequent occurrence?

A I don't know how I could answer the frequency question. When they come into court there is a problem that has been recognized and that is why they are in court, so we wouldn't see situations where there isn't abuse or neglect.

Q And do you interview these—you are not only the guardian for the child but you interview the teenage mother as well?

A My guardians do, in the process of the routine work, yes.

Q Do they do any assessment as to whether they consider teenage mothers mature?

A No.

Q When a minor is reporting for the interview with the [39] guardian, if the guardian hears then about an abuse situation, is she required to report that or does this court bypass law somehow undermine that legal requirement?

A It made it extremely difficult because of the laws saying that this is confidential and she is entitled to absolute confidentiality. So what we do with that is inform the attorney and the court.

Then we make a decision based on the individual circumstances of the case.

Q So you feel that this law exempts you from mandatory reporting if you hear about abuse in the guardian interview?

A We don't have clarity. I don't know how to answer, you know, that question.

We report it to the court.

Q And you don't know whether or not the court then reports it to the local authorities?

A In some situations that has occurred.

Q Do you have any opinion as to about how many minors who come to court come with one parent?

A About a quarter, 25 percent of the teenagers that we see are accompanied by parents. There are also additional numbers who tell us that they have informed one parent and there are also teenagers who appear with a parent and a step-parent who they consider to be their parenting parent.

Q Have you conducted interviews with these parents as well **[40]** as with the minors?

A Yes, I have.

Q What reasons—do you ask the parents why the absent parent cannot be notified?

A Yes.

Q What reason does the one parent tell you why the absent parent cannot be notified?

A We hear a number of descriptions of fathers who are long gone, basically abandon the family; problems with child support payments, lack of that, fathers who have had no contact and no conceivable parent interest in what is happening with their daughter. A lot of anger and resentment at that point, that they should be brought in when there hasn't been any contact for a number of years.

A lot of fears when the family might be currently involved in a custody battle, that somehow this is going to be brought into that process.

* * * * *

[43] * * *

THE WITNESS: Based on the teenagers we have seen that have been accompanied by their parents, we have heard from both the teenagers and the parents stories about family situations where it does not seem in my opinion appropriate for notice to be given to the absent parent. We have had parents that have been extremely angry about the fact that they have had to take time off of work and have wanted to be supportive of their daughter but are involved in this process because a parent **[44]** who has no contact or perhaps for a number of years or for some reason should not be notified is required by this law to be notified.

I recall two specific incidents, one was of a teenager who was I believe 16 accompanied to court by her mother. Her mother was in the process of getting a separation. The mother and the daughter both said that they felt that if the father knew that the daughter was pregnant that the daughter would be assaulted and so would the mother. That is what they believed.

We had another situation with a teenager who was 17, her father was institutionalized in a western state. She took the initiative to call the psychiatrist that was working with her father to ask whether or not she could have a notice sent and they said absolutely not, it would be detrimental to his particular care.

My opinion is based on the fact of the children, teenagers and the parents that we have seen talk about so many unique family situations where we are dealing with single parents and one parent who is assuming all of the parenting responsibility, that there just seemed to be a lot of situations where notice to one parent would be sufficient.

BY MS. BENSHOOF:

Q Do you believe that going to court is a burden to the parent?

[45] A The parent tells us that it is.

THE COURT: How would you figure out the cases where you feel notification of both parents is appropriate and where it is not appropriate except by providing for a court bypass procedure in the case where it is not appropriate to any one parent?

THE WITNESS: That is one of the difficulties with the process and if we are being asked to determine whether or not the teenagers are mature—

THE COURT: Or it is in their best interest it not be given to one parent?

THE WITNESS: Yes, what we are seeing consistently is the greatest majority of these teenagers are mature so it leaves us constantly asking what purpose we are serving.

THE COURT: You are talking about the whole statute, but your opinion related to notifying one parent.

You are saying your opinion was it is not appropriate to give notice to the absent parent in all instances or a number of instances?

THE WITNESS: Yes.

THE COURT: I guess my question is how does the—how can the law differentiate between those cases where you feel it is appropriate to give notice or it is not appropriate to give notice?

THE WITNESS: Well, based on what I have seen I [46] would like to see the law require notice only to the custodial parents, which would presume that the parent who is providing custody for the child, I presume in two-parent custodial situations, maybe that would apply to both of them.

• • • • •

Q I will rephrase the question.

The law has never worked in classifying a class of immature minors where there is no best interest, is that true?

A Yes.

• • • • •

THE COURT: Tell me what you—other than "yes", [47] what have you just told me, that the law has never done what?

THE WITNESS: We have never identified a group of teenagers that we felt were immature.

BY MS. BENSHOOF:

Q No best interest?

A And no best interest. We have not seen those teenagers.

Q So in the nearly 3000 minors in five years of the statute the law has never operated to identify any minor for whom the court would say that there should be parental notification?

A No, not in Hennepin County.

Q That is fine.

Do you have an opinion as to whether or not this law has deterred some minors from telling at least one parent?

A We have had situations reported to me by my other guardians as well as teenagers that I talked to myself who have said that they will consider telling one parent, usually mom, sometimes dad, but since they would have to go to court anyway, because they are absolutely sure they don't want the other parent to know, they don't tell either one.

Q So in some instances the law has lessened parental involvement with a parent the minor might have thought would have been helpful, is that correct?

A In those situations, yes.

[54] • • •

BY MR. ACKERBERG:

A In the process of setting up the procedure, we got agreement from the people who were running the 24-hour child abuse hotline, which was the 24-hour hotline that we had to take calls of an emergency nature, we notified the clinics that that was available if there was an emergency.

We notified the clinics how to get ahold of Judge Oleisky who, because of what he is required to do, is always available and he is usually contacted through the juvenile center.

• • • • •

[55] • • •

Q When you sent the minor back for counseling, was it required that the minor go back to a clinic for counseling?

A No.

Q Is there any requirement that the minor be counseled at a clinic?

A No, just that she receive counsel.

[56] • • •

Q You mentioned on direct examination the case of a minor who was unable to respond to any questions posed to her by the guardian's office or perhaps it was the court.

Could you further describe that case?

A This was a situation of a very young teenagers; I believe she was 13 or 14. During the process both the guardian, which happened to be myself, talking with her as well as with her attorney, we couldn't get answers to any of our questions. She would just shrug her shoulders, she didn't want to talk, [57] couldn't talk, was too afraid to talk. We didn't know, we didn't feel we had enough information to be able to proceed with the hearing.

Q What happened to that minor?

A We went into court at her insistence and the judge at that time did not grant her petition.

Approximately a week later there was a rehearing and I believe in the interim she had been to the clinic, received some counseling and some information and had apparently gotten over her fear of the court process and was able to talk to us.

Q Was her petition approved?

A Yes, it was.

Q Do you know of any other denials in Hennepin County?

A There were two others that I am specifically aware of. There may be others but I certainly haven't heard about them. One was a teenager who told us that she did not want her petition granted because she thought if it wasn't her boyfriend would marry her.

The other was a 13-year-old who could not tell us that she wanted the abortion and was not being coerced. It appeared

that her mother was doing the talking for her and in both those situations the guardian recommended the petitions not be granted.

THE COURT: Were the petitions denied?

[58] THE WITNESS: Yes, they were.

• • • • •

TRIAL TESTIMONY EXCERPTS OF JUDGE HENRY ALBRECHT, JUVENILE COURT JUDGE OF HENNEPIN COUNTY

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[7] • • •

Q And do you know about how many cases you have heard?

A I would estimate approximately 500.

Q In these 500 cases that you have heard have you ever found a minor to be immature?

A No, I have not.

Q And have you ever found a minor entitled to have an abortion solely on best interest grounds?

A No, I have not.

Q So you have granted all of the petitions on maturity grounds?

A Yes, I have, and I think probably additionally on best interest grounds.

Q Sometimes after finding them mature you would also check the best interest?

A Correct. I have checked our form, which I am sure the Court has probably seen in evidence, it has three boxes to check and in all of the cases I can remember I have checked the box regarding finding that minor to be mature, as well as the third box finding it to be in the best interest of the minor.

But I think my decisions have been based primarily on the finding of maturity.

Q You don't remember any case that you found it to be solely on best interest?

[8] A I cannot recall such a case.

• • • • •

[9] • • •

A I find them to be generally above-average in appearance and in intelligence. I cannot state a general category as to what their appearance is, as to their emotional state I found their emotional state varies considerably and that some appear to be at one end of the spectrum, almost flippant, and others on the other end of the spectrum. On the surface appearance some are sad and crying and scared and they fall within that range.

Q Do you ever reassure them about the court process during the hearing?

A I always do.

Q Do you find that necessary?

A Only necessary with those who appear to be frightened. If I were to define necessary as what is needed for the child, I think it is an important part of the hearing to reassure them whether they appear frightened or not. So I do it in all cases, whether they appear to need it or not.

• • • • •

[10] Q What is your understanding of the meaning of the phrase mature and capable of giving informed consent, both phrases, or the same if you think they mean the same.

A I think that maturity and capability of giving informed consent are essentially the same. I think there may be some slight distinction but I treat them as essentially the same and my perception of what is meant by those phrases is that the child would possess the necessary judgment to make as important a decision as that is in her life; as far as her maturity, that she would have that judgment that I think she ought to have in making such a decision without consulting her parents.

As far as informed consent—

Q Capable of giving informed consent?

A I think that goes not only to maturity but necessarily depends on what she has been told at the clinic and so in almost

every case I am informed by the lawyer that she has been to a clinic, she has been informed of the risks and dangers and the procedure and so forth and I think it necessary that she has that knowledge before she is capable of giving informed consent.

In other words, I interpret it as more than a mental status in a vacuum, I apply the knowledge that she has been given in interpreting that term.

Q How do you interpret the term best interest?

[11] A I interpret that as being the minor's best interest and it almost seems self-defining to me, that it is best for her to have the abortion and I obviously separate that from what might be best for her parents or for the fetus or society and I tend to interpret that phrase as to what would be best for her under her circumstances in this point in her life.

Q So if the teenager chooses to have the abortion and that is her decision and she is able to give that and has reasons for that, then you would find it in her best interests to do so?

A Yes, depending on what reason she has given. In almost all cases the reason she gives do support a finding that it is in her best interests.

Q So your interpretation of the phrase best interest is best interest to have an abortion as opposed to continuing the pregnancy?

A Correct.

BY MR. ACKERBERG:

Q You are available to hold a hearing on a petition even though you are in the middle of a trial, correct?

[12] A That is correct.

Q You have been available to hold hearings on Wednesdays which were outside the normal hearing schedule, correct?

A I don't recall being asked to hear a hearing on Wednesday but I certainly would hear one and I would consider myself available even though they don't normally schedule them on Wednesday.

Q Are there any days of the week you would not be available to hold a hearing, hear a petition?

A There are no weekdays, no court days that I would not be available.

Q It is extremely rare when you see a minor who is visibly upset, isn't it?

A I don't think so. It seemed to me that in each group of six to ten that come through there is usually one that seems physically upset or if not every group I would say every other group.

I would say one out of twenty appear visibly upset to one degree or another. The degrees of their being upset obviously can vary, but something I can perceive as a lay person of their being upset.

* * * * *

[15] * * *

Q Are you aware of any minor whose confidentiality has been breached under the bypass proceedings?

A I am not aware.

* * * * *

TRIAL TESTIMONY EXCERPTS OF HEATHER SWEETLAND, ASSISTANT PUBLIC DEFENDER IN ST. LOUIS COUNTY

[DIRECT BY MS. LYNN]

[CROSS BY MR. ACKERBERG]

[750] * * *

Q And when they come accompanied by a parent, is it usually the mother?

A Yes, it is. In fact I have never seen one of my clients come accompanied by a father.

Q Now have you had occasion, when the young woman has been accompanied by her mother, have you ever had occasion to talk to the mother?

A Yes.

Q And what have been the mothers' response to being in the court system?

A Two specific cases that I can remember; both of them were divorced from their husbands, the fathers of the minors, that they had been divorced for a lengthy period of time. One specifically was at least ten years. The father had had no contact with the daughter for that entire period of time and they

felt had gotten that man out of their lives a long time ago, why do we have to have him involved at all.

That was the mother's point of view.

Q And aside from those two circumstances, what general sort **[751]** of reactions have you observed in the mothers who have accompanied their daughters to court?

A They are nervous and I believe they are somewhat embarrassed because I had one mother that said, "I wish my daughter had not gotten into this 'trouble'," but they are embarrassed that they have to be there.

Q And how would you describe the emotional state of the minors you represent immediately prior to going into the hearings?

A I think they are very nervous because they don't really know what to expect, even though they have been told by myself and I am assuming the counselors from the health center what to expect; they are very nervous.

You have the sweaty palms, the looking off into space, the very nervous tics and habits that you might see in just about anyone who might have to go through a nervous experience.

* * * * *

[755] * * *

Q And now you cited physical violence within the home. Is that one of the main reasons the minors give you?

A Yes.

Q How common would you say that that response is?

A It is hard to put a percentage on it, but I would say at least a quarter of the time someone will say my dad hits me or my mom gets very upset and will slap me and that they are afraid that the parent would become violent as a result of this information.

Q And when they tell you this do you believe them?

A Yes, I do, in part because they are so reticent about telling me; they are embarrassed to tell me, but they feel they need to tell me so that they can get the judicial bypass or the order allowing them to have the procedure.

The other reason I believe them is that I handle **[756]** kids, you know, minors every day of the week in juvenile delinquency court and I like to think that I can tell the difference between someone who is lying through their teeth and someone who is not. Kids can be very good liars but most of them are not, and, you know, I can be fooled, I am not infallible, but I think these women are telling me the truth.

Q What are your observations about the minors' reactions to being in court?

A I think they are very nervous. They don't necessarily understand why they are there. They only know they have to be there if they are going to get an abortion without first notifying their parents.

They, as I have described, they don't understand why they are nervous. In fact, I had a parental notification hearing last week in which a woman was three weeks shy of being 18 and she had to go through a parental notification hearing. She was a straight A student from a local high school in Duluth and she was just a nervous wreck and I tried to calm her down and we appeared in front of Judge Nord who is a very kind person, very nice, and in fact at the end of the hearing he said to her, now that wasn't so bad, was it? I didn't bite you and she said, I guess not, scampered off out of the courtroom because she was nervous and afterwards mostly these women feel relief like, "I am done." It is like the big obstacle is **[757]** over, is done with.

* * * * *

BY MR. ACKERBERG:

[767] * * *

Q There has been at least one occasion where there was a possible confidentiality problem because the minor knew someone who worked at the courthouse, right?

A There have been several problems, yes.

Q And on at least one occasion you made arrangements to have the hearing in another courtroom than the usual courtroom to avoid recognition of the minor by a third party?

A Yes, that is correct.

If I might explain, there were three minors that were coming in that day; one of them was the stepdaughter of a probation officer, another was a niece of a judge and they were both frightened about being seen by relatives. Therefore, I moved it from third floor up to fourth floor and I kept them in the ladies bathroom awaiting the court appearance which is down the hall in a small courtroom.

Q And confidentiality was reserved?

A To the best of my knowledge. We took them down the back stairway.

* * * * *

TRIAL TESTIMONY EXCERPTS OF LAURA HUNTER, COUNSELOR AT PLANNED PARENTHOOD OF MINNESOTA

[DIRECT BY MR. PENTELOVITCH]

[CROSS BY MR. GALUS]

[836] * * *

THE COURT: My question is do you have an opinion?

THE WITNESS: I have an opinion, yeah.

THE COURT: As to whether or not the statute has resulted in—has or has not resulted in some minors talking to their parents who would not have talked to them, but for the statute?

MR. PENTELOVITCH: Do you understand the question he has just put?

THE COURT: If you don't tell me.

THE WITNESS: You are asking if I—

THE COURT: I am asking you first if you have an **[837]** opinion on whether or not—now, I can't even tell you what I am asking—whether or not the statute does or does not result in some minors talking to their parents about their pregnancy and their abortion who would not have talked to them but for the statute?

THE WITNESS: Yes.

THE COURT: You have an opinion?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. PENTELOVITCH:

Q What is your opinion?

A My opinion the way you phrased it is that the ones who by the time they talked to me had talked to the parent, both parents or had told one parent, then I have told them about the law, that has often, it seems to me, precipitated the minor to telling the other parent or to definitely telling the other parent, so I think that has made a difference there.

The majority of minors though, I think, already decided pretty much even before I tell them about the law if their parents are going to know or not, you know, if they did know anything about the law I asked them if they told their parents, either yes or no, but I am going to, or no, they are not going to.

* * * * *

[1097] * * *

BY MR. GALUS

THE COURT: When you counsel these folks, Ms. Hunter, they have already been scheduled, most of them have already been scheduled for the abortion procedure by the time you get to what you call your abortion counseling?

THE WITNESS: Right.

THE COURT: After you go through these alternatives, how often does it happen after you go through parent, single parenting or marriage or whatever the alternatives are, that you speak of, how often does it happen that the patient cancels the appointment and says I changed my mind, I am going to go out and carry to term or I am going to go out and get married or whatever the other alternatives are?

[1098] A Absolutely.

Q She is sufficiently mature to make the decision?

A Maturity is a hard thing to determine, I think—

Q Well—

A —in my opinion. Even a young woman going through the whole process of deciding what to do with that unplanned pregnancy and the stresses that incurs, it is a maturation process in itself. I think that they are mature enough to make the decision, that we absolutely make sure. Whether they are mature generally in life is not for us to say.

Q But one of the purposes of your counseling, and not the counseling imposed, ordered, required by a court, but the counseling you as professionals believe you should engage in, one of those purposes is to determine whether the minor is sufficiently mature to make the abortion decision, right?

A Right.

Q And now in the numbers of young women in the age group 13 to 17 that you have counseled have you ever turned one away on grounds of immaturity?

A We have had women in that age group come back for another counseling session before either court or the abortion because we didn't feel they were firm, because there was ambivalence.

Q My question is really directed to maturity. Have you ever refused to perform an abortion in the age group 13 to 17 one the grounds that you believed as a result of your counseling that **[1099]** the youngster was not sufficiently mature to make that decision?

A Not unless the immaturity was tied into ambivalence, you know.

Q Is ambivalence in your professional view a sign of immaturity for purposes of a decision whether or not to have an abortion?

A No.

Q What's then the connection between ambivalence and maturity?

A Someone can be ambivalent and immature and in that case I guess that would come into it. But I don't think being ambivalent itself is a sign of immaturity, no, no.

Q So you have turned away one or more youngsters on grounds of ambivalence?

A Correct.

Q And have you turned away any youngsters on grounds of immaturity?

A No.

MR. GALUS: Thank you.

THE WITNESS: None that I recall.

• • • • •

TRIAL TESTIMONY EXCERPTS OF ELISSA BENEDEK, DIRECTOR OF RESEARCH AND TRAINING AT THE CENTER FOR FORENSIC PSYCHIATRY, ANN ARBOR, MICHIGAN

[DIRECT BY MS. LYNN]

[CROSS BY MR. GALUS]

[904] • • •

BY MS. LYNN:

Q Dr. Benedek, could you define what a dysfunctional family is?

A Yes. A very simple definition of the dysfunctional family is a family where there are serious problems. Those problems can be either in terms of communication, in terms of control of emotions, in terms of abuse, either sexual or physical abuse; in terms of alcoholism, in terms of emotional disturbance. It is a family that has problems in coping with day-to-day functioning. That is a very simple definition but I think understandable.

Q What would you say characterizes the communication between various members of a dysfunctional family?

A The communication between various members—first, let me say dysfunctional families exist in all socioeconomic levels. It is not just the poor or the middle class or the rich where there are dysfunctional families.

All socioeconomic levels have them and in fact I primarily treat families in my private practice of an upper middle or upper socioeconomic level. All educational levels have dysfunctional families. It is not a function of the poor or the uneducated.

Now in regard to problems of communication there are a variety of different kinds of problems. Sometimes there **[905]** is too much communication in a dysfunctional family, for example, in a family that is dysfunctional because of divorce, in some cases the adolescent knows much too much about the parents' dating, sexual behavior. The adolescent knows too much about the parents' problems of daily living and is too burdened so there can be too much communication.

• • • • •

[911] • • •

Q Could you talk a little bit about the effect of separation and divorce on family relationships, specifically in terms of communication?

A Yeah, okay. The question deals with the effect of separation and divorce on communication.

After a divorce there is generally a custodial parent and a noncustodial parent. More than likely the custodial parent is still the mother. Unfortunately for hosts of **[912]** reasons the noncustodial parent often has very little contact with the child. It may be that the mother keeps the noncustodial parent away, it may be because of sadness and depression, the noncustodial parent chooses to stay away; it may be that there is physical separation. But generally there is very little interaction between the noncustodial parent and the child.

So there is not much communication and certainly not much communication about important issues.

The literature, Wallenstein & Kelley(ph), some of the material I have written, Lamb, hosts of authors have talked about the quality of communication between the noncustodial parent and the child. Both are, even when they see one another, extremely awkward and communication is around superficial issues, where will we go today, where will we eat today, when will I see you next, that sort of thing.

• • • • •

[927] • • •

Q What about a judge who saw an adolescent for fifteen minutes?

A Again one of the things that I need to stress is that it takes education, training and experience to interview an adolescent. It isn't something that you can do just because you have known adolescents.

It is sort of like saying I can do brain surgery because I have watched somebody do it. There are levels of skill in talking to an adolescent and you need training and experience and supervision to do it. So talking to somebody for fifteen minutes will not give you valid and reliable information.

• • • • •

[983] • • •

BY MR. GALUS:

Q Now you use the term dysfunctional family?
A Yes, sir.
Q You contrasted that with a normal family?
A Yes, sir.
Q Are those, as you see them, regular psychiatric terms or lay terms?
A I try to define them with lay language.
Q What is a normal family?
A In lay terms a normal family is a family where there is reason, functioning reasonable communication, reasonable amount of trust, those sort of things.
Q What is a normal family in nonlay terms?
A Pardon me?
Q What is a reasonable—excuse me, a normal family in nonlay terms?
A A normal family is non—okay, let me add, in lay terms one of the other things that seems to be considered, a normal family or an ideal family, is a two-parent family, a non-structured family, a family where there has been no divorce or no separation, a family that is somewhat—well, the typical family picture of a family is a two-parent family with several youngsters with no fracture, no dissolution, okay?

A normal family in terms of a professional opinion—

[984] Q Let me back up then, did I understand you just to tell us that you equate normal with ideal family?

A No, I did not.
Q But a normal family in lay terms, a divorced family is abnormal?
A Many lay people believe that a divorced family, per se, is abnormal. That is not the case.
Q Well, do you believe that?
A No, I do not believe that.
Q What are your beliefs as to a normal family?
A My belief as to what is a normal family is a group of adults and children living together in a reasonable amount of harmony with reasonable communication, with reasonable trust, with mutual dependence on, and independence on one another.
Q Now is a dysfunctional family as you have testified to it in your direct testimony, the opposite of a normal family?
A A dysfunctional family can have some normal parts into it, but it could have some one of those areas that are disturbed.
Q Are there normal dysfunctional families?
A Are there normal—are there normal families with some dysfunction, how is that—
Q You used the term dysfunctional families, didn't you?
A Yes.
Q When you used that were you contrasting those families from normal families?

[985] A Yes

Q How does a dysfunctional family differ from a normal family?
A A dysfunctional family has impaired communication, impaired trust, impaired dependence, impaired independence from one another. It may be dysfunctional in other ranges.

There are families where there is physical abuse, where there is sexual abuse, where there is alcoholism, where there is incest, where there is too much communication among the generations and so forth, so there are a wide variety of parameters in which a family can be dysfunctional.

Q As you use the term, how many families are dysfunctional?
A How many families are dysfunctional?

What is the percentage?

Q Do you have an opinion?
A No, sir, I do not.
Q It could be as infrequent as less than one in a thousand?
A I have no opinion.

• • • • •

[995] • • •

Q I notice from your resume that you have written to some extensiveness on issues of custody?
A Yes, that is correct.
Q And have you testified in connection with such proceedings?
A Yes, I have.
Q In what circumstances have you testified, generally speaking—
A Well—
Q —in custody matters?
A Well, in regards to the establishment of custodial environment, who should be the custodial parent; in regards to the issue of joint custody, in regard to changes in the custody, in regard to visitation arrangements, those sort of things.
[996] Q Have you ever testified in support of visitation arrangements for the noncustodial parent?
A Of course I have.
Q I presume in your—on those occasions you rendered your professional opinion that the child's best interest was involved in continuing in some manner the—
A Yes, I have.
Q I take it in your professional view the noncustodial parent in—even in cases of divorce has things of value to offer to his or her child?
A I believe it is the child's right to have contact with the noncustodial parent, if there is no physical, sexual or emotional abuse, that is correct.
Q Well, have you testified on occasions in the child's best interest to have continued involvement with a noncustodial parent?
A Yes, I have. But then that has to be qualified. You are giving me very general statements, I do not think it is in the child's best interest to have visitation with a noncustodial parent around simply the issue of pregnancy and what to do about a pregnancy. I believe it is important to have an ongoing relationship if possible with the noncustodial parent for the child.

• • • • •

[997] • • •

Q You indicated even in a normal healthy family communication about sex is very sporadic and incomplete?
A That is correct.
Q In the mother-daughter situation it tends to be limited to menstruation and matters of hygiene?
A Often that is correct.
Q Development of breasts?
A That is correct.
Q And not often, if ever, concerning abortion or pregnancy?
A I didn't say if ever, I said not often.
Q Not often?
A Yes, sir, that is correct.
Q Okay. Well, if this incomplete communication is the result, even in normal healthy families, how can we predict that children accurately know how their parents will react to issues of abortion and pregnancy?
A Oh, that is a very good question and the answer to that—
Q Thank you.
A —is that communication is not always verbal. A lot of communication is nonverbal.

• • • • •

TRIAL TESTIMONY EXCERPTS OF GARY MELTON, PROFESSOR AND DIRECTOR OF LAW-PSYCHOLOGY PROGRAM AT UNIVERSITY OF NEBRASKA, LINCOLN

[DIRECT BY MS. LYNN]

[1114] • • •

Q All right. Dr. Melton, in what ways has competency to consent to medical treatment been defined in the psychological literature.

[1115] A Well, most of the studies have looked at several different sorts of models of competency; one being simply whether or not a person is able to express a preference, to make a decision.

That is obviously the lowest standard.

A second standard is an understanding which is usually thought out in terms of knowing the nature and consequences of a procedure, its risk and benefits, and the alternatives and their nature, consequence, risk and benefits.

THE COURT: Once again, knowing the nature—

THE WITNESS: The nature and consequences and risks and benefits of a particular procedure and its alternatives.

THE COURT: And you added a third to that too when I interrupted you.

THE WITNESS: Well, nature of consequences, risks and benefits of a procedure, and the same for its alternative, the alternatives that one might choose.

THE COURT: That is the alternative part.

THE WITNESS: Right. Sometimes there is also discussion within that of appreciation, which adds an emotional component in some people's minds of sort of having a gut feeling about it as well as cognitive understanding.

Other times that is thought about in terms of understanding how a particular procedure or decision applies [1116] oneself. So that somebody, for example,—a good example is in terms of adult mental patients who may be able to describe very well all of the—or major risks and benefits of medication, but then say I am not crazy, it is somebody else this belongs to.

There is a question then about how one views that. Obviously you can have different levels of understanding but that is an approach to understanding competency.

A third way is in terms of focusing on the process of decisionmaking so that not only do we look at whether or not an individual understands the attributes of a particular decision, but also whether or not they weigh the risks and benefits rationally, whether they take what seems to be the salient aspects into account and can balance them.

That sometimes is talked about in terms of the reasonableness of the decisionmaking process. Then the final way that it is looked at is in terms of the reasonableness of the outcome of decisionmaking, that is the actual decision that one would make consonant with what at least some people think a reasonable person would make. Usually in research that has been defined by getting expert judgments as to what the best decision is and then comparing the actual decision that someone makes or says they would make with what experts think the reasonable thing is to do.

BY MS. LYNN:

[1117] Q And these, I think it is four—

A Right.

Q —tests you have laid for lack of a better word, are they alternative ways of looking at competency to consent or how do they work together?

A Well, yes, they are essentially alternative standards and usually when psychologists have attempted to understand competency to consent they develop data that is relevant to each standard so that the law can then take what they will in terms of what the appropriate standard is in a particular context and look at what it is children, adolescents, adults can do.

THE COURT: You mean there is a different standard or approach to competency to consent depending upon the context, is that what you are saying?

THE WITNESS: No, no, no.

THE COURT: Depending upon the type of decision it is?

THE WITNESS: No, sir.

What I am saying is that the law might—or as a matter of policy we might decide that what competence to consent means in different contexts is different and what I am saying is a psycholgist's approach, we don't make that judgment, we simply say that this is what we can say about whether or not minors express preferences; this is what we can [1118] say about how well they understand a decision; this is what we can say about how well they reason about a

decision; and then what we can say about what minors in fact do when given a decision.

THE COURT: You have given me four ways, as I understand it, to—which are models of competency as you call them?

THE WITNESS: Right.

THE COURT: I guess what I am trying to figure out is do you apply the same model in the context of any type of decision or does the model that you apply depend upon the nature of the decision that is having to be made?

THE WITNESS: The research has tended to look at all four sorts of approaches within different kinds of decisions.

THE COURT: Okay.

THE WITNESS: I should add not all studies look at all four, but in terms of how they have been reviewed they tend to get compartmentalized that way and some studies in fact look at all four.

* * * * *

[1121] * * *

A What I was starting to say is that what we—what we also know is that most people don't, in their making decisions in most contexts, systematically weigh risk and benefits, that it is not like taking a probability of a harm and a probability of a benefit and adding them all up and then doing Bassian(ph) equations to see what you are going to come up with in the end or what the right probability is: that people usually end up making estimates of base rights that are wrong and that is true for professional too, I might say, and part of it is because we tend to focus on what is really in our memory, the jargon term that is used is "available," and the things that are most available are those that are most emotionally charged, that are most recent, or that happened most frequently in our own experience. What happens in our personal experiences may not be representative of the real risks and benefits across time, so that the sort of short answer is most people make pretty good efforts to make decisions; most of the time they make decisions that are reasonably in their benefit, but that most people, most adults, [1122]

don't systematically and rationally weigh risk and benefits, that there are lots of things about cognitive processes that get in the way of our making fully reasoned decisions.

The other sorts of things are ones that are perhaps more commonly known in terms of very high or very low levels of anxiety affecting performance and sort of situational variables affecting decisions.

An example of that in terms of consent would be what we popularly call the foot-in-the-door technique, so that to give an example, studies on organ donations and tissue donations find that you get fewer people saying they will donate organs if you just say will you donate your organ; but if you first say, may I prick your finger and then say may I take some more blood and then may I talk to you about this and so forth to finally asking, well, now, will you donate your organ, you will get much higher compliance rates.

So that there are factors that affect how people decide that depend on the way in which the question is framed.

* * * * *

Q And now, still talking about competency to make decisions in general, how do adolescents compare to adults as you have just described them?

A In general adolescents look pretty much the same as adults do, that is—

> THE COURT: You had better give me your definition of adolescence so we are talking about the same focus we have [1123] heard from others.
>
> THE WITNESS: Sure. Most of the studies that have tried to compare adolescents and adults have compared 14-year-olds against 18 and 21-year-olds. But the discussion, when people—when there have been reviews of the literature about comparing various age groups, they tend to talk about adolescence beginning somewhere at 13-14 and moving usually to legal maturity, although psychological adolescence can sometime continue after that.
>
> 11 to 14 is commonly seen as a transition period.
>
> THE COURT: How are you using it when she asks you about adolescence?

THE WITNESS: Again, most of the studies I am going to talk about have used 14 years old as a comparison group or they have used junior high and senior high students if they go across age groups.

MR. GALUS: Excuse me, if the witness is going to respond to questions about adolescent decisionmaking I would appreciate it if we could have questions framed so we know when we are talking about 14-year-olds or other groups.

THE COURT: Well, I don't quite know, your studies deal with 14-year-olds, but you are talking 14—13-14 to—

THE WITNESS: Well, they are both kinds, they are studies—most of the real life studies across age groups, in other words, as I said, they will have elementary school **[1124]** children versus junior high versus senior high and do correlational kinds of things in looking at when kids begin to form different kinds of skills or competencies.

The cross-sectional studies, those who take out age groups have tended to use 14-year-olds as a comparison group against legal adults, usually 18 or 21, and against elementary school children, and that is often, in some of the studies it has been like 9-year-olds.

THE COURT: Tell us what you are going to be opining about, when she says tell us the difference between adolescent competency—

THE WITNESS: In general for adolescence we are talking about by the time a youngster or a person is 14 they have crossed into most of the cognitive and emotional characteristics that typically get used as adolescence.

THE COURT: Just tell us which group you are going to be referring to, if you can, doctor, when she said compare adolescents to adults, what are you talking about?

THE WITNESS: I am basically talking about junior and senior high age.

* * * * *

[1128] * * *

THE WITNESS: All right, by age 14 in both real life studies involving clinical populations as well as nonclinical

populations, and involving general groups of adolescents, say from a school population, adolescents are not differentiable from adults, according to the four tests; that is that adolescents are just as likely to express a preference, just as likely to understand the nature of the decision; just as likely to weigh risk and benefits systematically; and tend to make or at least to say they would make decisions that are like those that experts think are reasonable.

THE COURT: I want to ask you about that standard a little later on.

BY MS. LYNN:

Q Dr. Melton, what does maturity mean as opposed to competency to make decisions?

A Maturity is not a term of art in psychology. As I understand it, the way it is used colloquially it would mean something like what psychologists often talk about in terms of adaptation or of higher levels of development.

So that it would include being able to form real—exchanging relationships, ones that are psychological as well as based on activity. It would include ability to weigh to make complex decisions, to weigh risk and benefits; to

[1129] THE COURT: Okay.

BY MS. LYNN:

Q Would it be possible, doctor, to have someone who is immature, and using that phrase in the colloquial way that you have described it, would it be possible to have somebody who is immature and at the same time consider them competent to make certain decisions?

A Yes. To stick with the understanding standard, for example, a particular kind of decision may be a very simple one, it may be that there are essentially no risks and a clear benefit and what is going to happen is not complex at all.

In that instance, obviously someone who is not a very good reasoner in general terms still could have a good understanding of what was going to happen in a particular context so that that

competency and that decisionmaking need to be thought about in terms of a general competency, the sort of thing we were just talking about, about how people—their sort of general reasoning style and abilities to reason, but also in terms of ability to handle a particular kind of decision and in fact the correlation is nowhere close to perfect in that.

Q What do you mean when you say the correlation is nowhere near—

A Well, if you look—you use some sort of general measure **[1130]** of competency, generally adaptive, nonpsychiatric adults, for example, and compare them to people whom we believe to be impaired in their general reasoning, many people who have general incompetencies can still be quite competent to make specific decisions.

My example earlier about knowing all the risks and benefits of medication and thinking through and having pretty good reasons for why you are going to take it or not take it, but also not dealing very well with demands of everyday life would be an example of that.

By the same token, you could have someone who is very together, very competent, but in a particular context has a mental block about it for emotional reasons, or simply lacks the information that is necessary to handle the decision because of its complexity, and it being foreign to one's experience.

* * * * *

[1137] * * *

Q And in general how do adolescents compare to adults in their capacity to make informed decisions about medical treatment in general?

A As I have already said, there is no difference in all the existing studies.

Q What is the importance of the parents to the adolescent decisionmaker in general, what is the parents' role?

A Well, it depends on the kind of decision and also on how far along in adolescence we are talking about. Older adolescents in particular tend to go to make their own decisions, but to get information that is relevant from anywhere including parents.

Younger adolescents or junior high age tend not to go to parents very much but they also value parents' opinions about serious matters. There is a classic study by Brittain that found that when we were thinking about sort of trivial sorts of decisions, hairstyle, for example, that early adolescents conformed primarily to a peer group, but when you think about more serious decisions like choice of school **[1138]** curriculum, for example, that early adolescents defer primarily to parents in making those decisions so that across the range of adolescents most adolescents tend to look to parental information.

Obviously it depends in part, and I am talking in general terms, it also depends on what the specific relationship is between the adolescent and his and her parents.

Q If an adolescent is found to make one decision regarding medical treatment is it reasonable to think that she or he would not be competent to make—would be competent to make decisions about other kinds of medical treatment?

A Could you repeat that?

Q Do you want me to repeat that question?

A Yes.

Q Okay.

If an adolescent is found to make—competent to make one kind of decision regarding medical treatment, it is reasonable to assume that he or she would be competent to make other decisions about other kinds of medical treatment?

A The odds are they would be, the caveat to that is what I have already said, you have to look, with each particular decision, but in general people who can make one kind of medical decision also can make other kinds of medical decisions when they are presented with sufficient information.

* * * * *

[1144] * * *

Q Dr. Melton, are you familiar with Minnesota Statute 144.343, the Parental Notification Law?

A Yes, I have read it.

Q And in your opinion is there any empirical basis for the Minnesota legislator's determination that minors are competent to make all decisions regarding pregnancy-related services by

themselves but are not competent to choose to abort by themselves?

MR. GALUS: I object to the form of the question; it is assuming facts not in evidence, namely the opinion of the Minnesota legislature.

MS. LYNN: Your Honor, I would ask you to take judicial notice of the fact that the Minnesota law allows minors to self-consent to all pregnancy-related services except for abortion. It is right there in the statute.

THE COURT: Yeah, I think I understand that. I understand what your question is. I think the objection is overruled and you may give your opinion.

THE WITNESS: I don't see any basis in the research literature for making that decision.

THE COURT: Your testimony is in your opinion **[1145]** there is no empirical evidence for the distinction between medical services generally and abortion services in particular?

THE WITNESS: Right. Only as I have heard mentioned, the only thing that makes the abortion decision a bit different is the nature of the moral and social considerations that apply and those presumably also apply to pregnancy decisionmaking more generally.

• • • • •

[1146] • • •

Q Do you have—what is your opinion regarding the differences between those adolescents who choose to abort and those who choose to carry to term?

A There have been several studies comparing general psychological wellbeing of teenagers who have chosen to carry to term and those who have chosen to abort. All of the studies have simply given a personality inventory and looked at how the adolescent compares against national norms. In general the three studies that have been done; two involve the California Personality Inventory, which is a personality test that crosses a variety of different personality traits, and then an eroticism scale, in all three studies the adolescents who had chosen to

abort looked healthier than those who had chosen to carry to term.

THE COURT: Do they use the Minnesota Multiphasic for that?

THE WITNESS: Not in these particular studies. They have problems with the adolescent norms in the MMPI, so there is some good reasons not to.

THE COURT: When you say healthier, what does that mean?

THE WITNESS: They are closer to their—not closer to the extremes, in other words, in general those personality scales which are intended for research and personality **[1147]** in general, generally it is assumed that closer to the mean you are on a given scale, that is closer to the average the healthier you are; and the further you go out on the extremes, the more unusual your attitudes or feelings or behaviors that you report the less healthy.

• • • • •

[1155] • • •

Q Now you testified earlier, Dr. Melton, that you are the chair of the American Psychological Association's Committee on Adolescent Abortions, is that correct?

A That is right, or the Divisional Committee, Interdivision Committee, yes.

Q Could you explain what the interdivisional committee is?

A It is the committee that was established by four of the divisions of APA. The divisions are groups of psychologists that vary in number but usually are around a couple of **[1156]** thousand, that chair particular professional interest in research or practice. The divisions that sponsored this particular committee were the Division of Child, Youth and Family Services; the Division of Population and Environmental Psychology; the Division of Psychology of Women; and the American Psychology Law Society.

The committee included representatives of the various divisions that were involved and was charged with doing two things—

THE COURT: What is the name of your committee?

THE WITNESS: Interdivisional Committee on Adolescent Abortion.

THE COURT: All right.

THE WITNESS: The committee had a dual charge. The first was to review what was known and what needs to be known about psychological assumptions that have underlay policy and law on adolescent abortion and, secondly, to provide some guidelines for psychologists that were involved in research or counseling with respect to abortion by minors.

BY MS. LYNN:

Q And who wrote that report?

A I did with input from other committee members.

* * * * *

[1160] * * *

Q Now turning to that part of the report that concerns itself with examining the assumptions courts have made about minors faced with abortion decisions, can you go through and summarize what the report concludes about each one of these assumptions?

A Yes. In respect to the quality of the decisionmaking, the general sort of conclusion of the committee is one I have already alluded to in my own testimony with respect to there not being a great deal of literature on abortion decisionmaking per se, but to the extent we have got that, plus the treatment decisionmaking literature, suggests that minors are not differentiable from adults or adolescents, I should say, are not differentiable from adults except with respect to some of the particular factors that they consider; notably again the social effects of their decision, how it is going to affect their **[1161]** family, and perhaps other critical people.

The major issue with that is in terms of the somewhat different approach that adolescents tend to make to the decision than adults do is that adolescents tend to delay in making the decision, delay in seeking health care and so on.

And we discussed whether or not requirements for parental involvement would be likely to increase the reasoning or the quality of the reasoning of the decision; and generally concluded in our opinion that it would not. We were concerned about increasing the delay and therefore increasing risk, both physical and psychological.

With respect to the psychological sequelae of abortion in adolescents, again many of the studies have not separated the samples by age. To the extent that they have the findings have been generally consistent with the general conclusions in the literature on the effects of abortion which is that there are—there is some short-term anxiety and depression, not clinical depression, to distinguish it from the testimony earlier this morning, that is sadness as opposed to being a depressed person.

And that over time, that that tends to extinguish itself. That there are slight age trends, that is, that minors are slightly more apt to have some negative sequelae than adults are. But the magnitude of the effects is small. **[1162]** So their responses are just about unheard of, and the age trend can be accounted for by other things.

Again the tendency to delay, the fact that adolescents who have abortions often are, if not coerced into doing it, at least it appears to be somebody else's decision when parents bring them to have an abortion. In that sense having less support, but that when there is adequate support there is no reason to believe any more effect on the adolescent than adults.

Then we also looked at the assumptions about the relative effects of abortion and carrying to term and concluded that in fact there is much more risk in carrying to term in part because of the untoward social effects of adolescent parenthood which are well documented in terms of failed marriages and if there is a marriage, interrupted education, family discord and so on.

So that to summarize the general conclusions were that there is no special reason to be concerned about adolescent decisionmaking about abortion as opposed to adults; that they are—that notice, not necessarily notice statutes, statutes which mandate parental involvement are not necessarily going to result in more reasoned decisionmaking and may, in fact, have some deletory side effects and that the assumption of markedly

severe effects of abortion on minors isn't substantiated by any of the available literature.

[1164] • • •

Q In your opinion, Dr. Melton, is there any empirical basis for the assumption that young women under the age of 18 who are given the necessary information and given an opportunity to explore alternatives need to be protected from making hasty or ill-informed decisions about abortion?

A I am not sure what—could you spell out what you mean by needing to be protected?

Q Well, okay.

In your opinion is there any empirical basis for the assumption that young women under 18 who are given the necessary information and who have explored the alternatives are in any sense less competent to decide for themselves whether to have an abortion or not?

[1165] A There is no evidence to differentiate adolescents on that point from adults.

TRIAL TESTIMONY EXCERPTS OF K. M., MINOR

[DIRECT BY MS. PINE]

[CROSS BY MR. ACKERBERG]

[1235] • • •

Q Why did you ulimately decide to have an abortion?

A Well, I wanted to go to school, I felt that R was old enough; I felt I was mature enough to raise a child but I didn't think that the child would benefit from me being a parent. I did not feel in myself that I could carry a child to full term and be able to give it up for adoption. Then I thought I would want to keep it and I knew it would have been better with somebody–else.

I decided that because I wanted to be what I am now, going into my third year of nursing and I wanted to be a nurse.

Q Did you ever consider telling your father?

A Well, not really, no, I didn't. I considered him but I never considered the fact of telling him. I was afraid. I was always afraid. The first thing was does my dad have to know,

when I told my mom, you know, I said I want Bert to know but I don't want Ed to know.

Q What did you think would happen, Bert is your stepfather?

A Bert is my stepfather.

Q What do you think would happen if he knew? What were you afraid of?

A I was afraid he would come right to Minnesota. I was **[1236]** afraid he was going to take me away from my mom because he always used to send her letters and send us letters that said she was crazy and just things—I was afraid that he was going to blame it on her, that she was nuts and didn't raise us good enough because I ended up getting pregnant and it wasn't—I was fearful for her and for me because he was such—

Q Was there something that had happened in the past that made you worry that he would come to Minnesota and take you away from her?

A When he came to visit us one time and said that he was going to shoot my mom, he threatened to shoot my mother and on several occasions wrote letters saying she was dead and he was going to get his kids.

On one occasion when me and my sister were down visiting him during the summer he wouldn't let us come back to Minnesota but we were under the impression, he told us that my mother had written and we could go to school down there and everything was okay but we never had contact with her and we didn't know what was going on.

THE COURT: Slow down a little bit.

THE WITNESS: I am sorry.

THE COURT: It is okay, go ahead.

THE WITNESS: We didn't know what was going on until the court came and got us and we were brought back and all this time he was holding us against our will and, I am sorry, I **[1237]** am really a fast talker—holding us against our will and that was what was going on, but we didn't know about it.

My father wanted us back. She never gave him permission and at the beginning of the marriage I remember him

coming to our first house that we lived in and actually being in the house visiting with us but he was not allowed any further than the door for fear that my mom had because she wanted us to have the right to see him, you know, but after that, after he threatened to shoot her we didn't even want to see him. We were really afraid of him.

Q Were you afraid? Did you think it would change your relationship with him in any way?

A Oh, yeah, I figured that if he knew that I was pregnant it was just going to be a matter of, you know, you are just a slut, that was the biggest thing that sticks in my mind because of all I went through recently with that living together situation and I felt that is what he was going to say. I thought the relationship would be over, whatever little we had, it was going to be over for sure if he found out.

Q Did you ultimately decide to go to court to avoid telling your dad?

A Yes, I did.

Q Let me ask you one thing, if you had had to tell your father how would that have affected your abortion decision?

A I would have carried it to full term.

[1238] Q It was that important to you?

A Yes, I would have carried it to full term if it would have been something, if there was no other option I would have, just to avoid that fear because I just—I am really terrified of him.

Q At the time you decided to go to court to avoid telling your father, did you and your mom talk to a private lawyer?

A Yes, we did.

Q What was it like when you went to court, can you remember how long you had to wait?

A Well, I think that from the time that we saw our lawyer until the time we got the court date it seems like it was five days, three to five days, and we didn't even have the judge we were supposed to have and the aroma when we walked in the room, the way—I thought he was a really prejudiced judge, I called him "Prejudiced Plunkett" because that is exactly what I thought of him.

I walked in the room, he treated me like an infant when he questioned me, it was repeated questions, you know, it was really stressful and I went through, you know, trying to get into the court for a week and I was just really stressed out and he was asking me questions that, you know, were just—I considered him making his decision before I even walked in.

I felt his personal views and it scared me when I realized who the judge was. I go to school with his son and I am in school with his son.

[1239] Q So you were worried?

A I was wondering how far it was going to get.

Q You were worried that his son would learn that you were in court about this matter?

A Yeah, uh-huh, and was really stressed. That brought a lot more stress out knowing it could possibly, you know, get around school.

I wasn't embarrassed about it, I didn't think that I needed to go through this kind of hassle for the simple fact it is clearcut that my father would have just, if he would have found out, I suppose—

Q Also were you pretty involved with a lot of activities relating to your church at the time? Was that somewhere near the time when you were confirmed?

A Oh, yeah, I was confirmed a week later and he walked in with his son for confirmation, he was his sponsor, and he looked at me and I looked at his son and I was wondering exactly what goes on around the family table at night and it worried me but I was confirmed right after that and I could see him looking at me, going, you know, wondering if I was still pregnant or how I could get confirmed considering I was seeking an abortion. I knew this was going through his head because he was a Catholic and my mom was.

Q What do you think would have happened if somehow his son had learned about this and that got out in your circle of [1240] friends connected with the church?

A It would have been—I would have probably—I know for one thing I went to a strict Catholic school all twelve years and I would have been out. I would have been out of the school I know for sure. It was run by nuns and fathers and I would

never have been allowed in there if they would have found out and it would have gotten around, it would have, you know, how fast things spread in high school.

Q Did you have to wait for the judge's decision?

A Yes, we waited three days I believe for the decision but we knew what it was before it ever came back. We did, you know.

Q How did you feel while you were waiting for the decision?

A It was terrible, I was sick, I was up all night wondering what I was going to do and—

THE COURT: He didn't sign it right at the hearing?
THE WITNESS: No.

BY MS. PINE:

Q How did you know what he was going to do?

A I knew—if you would have been there you would have known; he was really prejudiced. When I walked in you could see anti-abortion written all over his face.

Q What did he decide?

A He decided that I couldn't have it without my father's consent.

[1241] Q So he denied the petition?

A So he denied the petition.

Q Did your lawyer then explain to you that you had a right to appeal?

A Yes, he did and we felt that with his attitude toward it and as long as he waited that it was going to be the same.

Q So that made you feel like you didn't trust the appeal process?

A Yeah.

THE COURT: Wait a minute, you are both talking at the same time; you have to wait until she is through.

BY MS. PINE:

Q So you didn't feel like you trusted that you would get a fair hearing on appeal?

A No. I felt there was no fair hearing.

Q That is the way you felt.

Were you also worried about time?

A Yes, because it was—it seems to me like I had one week before the first trimester was over and so that was a lot of stress too, I mean.

Q What did you and your mom decide to do?

A We ended up going to Mason City, that is what I decided to do; we ended up going to Mason City which was two days in Mason City, Iowa, excuse me, which was two days, and it was probably $200 more.

[1247] * * *

BY MR. ACKERBERG:

Q So the judge asked one question, the judge asked you what made you think you were mature enough to make that decision?

A That is kind of how he worded it.

Q Was there another question he asked?

A There was lots of them and I really cannot recall them, I am sorry.

Q What did your lawyer tell you about appealing Judge Plunkett's denial of your petition?

A From what I can remember that I had the right to appeal, just that I had the right to appeal, which would be—I have no idea, I think that I had the right to appeal which would mean that I would go through the process again. I am not sure.

MS. PINE: Just what you remember.
THE WITNESS: Yeah.

BY MR. ACKERBERG:

Q Your lawyer advised you not to appeal?

A No, he didn't advise us that; that was my decision. That was my parents' and mine.

Q Why did you decide not to appeal?

A It was because he was totally prejudiced and I didn't think if I ever appealed to him he would change his mind.

Q What was your understanding about who would hear the appeal?

[1248] A I assumed, I guessed that he would again because at that time there was two juvenile judges and one of them had been out of town; that is why I didn't have him the first time and he was going to be out of town for some time, for some period of time.

Q Were you advised that you had an opportunity to submit your petition to another court?

A I don't remember.

Q What is the name—what was the name of your lawyer who represented you at the hearing?

A Mr. Donald Rysavy, I believe it is Donald.

Q Do you know how to spell his last name?

THE COURT: R-y-s-a-v-y, maybe?
THE WITNESS: Maybe.

BY MR. ACKERBERG:

Q Do you know what the basis of the judge's decision was, do you know if the judge determined that you were not mature enough to consent to the abortion?

A That I never found out. I don't remember ever finding out why I was denied. I don't remember finding out. I don't remember the reason why I was denied. I can't believe it was because of my maturity level, but I can't remember the reason why it was denied.

Q Did you at one time know or did you at one time know what the reason was for the denial?

[1249] A I am sure I did at one time.

Q How many days was it your testimony that you found out, about three days later?

A Uh-huh.

Q After the hearing that it had been denied?

A Uh-huh, yes.

Q That would have been approximately October 6?

A Yes, I think, I would say—

Q When did you make arrangements to go to Mason City, Iowa to terminate your pregnancy?

A I believe we had to look for a place that it could be done without having my father's consent which I think took about a

week and that is when we found Mason City and we made an appointment immediately.

I don't know if I should say this but for the simple fact that I was far along, but now that it was even going to cost more money if I waited any longer.

Q Well, do you know how much along you were at the time of the hearing?

A Seven to eight weeks, I believe.

Q And two weeks later you had the procedure in Mason City?

A After the hearing?

Q Yeah.

A I am trying to remember. It is really hard, I want to say like around the 20th or the 21st.

TRIAL TESTIMONY EXCERPTS OF S. L.,
MOTHER OF MINOR

[DIRECT BY MS. PINE]

[1253] * * *

Q And what was your daughter's relationship like with her stepfather?

A It was a close relationship, they were able to talk and they got along good.

* * * * *

Q Where did your ex-husband live at the time of her pregnancy?

A Oklahoma City, Oklahoma.

Q And in the years between the divorce and the time of her pregnancy how often did your daughter see your ex-husband?

A About five times.

Q And did she speak to him any more on the phone? How often did she speak to him on the phone?

A She visited him twice and spoke to him on the phone probably five times in that eight years.

Q Okay. How often were you in contact with your ex-husband at that time?

A No more than I had to be. I suppose there were four or **[1254]** five incidents of harrassment that he did, and which I was in contact with him by phone most of the time.

Q Maybe you could describe the incidents for us?

A Okay. The first summer we were divorced, in August of '73, the next summer he came up with a brand-new wife that was three years older than our oldest daughter. He took the two youngest daughters back with him and wanted to keep them the entire summer, which was fine with them and fine with me.

At the end of the summer when it was time to return them he refused to return them. He wanted to keep them. So after trying to talk to them on the phone and convince him to send them back he still wouldn't do it so I contacted my attorney and we got a writ of habeas corpus and within two days I had them back.

Q Uh-huh.

A The next summer while I was working he called me on the phone and he was in Austin and he told me he was going to come out and shoot me; he knew where I worked and he was going to take the four kids and take them back to Oklahoma and I would never see them again because I was an unfit mother.

Also that first summer our 16-year-old took the divorce very badly and she attempted to take an overdose of drugs in order to get some attention from her father and while she was in the hospital he called her and told her that the reason she took—did all of this was because she had an unfit mother and not a decent home life, et cetera, and wanted her to come down and stay with him a few days or for a couple **[1255]** of weeks. She agreed to do this and I agreed for her to miss a couple of weeks of school and go down and see him and see if they couldn't get their relationship back together again.

She went down there and during the course of the four days she was there she was kept locked in a bedroom at all times. She had a close friend down there who came to visit her and that close friend, I tried during that four days to get ahold of my daughter and could not reach her. I was told she was out or shopping or whatever and was not around.

Her close friend went over and saw her one day and found she was locked in the bedroom and my daughter was in hysterics wanting to get out of there and told her best friend to please contact me to send her some money so she could leave. If I didn't send the money she was going to leave one way or the other and would rather come home, have a decent way of getting home rather than hitchhiking.

I wired the money to her best friend and in the middle of the night she stole away from the house and got on the first bus she could find and started coming to Minnesota.

During the course of the whole time she was on the bus she was terrified because there was one time when they crossed the Oklahoma border they were stopped by the police and she thought for sure he had found out she was missing and was after her but it was for somebody else.

After she got home I received a phone call from him and the language and the abusiveness on the phone, the things **[1256]** he was going to do to both me and her was just horrible. I finally hung up on him.

Q Can you describe a little bit about what your relationship was like with him when you were married to him?

A He was a very domineering man, a very military-minded man. He spent 22 years in the military. I was a very dependent wife. I had lived in Austin most of my life and had left the town—my dad died when I was very young so I had really no male relationship to deal with. When I got married I was very much in love and I wanted to do everything to please my husband. I had children right away from the time I was 18 until 26 I had four of them. He told me what to wear, what meals to fix, whether I could go somewhere and when I couldn't go somewhere, I learned to live with that. The children became the same way.

Q Was he abusive to you in any way?

A The only way he was abusive to me verbally, he slapped me only once in the years we were married and that is when I called him an SOB so he did slap me across the mouth but otherwise he was not physically abusive to me but verbally.

I was called a no-good bitch and a fat bitch so often after a while I began to believe it. I became, "no identity" at all.

Q What sort of precipitated the divorce?

A Well, he for the last six years of the marriage had been **[1257]** drinking quite heavily, was a real bad alcoholic, his health was going down the tubes. There was even a period of about three months when I decided I would join him in this. I loved him; I wanted to keep the marriage together. I did not want to break up this family. I was terrified to raise four children alone, that was probably half of it. So I attempted to kind of join him for three months and see. I couldn't handle that. I figured that the children had to have at least one solid parent. So I don't know, it was just one night in Oklahoma City he made one of his nasty comments and I said you can have your divorce. There was also many women and it was getting to the point where they were coming to the home and they were having their affairs there.

I had no control over anything. It was just a bad atmosphere and a bad influence on the children.

Q Was it a contested divorce or you ultimately agreed?

A No, it wasn't. There was no contest. He wanted the divorce and I finally gave it to him.

I had had it and he did want to have the children very badly so he did several things within the next three months in Oklahoma, I had to wait three months before I could leave the state with the kids, and he did a couple of things in those three months in order to try to drive me insane because he wanted the children very badly and he told his attorney that is what he was going to try to do. I hear him **[1258]** on the phone telling him that.

Q In the years between the divorce and the time of your daughter's pregnancy you said you only spoke to him or saw him a handful of times relating to these harassment incidents that you talked about?

A That's right.

Q How would you characterize your relationship with him?

A No good at all. He was very verbally abusive. He wanted to harm me, he wanted the children in any way he could get them. The one time he was going to shoot me I had to take the four children and take them to a friend's home and leave them there for three days while he was in town but I had to be at my

parental home in order to talk to him. If he wanted to talk I did have a policeman there with me because the man does own guns. Twice during the last six years of our marriage when he was in a drunken stupor he put a .45 Magnum (sic) to my head and was going to blow my head off. So I knew he was capable of it and I had no qualms he would do it. He wanted me dead.

He told my attorney I was dead and just killing me was a matter of just finishing it.

* * * * *

[1265] * * *

Q Uh-huh.

A Because when we actually had the abortion she was very close to 12 weeks, we could not have waited any more time—

Q Uh-huh.

A —you know, because there would have been much more of a procedure, and—

Q Uh-huh.

A —and I felt that if that was her decision I wanted to have it as safe and easy for her as possible.

Q Uh-huh. Could you describe how long did you wait when you went through the courthouse with your lawyer for the court bypass procedure to avoid notifying your ex-husband?

How long did you wait around the courthouse and can you describe what you were feeling while you were waiting?

A I suppose we had about a 15 or 20-minute wait. I was angry, I was very angry that we had to be there. I thought to some degree we had been violated. I didn't know why we had to go into court and ask for this, her father not to be notified when for the last eight years he had such little contact with her and never called her, never knew what was going on with her everyday life, and I really felt we were not going to get a fair judgment out of the judge that we were seeing.

Q What were your feelings about going before a judge who you knew personally in the community you were in?

[1266] A I was scared, apprehensive; I thought perhaps, you know, something might—he might say something to his son or something and it might get into the school.

If the school would have found out what K. had done, what K. had done, I am sure she would have been kicked out. In fact I am positive she would have been.

She was getting an excellent education there and I just felt that her education would have gone down the tubes.

Q Can you describe what happened when you went to the courtroom, what your first impressions were?

A The judge was very aggressive with his questions. I don't remember totally all of the questions, there was many of them on why I felt she was mature. He asked K. why she felt she was mature. We went over and over again the incidents that my ex-husband did. He was just very aggressive and—I just did not get a real comfortable feeling. I felt he had basically made his decision before he walked in there. He many times asked her, "You are Catholic, you are doing this and you are Catholic," I mean—

Q Was there anything else that was asked or anything else that was said that made you have that feeling, that it was set against you?

A No, I can't think of anything right now.

Q How long did—let me ask you one other question about this; do you think that her father could have added anything to **[1267]** the decisionmaking process?

A He would have made her—have made her carry the baby to term and raise the child. I don't think he could have added anything. I don't think he had any right to, really.

Q If you had been forced to notify him what do you think the decision would have been? What do you think?

A We would not have notified him. She would have had the child. We would not have notified him, there would have been no way, no way.

Q How long did you, to the best of your recollection, how long did you wait for a decision from the judge?

A We went into court on a Thursday, I believe it was the 8th. I do have the report here, and if I remember right it is dated the 9th, which is a Friday.

My attorney didn't call me until Tuesday afternoon which was the 13th and he said he had just heard from the judge then. My attorney knew how desperate we were waiting for this

answer so the only thing I can come up with is that it must have been mailed because that is when I heard the first time, five full days with the weekend, it was five excruciatingly horrible days.

• • • • •

TRIAL TESTIMONY EXCERPTS OF JUDGE GEORGE PETERSEN, JUVENILE COURT JUDGE OF RAMSEY COUNTY

[DIRECT BY MR. PENTELOVITCH]

[CROSS BY MR. ACKERBERG]

[1285] • • •

Q Do you know approximately or can you estimate approximately how many hearings you have held under the parental notification statute since it went into effect in August of '81?

I am just limiting to cases you have personally heard.

• • • • •

A Right around 700.

Q Now of those 700 cases do you have a recollection as to how **[1286]** many if any of the petitions you have denied?

A I have denied one.

Q And do you recall the circumstances surrounding that particular case?

A Yes.

Q What were they?

A The young woman came into the juvenile center accompanied by her boyfriend, the father, as many young women do. There are many of them that come with their partner. This particular fellow, however, was apparently being very forceful about this woman having an abortion. She did not want it but she was fearful and I felt that rather than just send her away and have her bear the brunt of the man's pressure, that it would be better for all concerned if the court took the responsibility, he could blame the court rather than her for the denial.

So I simply executed an order denying the request.

Q Do you recall whether this young woman had received counseling prior to coming to court?

A I cannot recall. I can only respond to you that I am confident that she did.

Q Okay. Well, have you required—you require counseling of the minors before they enter into the judicial process at that point, is that correct?

A I do.

Q Have you required that ever since August of 1981?

[1287] A There was a time when I expected it and it seemed to be happening and then there was a period of time when it was not happening, we were getting the message instead from these young women that they were told to come to court first and then come to the clinic, where they would receive their counseling and their information and be prepared to go right ahead with it immediately.

I guess the thought was that maybe they could save themselves an extra trip or they could save some time. There was a period of time when I became aware of the fact that they were not getting their counseling before coming to court.

Q And when you became aware of that did you take any steps to change that situation?

A Yes.

Q What were those steps?

A First of all, I tried talking with the individual clinics, telling them that this was our situation, I didn't like that. I felt it was neither the job of the attorney nor the job of the guardian ad litem to do that kind of counseling, to explain the options to them, to describe a procedure that would be used. I talked to them on the telephone; I would tell them that I wanted to have that done before the young women came to court.

It didn't have a lasting effect uniformly on all of the agencies so I wrote a letter.

[1288] Q If you would look at Exhibit 20, is that the letter which you wrote at that time?

A Yes.

Q And in that letter you indicated that you would hear cases where the clinics had not engaged in counseling, is that correct?

A That is correct.

Q And that you—

A Excuse me, let me interrupt; not just the clinics engage in counseling, I think you look at the second page, I talk in terms of—yes, the third full paragraph, "Prior counseling by some trained or experienced professional will be required." So I wasn't requiring that counseling be provided just by that clinic to which the girl was going, but there had to be counseling.

Q From the source?

A Yes.

Q And according to the letter this is something that you and Judge Oleisky had discussed and agreed would be the policy in both counties?

A Yes.

[1291] • • •

Q Now have the procedures which have been described in Exhibit 18 changed in any respect since the law went into effect?

A I don't know how many minors are coming to us through the child protection intake phone number.

In four and a half years I would guess all of the clinics and the agencies and hospitals and everybody knows the process to call the public defender so they may call the public defender immediately. I know that the public defenders still take turns being available on a beeper 24 hours a day.

• • • • •

[1292] Q What is her name?

A That is Charlotte O'Connell.

On page 2, under No. 4, court scheduling, you will see under paragraph 1(a) hearings will be scheduled during court hours Monday through Friday whenever possible.

In that respect they have changed now where the hearings are held Monday and Wednesday. It is still the case that I would hear a matter whenever it needed to be heard, it is just that we have a schedule we try to stick to now.

Q Can you think of any situations where you have heard cases outside of the Monday-Wednesday schedule since you have implemented it earlier in 1985?

A No. No, and there has never been a request for a hearing outside of business hours.

• • • • •

[1293] Q That is a letter that you sent to Senator Waldorf, is that correct?

A That is correct.

Q You provided him certain information about the way you had been handling—or cases had been handed in your court under the parental notification law, is that correct?

A I believe that is part of the letter, yes.

Q Now you mentioned in there that the average time required for hearing is about 20 minutes. Is that still true?

A That is still true, although it may be a little shorter in a lot of cases.

I think as the attorneys who handle the matters have grown more familiar with the process may be shortening it up now, but at least ten minutes, no shorter than that, 10 to 20.

Q Now on the second page of the letter you talk about some statistical information. You indicate that you had not found any of the 13, 14 or 15-year-olds who appear before you to be mature, that 95 percent or more of the 17-year-olds you find to be mature, and that you were able to give them an estimate or you only were able to give a best estimate of about 15 percent of the 16-year-olds were found mature.

You have not kept statistics in detail for the entire time period since the day of this letter, is that correct?

A That is correct.

[1294] Q Do you have, based just on your recollection, and impressions, have the statistics changed significantly? In other words, have you found any 13-14 or 15-year olds mature at all?

A I seriously doubt it. I certainly can't recall that I have.

Q What about 16-year-olds; is it still true that you are finding the majority of them not to be mature?

A I still find the majority of 16-year-olds not to be mature.

Q Is it still true that you find the vast majority of the 17-year-olds to be mature?

A Yes.

Q Could you—the statute does not define maturity, is that correct?

A That certainly is correct.

Q What standards or criteria do you apply in determining if somebody meets the m[illegible] standard of the statute?

A I look at the young women; of course the same as I look at a witness who testifies, and I am trying to determine credibility for instance I am concerned about the manner in which the young woman is testifying, how she conducts herself on the witness stand, how she talks. More importantly, I am concerned with what it is she says. I am concerned about if she is in school, how well she is doing in school, what her plans are after school, her career plans or college plans. I am interested in knowing what kind of thought she has given to what she wants to [1295] do, how realistic her goals are, if you will.

I am interested in knowing if she is employed and if she is employed how long she has been employed, what she does with the money she earns, is she saving it for college or is she putting part of it away, is she helping to buy her clothes.

I am interested in knowing if she has a driver's license and if she has a driver's license does she have the use of the family car; is she trusted with the family car. Does she help pay for gasoline, insurance; what kind of community activities is she involved in, what kind of extra-curricular activities is she involved in, is this a person assuming some responsibility outside of herself, volunteer activities in the church, babysitting at a nursery school for church or doing candystriper work or nursing home visitation.

Part of the judgment about maturity is the thought that she has given to the reason why she is in court with me; the people she has talked to, a reflection of the concern that she has about getting information and other people's input in making her decision. Those are the types of things I am listening for.

At the same time I am listening to the manner in which she is testifying, both the substance and the manner.

Q Now the statute refers to mature and able to give informed consent. Do you equate those two?

[1296] A Yes.

Q Now the remainder of the minors are the minors whom you have not found mature with the exception of the young woman we have discussed, you have found best interest, is that correct?

A That is correct.

Q In your letter to Senator Waldorf you say you interpret best interest as not the best interest to have the abortion, but best interest to require that not—to not have her parent notified?

A Absolutely. I make no judgment as to whether it is in the best interest of the young woman to get an abortion.

[1306] * * *

BY MR. ACKERBERG:

Q Is the court prepared to hold hearings outside of the regularly-scheduled hours?

A Yes.

Q Under what circumstances?

A Where it is advised that she cannot wait until the next scheduled court hearing. I assume that the girl would tell us that the clinic advised them that that would be the case.

Q For whatever reason?

A For whatever reason.

[1307] * * *

Q When minors came into court, what generally is their demeanor?

A Normal.

[1308] Q Are they distraught?

A No.

Q Are they crying?

A No. I hardly have ever seen a young woman cry. I only remember a couple who have demonstrated that kind of emotion.

Q What kind of attitude do you attempt to take in your dealings with the minors when they appear in court?

A I think any youngster coming into court is nervous, regardless of the reason why he or she is coming to court. My main concern at the outset is to make them feel at ease and that they can trust the environment they are in.

Q How do you do that?

A I greet them, smile, make my opening remarks as explanatory as I can about why we are there, what the process is, what I am doing. I have a regular litany, I put myself on autopilot

and it comes out just about the same everytime explaining my record.

* * * * *

[1311] * * *

BY MR. PENTELOVITCH:

Q Judge Petersen, you related to me an incident where we spoke the other day, a minor came before you last week with both parents?

A Yes.

Q Would you describe the incident to the Court?

A Sure. The young woman came to court for the hearing that had been scheduled and the attorney and guardian ad litem came in and said to me, judge, this girl came in with both parents, mother and father are with her and I said are they her biological mother and father and they said yes. I said do they know why she is here and they said yes and I said why is she here—because one of the parents will not sign an acknowledgment of receiving notice.

I was upset because I thought it was the facility, clinic or the hospital whichever it was, that should have employed the service provision of the statute, simply service **[1312]** of a notice upon them, personally with an affidavit, and you could avoid the signature on the certified mail receipt for the notice that was sent.

But we will just take care of it. So I said, have the parents come up and we will all go into the hearing room together.

I asked my court reporter to type up a notice real quick, so I dictated over her shoulder a notice addressed to so and so and so on and so forth, the parents of the above-named minor, you are hereby notified that your daughter is scheduled for an abortion hearing at her request at such and such a time.

Q An abortion hearing or procedure?

A I am sorry, an abortion procedure. Operation, the operative word was operation, abortion operation, that is the word the statute uses, at such and such a place, here is the phone number to call if you need directions, and I signed my name to it.

I made two copies. I went into the courtroom, I asked my clerk to make up two affidavits of service for me to sign. She did. So I went in the courtroom and I handed each of the parents a notice of the abortion operation and then I filled out the affidavit of service as to each one of them. My court reporter notarized it and I had copies made for my files, gave the originals of the notice to the minor so she could **[1313]** take it with her to the clinic or the hospital as authority for them to go ahead.

As it turned out this was a case where it was going to be a two-day procedure so it was a case—'hen afterwards, the parents in the courtroom, the parents seemed pleased that they had been included in the proceedings. They found it hard to believe that it was the first time two parents had ever shown up and they said on the record we don't consent to this, judge, but we love our daughter so they wanted me to provide the authority rather than them being put in a position of seeming to consent to it.

Q And they had the impression that was required of them was consent, not merely being notified?

A I think that is absolutely true, that they were confused that their signing meant they were going to consent to something they didn't want to consent to.

Q And this was somebody who—a young woman who had apparently told her parents freely that she wanted an abortion and it was a situation where there was some confusion on their part as to how they had to go about it, is that right?

A Yes, sir.

* * * * *

TRIAL TESTIMONY EXCERPTS OF JUDGE PAUL GARRITY, SUPERIOR COURT JUDGE IN MASSACHUSETTS

[DIRECT BY MS. BENSHOOF]

[1318] Q Which?

A If I may refer to what you gave me, just as I came in the courtroom, it is General Laws Chapter 112, Section 12(s).

Q And is that a notification statute or a consent statute?

A It is a consent statute.

Q Is it a one-person or two-person consent statute for minors?

A Both parents are required to consent unless one parent is unavailable or if the parents are divorced or separated, then one parent is sufficient.

Q Do you know—is that currently implemented in Massachusetts?

A Yes, it is. Most of the so-called 12(s) petitions that I heard both parents were available to be consulted but the young woman, the girl, decided not to do it. On rare occasions there would be both parents who would be available and in some of those occasions the parent that was the one parent would come in to the lobby with me when I would be hearing a 12(s) petition with the young woman.

Q Let's step back one minute.

If a minor chooses not to get her parents' consent or cannot get her parents' consent is there a court bypass procedure provided for in the statute?

A I am not familiar with the jargon, but basically what happens is you have to get the approval of a superior court **[1319]** judge as opposed to other departments of the general trial courts, say the domestic relations, family court.

Q On what grounds can a superior court judge grant approval?

A That the young woman is sufficiently mature to make up her own mind to get an abortion or if the judge determines that she is not, the judge would have to determine that it would be in her best interest to do so.

* * * * *

[1320] * * *

Q And did you hear petitions under this statute in Massachusetts?

A Yes, I did.

* * * * *

[1321] * * *

Q About how many minor petitions did you hear of the Massachusetts statute since 1980?

A I have given that some thought. Over 100 and probably less than 200 or almost 200.

* * * * *

[1322] Q Do you have any opinion as to the reasons why there were so few judges hearing these petitions?

A Yes. My sense was and is that judges were disinclined to hear them on religious grounds, on moral grounds, and what has also been unfathomable to me, although we don't elect judges in Massachusetts, on political grounds.

Q Do you have any restrictions on the kind of petitions that you would hear from teenagers?

A Me, personally?

Q Yes, you, personally.

A I just had a—I am personally opposed to abortion, I just don't like it, and it is a moral gut sense, and I didn't hear cases where the young woman was more than three months pregnant and I let that information out early out. So they weren't sent in to me. It would have been pretty bad had they come in and then I would have gotten to hear the case and I determined that the young woman was three and a half months pregnant, I couldn't deal with it and it was very—tough enough for her to come in before me.

* * * * *

[1324] * * *

Q The statute says you are to make a determination as to whether she is mature and capable of giving informed consent. How did you define that phrase and did you define mature and [1325] capable of giving informed consent as two distinct concepts?

A I don't think I did.

Q You don't think you defined them?

A As two different concepts, no. What I did, I asked four or five or a dozen questions, depending on how nervous the young woman was, to put her at ease. I guess I would call them

throwaway questions and then I would get into the other questions of has she thought about this, why does she want an abortion, has she considered the alternatives, and in every case I determined that the young woman was mature.

Q So you in some 200 cases you heard you found maturity in every instance?

A There was never any question, it wasn't even a close call.

Q And you never reached the best interest standard?

A Never did.

Q And you equated maturity with capable of giving informed consent?

A Knowing what she was doing, that is my Boston way of putting it, and why she was doing it.

Q What age range of minors did you see?

A I know I had a bunch as young as 13. I might have had a couple at 12 and the ones who were that young were just as mature as the ones who were older. I think I, by the time they came, they were scared stiff and it was traumatic, but they knew [1326] what they wanted to do and I might have personally disagreed because of my own moral feelings about them, about the issue as to why I might have thought, gee, I don't think that is a good reason in my own mind, but it was an objectively good reason and articulated in a very mature way in my experience.

Q So despite the fact that you might disagree with abortion in general you found them capable of making that decision?

A Yes.

Q Describe the demeanor of the minors who came before you?

A Most of them were scared to death and I used to think about it; I didn't think about it that much, but I used to think about it and it is tough enough being 13, 14, 15, being pregnant and not wanting to tell your family because your family situation would blow up in your face if you told them, and then coming in before a middle-aged white male, and I think that to a great extent I was from a similar, the same background as many of these young women, but I am not anymore in terms of, you know, the class perspectives, and they were really scared.

They really were. I would ask them why didn't you tell, why don't you want to tell your parents and the responses would be

I am afraid to, they won't understand, I will never be able to live at home again, they won't let me get an abortion. It was all over the place. I am sorry, go ahead.

Q You were listing the reasons why they did not want to tell [1327] their parents.

Were they ever accompanied by another parent?

A On rare occasion there would be one parent, typically the mother, who would come in with the young woman and in those instances, and I have a vague memory of the mother volunteering on a few occasions that if the father found out there would be the devil to pay at home.

Q Did you believe her?

A Sure.

Q You testified when you observed the demeanor of the minors before you, that you had thought about it. Does that mean outside of the time that you were hearing these petitions you thought about their attitudes and demeanor?

A Yeah. I didn't give much thought to it but I did think about it and if a youngster was especially nervous on a particular day I would think to myself, you know, what did I do to cause that, which I might have done, I might have got up on the wrong side of the bed and just been a little bit short and abrupt and not have spent enough time with the youngster calming her down. But it was, you know, I hope I don't sound—I didn't lose sleep over it, I hope I am not sounding callous, but it did occur to me and I did reflect on how nervous these kids were.

Q Did you feel a legal procedure was traumatic and had this effect on them?

[1328] A Absolutely. You know, it was just—it was just another thing at a very, very difficult time in their lives.

Q Did you ever see any minors who had first approached their parents but couldn't have parental consent or were these minors who came because they didn't want to make the initial contact in the first place?

A I can't recall of a minor who had approached a parent and didn't get consent. There may have been but I can't recall any.

Q So in the minor's mind why they wanted to go to court was so they didn't have to tell the parents in the first place?

A That is correct.

Q Do you have any opinion as to what the law is accomplishing in Massachusetts?

A It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion and if abortion is legal, it doesn't seem to me to make any sense to go through this barrier which my sense is. I could be dead wrong, but my sense is that it has to be calculated to throw that barrier up.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. STEVEN BUTZER, PSYCHIATRIST AT ST. PAUL RAMSEY MEDICAL CENTER

[DIRECT BY MS. PINE]

[CROSS BY MR. GALUS]

[1337] * * *

Q Going back to your clinical experience, you have been essentially a full-time clinician for the past eleven years, is that correct?

A Not really. I have worn several hats during this career and as one of them I am still an academician, I am a full-time faculty member in the department of psychiatry at the University of Minnesota. I am an assistant professor rank, although I believe that will be changed at the end of this academic year to the college faculty. The other part of it is I have been [1338] involved in administrative roles in the Ramsey County Medical Center and Ramsey Clinic and as part of that have been involved in the design or management of treatment programs sometimes centering around adolescents.

* * * * *

[1341] * * *

THE COURT: You are going too fast for me and I know you are going too fast for Mr. Lindberg. You talk awfully fast and you have got 50 percent females had sexual intercourse in their 15th year, that is what your first number was?

THE WITNESS: That is correct.
THE COURT: And boys?
THE WITNESS: By their 15th birthday.

• • • • •

[1342] Q Judging from your clinical experience, from your experience with adolescents in treatment with you who are making reproductive choices, how capable would you say adolescents are with dealing with those decisions?

A I think capability gets us into two kinds of worlds; one is the capacity to make the judgment and the other is the competency to make the judgment. On both counts it is my belief that they believe they are both capable and competent to make the judgment.

Q Can you give any examples of the types or choices that are being made, and in choosing your examples, can you elaborate on your sense of competency capability in this area, from your clinical experience?

[1343] A Well, the patients I have dealt with are a full range of individuals so their attitudes and their values reflect pretty much a cross section of our society. I have had individuals as adolescents struggling over decision about the degree of sexual activity within a relationship, even being concerned enough to say how much kissing or petting they might engage in. I have had some individuals who were quite concerned about making an appropriate choice about the person that they chose to become sexually active with under the definition of sexual intercourse and seeking input or advice about that or in general thinking about the ramifications of it, both positive and negative.

Others are perhaps considered to be significant level decisions, but it is common practice dealing with adolescents to deal with abortion, certainly birth control; I have dealt with some individuals who have kept pregnancies to term and then struggled with decisions about keeping the infant or putting the infant up for adoption and one rather notable case in my memory dealing with an individual who put an infant up for adoption and then was struggling with the decision to pursue

acquiring parental rights again afterwards and so it is really a full range.

Q And without giving a theoretical definition, how would you articulate your clinical experience that they are making these decisions and grappling with these issues in a competent [1344] way?

A Well, they fulfill the underpinnings of the competency type assessment. They want to know what the range of options are, they usually have a very good understanding of that. They are looking at the consequences of those options and they are using a personal value system or set of facts to make the judgment.

When they are doing it with someone like me they are usually doing it because it caused them some anxiety or distress or it has been a particular reason for referral.

Q Let me backtrack for just a second back to your summary of trends in the counties surrounding the Twin Cities. You have talked about the age going up. Do you know where the age is now, how far up it is?

A Well, we measure it in terms of a year or months of a year depending on who is doing the research and from its low point several years ago it has drifted perhaps a quarter of a year for both sexes toward the upward side.

There is no way to know where that will go or how far, it is not likely to exceed what was perhaps a normal level, say, 12 or 15 years ago.

Q Which was what?

A At a point, that 50 percent point, the highest point since they have been doing the research early in the 50s has been at point around 17th birthday for girls about the 16th birthday [1345] for boys so it is about a year's variation or a year and a half at the most.

Q As a therapist what approach do you take when a patient who is a minor is grappling with a reproductive decision?

A Well, the approach is really to try to have them feel in control of the decision and reach the decision based upon their sense of what their options are and what their competence, or rather their understanding is of it.

Each individual comes in with their value system and their belief system, their social network, and the job of the counselor or the psychiatrist whoever is providing that service is to help them work that through so that they have a good understanding of what they have chosen and why they have chosen it.

They sometimes use us simply to reflect that, they bounce things off of us and sometimes they use us to answer questions. Sometimes they want to use the accumulated experience that the therapist has to ask about outcomes.

I think an interesting product of that is that most of them perceive us to have the same values that they have because of that process. They don't really understand what we are as people underneath it because of that reflectivity attitude or reflective process. They will often come back later and have a belief that I was one thing or another because that is the way they ended up with their decision.

* * * * *

[1353] * * *

Q Are you familiar with Minnesota Statute Section 144.343?

A Yes, I am.

Q And are you familiar with the statute's requirement that minors notify their parents or alternatively obtain a judicial waiver based upon maturity or best interest?

A Yes, I am.

Q Based upon your clinical experience, do you believe that some minors in the State of Minnesota involuntarily tell parents about abortion against their better judgment because they are too frightened to go to court?

A Yes.

Q Can you tell us what the basis of your opinion is?

A I have had a number of cases where adolescents and their parents have shared information that has not been voluntary for one reason or another. I have had some where adolescents have unwittingly left diaries out and parents have acquired information, others where they have been able to get services and a bill for those services has appeared at their parental home.

But more specifically I have had some pregnancy-related issues and a couple of cases recently that have reflected that. In one case I was treating a patient—

Q Let me backtrack one minute.

This is about your basis for your opinion that they are [1354] too frightened about court in particular. Has anything come up in clinical treatment of patients with regard to patients' perceptions about the court process?

A Yes, that has been discussed frequently because—

Q Can you give us the sense or the basis of this?

A When they become aware or if they have become aware that that process is there, they usually find it intimidating or frightening. Some stronger characters are just indignant or angry about it.

Q Parents have actually told you this—

A Yes.

Q —in the course of therapy?

Now can you pick up where I interrupted you and elaborate a little bit about the types of situations which parents find out about adolescents' pregnancy, abortion, sexuality, in some way that is involuntary in the sense that the minor did not share it with the parents deliberately?

A Well, the case that I was describing is that of a single parent family where the mother became a patient of mine because of her knowledge that her daughter was in the process of seeking abortion services. That information was provided by the doctor of the daughter who also was a family practitioner and was the mother's doctor as well. It was his mistaken assumption that the law required him to provide notification and he also perceived himself as being helpful by telling the [1355] mother that the child was facing an abortion decision.

The outfall of that was enormous in terms of conflict and difficulty in the family. That resulted in the mother also notifying the father, who was out of state and who had not maintained much contact with the family but appeared again in a rather punitive and angry role.

The difficulty with it is that the mother, even though working through the decision and ending up allowing her daughter to make the choice, ended up in treatment with me and had said

on a number of occasions that when all is said and done she would rather not have known it was happening, she didn't like the idea and the reason—that would be putting it mildly—she abhors the idea. The problem is that the mother is a member of a very conservative religion, very much opposed to abortion in concept and in practice, and the daughter saw abortion as a strategy and a reasonable way to deal with the problem she was having with her pregnancy.

Without getting into what those values represented, it represented the determination probably of a functional relationship between those two.

Q So you have actually had cases in which parents, mothers have said to you that they would rather not have known?

A In that case specifically, "I would rather not have known." In another case the daughter felt she was compelled to notify the parents; did not understand her options or choices and I **[1356]** think she was informed by her doctor that she had to do so. She was a patient of mine and still remains a patient of mine and ended up disclosing to her parents the situation she was in and that has created a fallout also of similar magnitude.

Q In that case was there any—was there any effect on the husband and wife's relationship?

A I think it is probably going to rupture the marriage. I doubt if their marriage will survive. The reason is the polarization there is between two points of view. The mother's opinion was again rather polarized towards one direction and the father toward another and they are unable to reconcile that.

They find themselves still fighting over the decision even though it has been made.

Q Have you had other cases in which you have seen some form of involuntary communication about these kind of matters to parents?

You were mentioning earlier about diaries—

A There are lots of ways that that occurs but in general this is information that is given to someone in a period or a state of duress or for reasons other than just simple disclosure and the resulting emotional fallout is usually tremendous. The more typical example is for the parent to come upon a communication, a letter or a diary and realize that their **[1357]** child is sexu-

ally active or that they have been involved with a birth control decision or an abortion-related decision.

I have had examples where former friends, after having an angry argument or disagreement with the teenager, felt compelled to disclose to their parents something about them in the sexual arena and do so as a retaliatory measure, knowing what the parents' response would be.

Q Do you have an opinion from the entire range of your clinical experience with accidental or coerced in the sense of a doctor making the communication, of the effect of such involuntary communication of matters such as pregnancy or abortion to parents on a family or relationships between adolescents and their parents?

A Yes, I do. In my experience when disclosure is not voluntary it is almost universally negative.

Q That is specifically because it is involuntary?

A I think primarily because it is involuntary and also because of the underlying assumption, it is that the adolescent believes that the knowledge would be shocking or disruptive in the family or to the parents and the parent is usually in a position where they do not want to know the information in the sense that they either disagree with it or they would rather not hear it or they would like it to be otherwise; not wanting to know, it takes different forms of opinion or different layers of control.

* * * * *

[1361] Q Do you have any reason to believe that the effects of involuntary notice which you observed in the two cases you described are unusual in any way?

A Maybe unusual in that they represent part of my practice in one small period of time, but, no, I don't think they are unusual in terms of either the problem involved, the type of disclosure pattern involved, or the consequences.

I am sure there are other clinicians who have exactly the same type of experience.

Q Dr. Butzer, based on your entire range of experience treating teenagers and adults in the State of Minnesota, what is your opinion about the actual and potential effect of the Min-

nesota statute which is the subject of this case on minors making reproductive decisions and their families?

A Well, I have two opinions about it.

On the one hand, I think that the provision is not functional or useful. It does not provide a service or a safety valve or a diversion process that is needed. The individuals making the decisions often are unable to get those kind of services within their community or within the medical setting or, in many cases I think they do it within their own families.

The second thing is that I think that when it is invoked or what it presents itself, it provides a punitive and negative type of response to the individual who has to use it. **[1362]** On the one hand, they are afraid to disclose to their families and by using the bypass procedure they have to face in their mind an authority figure and I think they see it as a process where they have to justify themselves, have to justify the situation they have been in, and justify the process they have gone through in making a decision. I think to them it is—they see it as a validation kind of effort rather than a consultative or really equal decisionmaking type of format.

Q Do you think it improves the quality of decisionmaking at all?

A No, I don't.

Q Let me ask you one last question, and that is that in such situations where adult involvement might be helpful is it sometimes better, better for the adolescent to get adult input from someone other than the parent?

A I think they are excellent judges of that. I think they seek the attitudes that they can relate to, that they know they will get good information from. They are very responsible about how they do that. If they think that they have not adequately processed the decision, they will often go to someone they have confidence in.

They use teachers, they use religious advisors, they use other people's parents; they use professionals and many of them I suppose will use their parents.

[1375] * * *

BY MR. GALUS

Q Could you indicate a calendar year?

A I think it probably occurred around anywhere from '81 to '83, the period in the early 80s was reflective for a span of time of increased, increased sexual activity and increased drug experimentation and somewhere in that period of time the value system began to change. It is different in different segments of each of the seven-county area.

If you look at the far suburban or rural, if you get out further into Wisconsin or further south in Scott County or north in Chisago County you see a more conservative impact earlier than you do at the urban core. But the trends are the same, it is just the degree or the rate at which they change.

Q Let's think of them in the aggregate if this is possible for you to do; how has the value system in the period '80 to '83 changed?

A The value system seems to be drifting away from a high value on sexual experience or sexual activity to one more of individual decisionmaking or individual choice or individual control. As a consequence there is a renewed, I would say it is probably termed best as a conservative sort of development in **[1376]** society so that a group now that has a value of about nonuse of chemicals, of nonparticipation in social sex rather than meaningful relationship oriented sex or recreational sex is a phrase that has been used that also applies to the same statistics, are showing a trend in terms of numbers of students completing high school diplomas and it is being shown in terms of voluntary enlistment in the military and it is being shown in terms of voluntary participation in religious and other related activities. It is a general societal trend we are seeing.

Q There is a trend away from recreational sex, that is a trend among the teenage population, a trend away from recreational sex to responsible sex?

A A trend away from recreational sex toward more relationship-based sex in all ages of society.

Q Including teenagers?

A Yes.

Q Well, I thought we were talking about the change in the trend you noticed in the adolescent population in the '80 to '83 period?

A Yes.

Q My questions are intended to be limited to the adolescent sexuality.

A I understand.

Q Okay. Increase in positive attitude toward choices?

[1377] A Yes.

Q That could account for fewer conceptions, couldn't it?

A It could.

Q That could account for a lower abortion rate, couldn't it?

A It could.

Q Have you observed, in reviewing the statistics that are available, any trends in use of contraception among the teenage population in Minnesota?

A There is less generalized information about that so I would be speaking more from a clinical population or perspective and I would say that there is increasing awareness of birth control choices, better planning about it, but still I think less than there should be in terms of that group. But certainly there is more individuals choosing birth control methods, more males, for instance, are choosing to accept responsibility in the sexual relationship than previously.

Q And is you answer with respect to the teenage population?

A Yes.

Q And that would certainly account for fewer conceptions, wouldn't it?

A Yes.

Q That would certainly account for a lower abortion rate, wouldn't it?

A Yes, possibly.

Q A plausible hypothesis, is it not?

[1378] A Absolutely.

Q This change in attitude occurred sometime in the '81 to '83 period to the extent you have been able to observe?

A Yes.

Q You say that teenagers are more aware factually of contraception but still aren't doing as good a job about it that you think they should?

A That is true.

Q Do they do as good a job as an adult?

A Yes, they do.

Q You talked in statistics about the statistics that you became aware of near the end of 1985.

Can you identify those specifically?

A They were accumulated through social service agencies in the St. Croix river valley and I believe they were done through questionnaire research and I am unsure of who actually did it. I am unsure of what their actual sampling techniques were but it was school systems in the Stillwater area south to Hastings, Cottage Grove.

Q Did that study confirm the opinion that you have otherwise come to hold about more conservative attitudes about sex?

A If you look at it in the context of all the information it shows that that group at the time it was sampled was certainly a more conservative group than previous samplings. [1379] So I think you get into methodologic kind of analysis and then that gets into a different criterial arena.

Q You to some extent believe it is meaningful to talk about conservative-liberal attitudes?

A They are generally accepted terms and people usually know what we mean when we use them.

Q When you use those terms with respect to sexual matters do you believe there are conservative and liberal attitudes about abortion?

A Yes.

Q The trends that you have observed among the teenage population in Minnesota concerning conservative attitudes about sex, does that also include a trend toward more conservative attitudes about abortions?

A I think so.

Q That would certainly in you opinion account for a reduction in the abortion rate?

A I think it adds to the deterrent value of the whole array of information. There is also at this time a markedly increased

awareness about sexually-transmitted diseases and I think all of that has had or influenced the decisionmaking of everyone in sexual behavior.

But the conservative attitudinal shift adds to that as one increment or one factor.

Q In you clinical experience have you treated adolescents **[1380]** who have suffered anxiety or stress or other disorders because of abortion decision?

A Yes.

Q How many?

A It is probably easier to talk about them in two groups. One group, talking about their anxiety in terms of making a decision and their difficulty in weighing the alternatives, those are usually short term and they are usually decision-related types of counseling exposure. They are largely oriented towards the conclusion of the decisionmaking process and the anxiety usually abates afterwards.

So whatever their choices they affirm them and they go forward from there.

Q Let me just focus on that one group for a minute. By short term you mean the problems were trivial?

A I mean short term as applied to the duration of professional contact or treatment.

Q But still serious problems?

A Of course.

Q And still serious enough for you as a professional therapist to be valuable in solving?

A Yes.

Q How about the other group?

A The second group, the second group applies to individuals who have gone through abortion decisionmaking and regardless **[1381]** of their decision have had either emotional fallout or distress after that either in terms of—we might use two diagnostic categories, one an adjustment disorder which implies a more time-limited or mere event-type of psychiatric disorder, so people who made a decision and then suffered some problems about the emotion related to the decision and sought treatment.

* * * * *

[1384] * * *

Q In those situations the patient didn't want to initially want to have anything to do with you?

A Absolutely—excuse me, in the whole part of the relationship which was important was that the intitial part of the transaction involved was to get them to see that I first was a valuable person, nonthreatening, and had something to offer them. Only when that has been accomplished could I then move to the second part of that equation which was to say now it has been useful or productive.

Q Don't you think parents have those sort of skills too with respect to adolescents whom they have reared and lived with for 14 or 15 years?

A Some parents, yes.

Q So it is not useless, the invocation of parental values **[1385]** and experience is not always useless if it is not wanted by the adolescent, right?

A No, but it depends on the variables as I mentioned.

* * * * *

TRIAL TESTIMONY OF J. M., MINOR

[DIRECT BY MS. PINE]

[1417] * * *

Q Okay, J., how old are you now?

A Seventeen.

Q How old were you when you had your abortion?

A I was 15.

THE COURT: You have to talk a little louder, there is just us here in here and he wants to hear you, okay?

BY MS. PINE:

Q Who were you living with at that time?

A My mother.

Q Your parents were divorced?

A Yes, they were.

Q Can you tell us something about what your father was like and what your relationship was like with your father?

A After my parents were divorced my father and I didn't have much of a relationship. I saw him on my birthday and Christmas, various holidays like that and it was never directly on the holiday, it would be like the day after or the week following.

[1418] Q What is your mother's religion?

A She is Catholic.

Q And what are her views on abortion?

A She is pro-life.

Q Did she ever send you to classes at her church on these kind of issues?

A Yes. I was sent to classes in all through ninth grade.

Q And what was the subject of those classes?

A Abortion, pregnancy, it was all pro-life saying that you must preserve the life of children.

Q And when they said that they were referring to abortion?

A Yes.

Q What was your relationship like with your mom before your abortion?

A It was typical mother-daughter relationship. We didn't have too many problems, no more problems than the average mom and daughter have.

Q When you first learned you were pregnant who did you talk to at school?

A The school nurse.

Q Why did you decide to have an abortion?

A Because I thought I was too young.

THE COURT: How old were you, J.; I didn't hear you.

THE WITNESS: Fifteen.

* * * * *

[1420] * * *

Q And then what happened, did the school nurse set up a meeting?

A Yes, she called my mother to come in.

Q So who were you with when you told your mother?

A Well, the school nurse and my mom were in the nurse's office and I walked in and just when I had walked in my mom looked at me and she says, "You are pregnant, aren't you," right away; I am like, well, yeah, I am.

THE COURT: Had the nurse told her?

THE WITNESS: No, the nurse hadn't said anything.

BY MS. PINE:

Q She guessed because you were with the nurse?

A Uh-huh, yeah.

Q Can you tell us what happened at the meeting with the school nurse, exactly, what you told her, what the story was?

A She was hysterical, she was hysterical at first. She hit her fist against the seat and said, "I don't believe this," and started to cry and said, "I can't believe you would do this to me." I had like betrayed some trust in her or something, and it was hard for me to see her do that because it hurt me so much because I knew I was hurting her and it was very difficult to even tell her.

Q Was there any attempt to talk about what to do in that meeting?

[1421] A Well, the nurse had gone over what we could do, told us of a doctor that we could go to and the options that we had and my mother asked what I was going to do and I said, Jeff and I have discussed it and we are going to have an abortion.

Q What did your mom say, do you remember?

A She didn't really say anything at that point. She just kind of swallowed that in because she is against it and I didn't know what to expect from her.

Q After you left the school nurse's office did you and your mom drive home together?

A Yes.

Q Did your mom say anything to you in the car?

A No.

Q Nothing at all?

A Nothing at all.

Q So you drove home in complete silence?
A Uh-huh.

THE COURT: Now your father was gone, your parents were divorced and you were living with your mother, is that the situation you were in?

THE WITNESS: He lives in the same city we do but he is never around or anything.

BY MS. PINE:

Q What happened when you got home, when you got home what was the first thing that happened?
[1422] A We walked into the kitchen, we sat down and mom started to make some lunch. I turned on the TV. She didn't even turn to look at me, she just stopped, she had her hands on the counter like this, her back was toward me and looked up like this and said, "Why can't we keep it?"
Q Did she say anything else to you about the abortion that day?
A Yes, she said, "How can you kill something?"
Q Did she say anything else?
A No, we sat there in silence the rest of the day.

THE COURT: I am sorry?

THE WITNESS: We sat there in silence the rest of the day.

BY MS. PINE:

Q So you and your mother were sitting on the couch in front of the television—
A We were sitting in the kitchen.
Q Sitting in the kitchen?
A Sitting in the kitchen watching TV.
Q Watching TV and the two things you just told us are the only two things she said to you about that?
A Yes.
Q Inside did you—were you wishing that you could talk about it with her?

A Yes. I wanted to say something like, mom, what will help [1423] me, but I was afraid to. I just couldn't.
Q And your mom wasn't able to do anything helpful?
A She could have said something.
Q What did you feel, what did you say when she said the two things you just reported to us?
A I put a lot of thought into it and I did in a sense want to keep the child but how could I, I am too much of a child myself and I think of it that way, just if I am too much of a child how could I actually carry one?
Q So what did you say to your mom?
A I told her that exact same thing: I said, mom, I am too much of a child, I can't carry it, I don't feel responsible enough, and the second thing was almost like a shot through the heart; it hurt so badly.
Q When she said, "You are killing something."?
A Yes, because I fully realized what I was doing and I knew what I was doing and to have her reaffirm it, I know, and to have her just tell me that, it hurt so badly.
Q Did your mother ever bring up the subject of your pregnancy or your abortion in an effort to be supportive from the time—
A No.
Q —from the time she learned about it to the present?
A No.
Q After you told your mom did you still have to go to court?
[1424] A Yes.
Q Can you explain why?
A We couldn't—we both, my mother and I, decided, they told me I had to tell my mom and my dad and my mom thought this was absurd and so did I because my father is not a part of my life; I don't think he is, I see him twice a year. He lives a mile away from me and he calls on occasions, not very often.

He isn't a part of my life, he hasn't been for the past eight years.
Q Did your mom stay with you through the court process?
A No.

Q When you were on your way to the clinic to actually have the procedure done did your mom say anything to you about birth control?

A They had told us before we went to the clinic that they would be giving me a three-month pack of the pill and she told me to refuse it, to not take it.

Q Why did she say that to you?

A She said, "You have learned from your mistakes and you won't do it again, will you?" She was telling me I wasn't going to do it again.

It wasn't my choice as to whether or not.

Q Has the subject of your pregnancy or abortion ever been brought up by your mother in a nonsupportive way since the time **[1425]** she learned of it?

A Yes, sometimes she threw it back in my face as if like I would say I want to go out, where are you going and I would say, mom, we are only going to a friend's house, she would say what are you going to be doing, I said, mom, it is a bunch of friends; we are not going to be doing anything bad, and she would say no, you have already done that—

Q By that she meant—

A —she meant the abortion, she says you have already done the worst thing possible.

Q Could you give another example?

A I could give you one very recently, just this weekend my brother and sister-in-law were here and she said she wanted grandchildren right away and I looked at her, and this is after they had left and I said you want grandchildren, she said, "From them, certainly not from you."

Q So how would you—well, let me ask you one more thing, because of your mom's views on abortion did she ever—are there other ways in which she brought it up in which you felt she was specifically trying to make you feel bad and feel guilty and feel like you had done something wrong?

A I don't know, a lot of times mom didn't have to say anything. When we would see—we would watch a movie perhaps on TV that had something to do with teenage pregnancy or something just the look in her eyes, she would look at me and the look in **[1426]** her eyes is, "I cannot believe you have done

that," and I would have to look away. I felt guilty just by the way she would look at me.

It is almost like I have her looking over my shoulder saying, well, you have done this now.

Q Does she—I know you have said this before, I will ask you again; did she ever bring up the issue of teenage pregnancy or sexuality in any way to discuss openly your feelings and what you were going through?

A Never. When I did once ask her for help because at one point I was having a hard time dealing with it, she rejected the idea; she said you can come to me for help but the way she said it she said it in such a harsh tone I don't know how she—how I could go to her to ask for this if she was going to yell at me, talk down to me and tell me what I was to do rather than asking, rather than asking me what I wanted to do.

Q Can you sort of summarize in general what your mom's attitudes and her behavior with regard to pregnancy and abortion from that time on made you feel?

A Can you say that again?

Q You have described what your mom's attitude about abortion was and told you you had killed something. You have also talked about the way she has thrown it back in your face, and expressions, and that kind of thing.

What did all that make you feel about the abortion **[1427]** by yourself?

A It made me feel worse about myself, worse about the decision I had made. I thought I had done something for myself and she couldn't realize that. I felt guilty.

The decision was hard enough to make and to actually go through with it and accept what I had done. I didn't need her coming down on me afterwards.

Q How would you say the abortion and your mother learning about the abortion has affected your relationship with her?

A We always had that thing between us, it will never make it quite the same. She had told me that it will take you a very long time to rebuild the trust that you have destroyed and sometimes now even I know that I don't have the trust that I should for being my age and a senior in high school; I thought that I should deserve a little more than that because I have learned

from what I have done and she doesn't seem to realize or accept that.

Q Did you ever at that time, do you ever worry that she might do something drastic out of her anger towards what you have done?

A Yeah, I have often been afraid of her kicking—kicking me out of the house. She kicked my brother out of the house because of being too independent, too outgoing and I am afraid she just may do the same thing for me.

THE COURT: There is just the two of you now in the **[1428]** home?

THE WITNESS: No, there is my mom, me, my two brothers, one is older, one is younger.

BY MS. PINE:

Q Do you have—your relationship with your mother would be better today if you had not told her about the abortion two years ago?

A Yes, I believe so.

* * * * *

TRIAL TESTIMONY EXCERPTS OF I. B., SISTER OF MINOR

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. ACKERBERG]

[1446] * * *

Q So after Meadowbrook told you you could go to court in your home county, what is your home county?

A St. Louis.

Q What steps did you take next?

A I then called the courthouse; after I told my mother and my sister that this had to be done, I called the courthouse.

Q Where?

A In Virginia, since I worked there every day, and told them what the situation was and what I wanted to do.

I was referred to someone from social services and I don't know if the name is important, if you want the name it was

Debbie Josephs, and I explained the situation to her, told her about the time factor, she did not know what—

MR. ACKERBERG: Objection, hearsay.

THE COURT: I think it has relevance with the fact it was said, not whether it is true or not. Objection overruled, you may answer just that it happened—

THE WITNESS: She said that she did not have any information on it and could I call her back in about an hour and a half, which I did. And she told me when I called her back **[1447]** that if we went to Duluth or Meadowbrook they would take care of the whole court proceeding along with the actual medical procedure, that that would probably be the best thing, that they weren't able to do that for us there; that if we went the other two places they would take care of it for us, either facility.

Q What did you do next?

A Well, I told them that I would just as soon be able to do it there and could I talk to anyone else and I believe at that time I talked to a Jean Paoletti. There were a few phone calls involved and after two years I guess I don't remember the exact sequence, but I did talk to her twice and then I finally got the judge on the phone and I told him the whole story over again and at several points I was told that either one of the other two facilities could take care of everything for me.

The judge finally said—excuse me, Jean Paoletti said they did not have the tools or the forms, they had the ability to do it at the Virginia court but they did not have the tools or the forms.

BY MS. BENSHOOF:

Q When you were told this what did you do next?

A At this point that was the end of that conversation or the two I had, I called back down to Meadowbrook and I don't remember if it was Pam or Paula that I talked to and asked **[1448]** them what kind of a form or what I needed and I said I could have a doctor's statement written up, whatever was required. They said they would send me some information as to

what the counties down here use, which they sent to me, forms, sample forms.

Q How did they send it to you?

A By air express. It came overnight.

Q Do you still have the envelope?

A Yes, I have the envelope in my purse with the information in it.

I then waited for the information to arrive and I believe that was Thursday and this had started on Monday—or Wednesday. I was not at work Wednesday afternoon so I started in again Thursday morning.

I called back to the judge's chambers and got the judge—

Q What judge?

A Judge Hall from the Virginia court.

I told him that I could have whatever they needed, I had some sample forms that could be used to let us do this part of it in Virginia. He asked me if my sister had a lawyer or was being represented, and I said no. He said, well, if she doesn't then I will have to appoint a public defender. I was not aware that she would have to be represented. Since he said that he would have to do it we went along with it. I was just trying to get this thing speeded up so we could get going **[1449]** and I told him if he would just give me the name of the public defender I would call them, make an appointment, whatever I had to do.

He told me at that point that the public defender was in court with him and if I would hold on a minute I could talk to him.

A few minutes later a gentleman by the name of Richard Salmen, I think, as I recall, was his name, introduced himself; he said the judge had told him what was going on, set up an appointment, and we were at the courthouse at I believe about 11:30.

Q That morning?

A 11:00-11:30; at which time—

Q When you say "we", who are you referring to?

A I was with my young sister and my mother was with.

He spoke to my sister for probably a half an hour, I don't know exactly what the conversation consisted of, I didn't press her as far as that.

Q You were not in when he talked to her?

A No, it was the two of them, they were talking, and at that point I was given a form or my sister was given a form that was a report to court, which I assume came from Duluth because the counseling was done at the Womens Health Center down there. My sister was given the form, told to have it retyped, fill it out and bring it back in the afternoon and **[1450]** she could see the judge.

Q She was given a report to the court form by whom?

A I believe Richard Salmen gave it to her.

Q And did your sister give this form to you?

A Yes. She told me what she had been instructed to do and because I happened to be lucky enough to have access to a medical secretary, I took it back. The name was inked out but the questions had been answered, all in all. I had it retyped, gave it to my sister, she filled it out and we were back in court that afternoon with a letter from the doctor, her doctor.

Q The doctor you work for?

A Yes, the doctor that examined her and also the doctor that I worked for. So I did have it retyped and it was filled out and we were back in court that afternoon.

Q And did you go into court with your sister when she saw the judge?

A No.

Q And did your sister come out with a court order?

A Yes, she did.

Q And did you then take that order down to Minneapolis?

A Yes.

* * * * *

[1453] Q And other than your sister have you ever seen a court order for a minor in Virginia?

A No, I have not.

MS. BENSHOOF: That is all I have.

THE COURT: Cross Examination, Mr. Ackerman (sic)?

CROSS EXAMINATION
BY MR. ACKERBERG:

Q You weren't told at any point that the Virginia court would not process the petition, were you?

A They said they had the ability to do it but they didn't have the forms or the tools.

Q You indicated this was the first time that had come up, right?

A I don't know if in specific words, but, yes, I was under the impression that it had not come up.

Q Do you know of any minor who has been turned away from the Virginia courthouse in trying to get a petition processed?

A No, I do not.

Q On what day did you first contact the court?

A Monday.

Q And on what day did the court hold the hearing?

A Thursday afternoon.

Q And on what day was the petition approved?

A Thursday.

* * * * *

TRIAL TESTIMONY EXCERPTS OF J. H.,
MOTHER OF MINOR

[DIRECT BY MS. BENSHOOF]

[1521] Q And have you supported the children?

A Yes.

Q What year did you get a divorce?

A Officially in February of '73.

Q What were the grounds of that divorce?

A At that time the grounds were cruel and unusual treatment or something; I don't know what they—

THE COURT: Cruel and inhuman?

THE WITNESS: Cruel and inhuman treatment.

BY MS. BENSHOOF:

Q Did you actually go to court in this matter?

A Yes.

Q Was there testimony about your husband's treatment of you?

A Yes.

Q What was the nature of his treatment of you?

A Basically it was physical abuse, based on his anger with me before for not acting right.

My two witnesses were there to testify, one because she happened to be at the house when he slapped me with a spoonful of peanut butter because I didn't know how to make a peanut butter sandwich and the other was a nurse friend, I'd go to her to check some bumps on my head because I didn't want to go to the doctor.

Q And the bumps were caused by your husband?

[1522] A Yes.

Q Was he ever abusive to the children?

A Yes.

Q What sort of things did he do to the children?

A Mostly in terms of intimidation because they knew how he treated me so basically his philosophy was that everything, every dispute was to be settled by a board, what you need is the board up alongside the head. That was his solution to any situation that he couldn't control.

Q With the children?

A With them, yes.

Q Subsequent to your divorce what was the nature of your husband's contact with the children?

A He typically will see one of them like once a year.

Q So if there is four children he will only see the children once every four years?

A Probably.

Q So he sees one of the four every year?

A Yes.

Q And what is the nature of that contact?

A A social visit, they go to Arizona and he takes them to Disneyland when they were little or some type of thing like that for two weeks.

Q Did there come a time when one of your daughters got pregnant?

[1523] A There came a time when two of my daughters got pregnant.

Q Could we start with the first one.

Do you remember what year that was?

A That was in probably '79.

Q And did she come to you about this pregnancy?

A Yes, she did.

Q And what was the result of that?

A She came to me and asked me if I would—told me that she and her boyfriend had decided she was going to have an abortion and would I go with her to the clinic.

Q And did you?

A I did.

Q Did you talk to her at that time about whether or not she should tell her father?

A No.

Q Do you know whether or not she told her father?

A She did not tell her father. She asked me to promise that I wouldn't tell her father.

Q Do you believe that—what is your understanding if her father would have found out about her pregnancy?

A First of all, he would have probably harassed her terribly. He would have held it over her head forever. He would have talked about it to the other children, to make a big family issue of it and I don't really know whether he would—it would have ever—if he would have not, you know, seen her again or **[1524]** let her come out. I don't know what he would have done except that is—this typically would be something he would use to hold over her head to get her to do something later on, "Well, you remember when you did this kind of thing."

Q Do you have personal knowledge that his reaction to events subsequent to the time he moved away is what you described?

A Yes.

Q So even though you are divorced his relationship with the children continues in a manner to hold things over their heads.

A A social manner, yes, and in that same kind of thing he typically holds things over their heads.

Q Now did there come a time when your second daughter got pregnant?

A Yes.

Q What year was that?

A That was in 1981 or it was after the law so it must have been in the spring of '82 I think it was.

Q Did she also voluntarily come to you about her pregnancy?

A Yes.

Q And could you describe the nature of that communication or what steps you took to comply with the law and how you felt about it?

A When she came to me and her boyfriend was going to be gone because it was something that he didn't want his parents to know about so he didn't even want to be in town when she went **[1525]** to the clinic. So she had come and asked me if I would go with her and she had already called the clinic and talked to them and found out that she had to have consent by a parent and—which I assumed to mean that she had to have my consent since I was the custodial parent—so we went under the assumption that my consent was all she needed and that is so—since I was going to be going with her I could sign a consent when I got there. Then it wasn't until after we got there that she was already through the counseling and through all the other films and everything else that she was told that she had—where was the consent from her father, which of course we didn't have because, well, I was the one who didn't think that that would be necessary since I had legal custody of her and I didn't have to have his permission for anything else, when I had her tonsils out or anything like that.

So then what happened is we had to leave the clinic.

Q What clinic was this?

A Meadowbrook Clinic and go down to Hennepin County courthouse and go through filling out all the papers and get a court order based on the fact that her dad wasn't around and it wasn't anything she wanted him to know, before we could go back and complete the procedure.

* * * * *

[1527] * * *

Q You went before Judge Lindsay Arthur. Did he ask you any questions?

A Basically the same type of things you asked me.

Q And so you had to relate the story of your divorce to the judge?

A Well, I didn't because I didn't want my daughter to hear it, what the gory details were. He accepted the fact that my divorce was based on physical abuse and I didn't have to tell him all about that.

Q But you had to relate that in front of your daughter this day that she was getting her abortion?

A Yeah.

Q How did you feel about having to bring up those details on that day?

A Well, I didn't think the whole thing was necessary so I was very angry about having to bring up all of this other stuff in addition to what she was there for.

* * * * *

TRIAL TESTIMONY EXCERPTS OF MARY RING, SOCIAL WORKER WITH OLMSTED COUNTY SOCIAL SERVICE DEPARTMENT

[DIRECT BY MR. ACKERBERG]

[CROSS BY MS. BENSHOOF]

[1653] * * *

Q Do you know what the purpose of those questions are?

A I think, my understanding of the purpose of the questions is to develop awareness of the minor's understanding of the decisions involved in terms of pregnancy, her maturity, involved in terms of understanding the decision that she is making and also the circumstances that are surrounding her in terms of that decision.

Q You mentioned followup contact; is that correct?

A Yes.

Q What is involved in that?

A Well, sometimes clients will call me or come in to see me and advise me of—that they have gone for a post-abortion checkup, that they have—I usually ask them three questions: Number one, did you have any medical or psychological complications; number two, did you have your post-abortion checkup; and number three, did you receive contraceptive counseling at Planned Parenthood or some other medical facility.

Q Do minors who go through the parental—who go through the judicial bypass in Olmsted County, are you appointed as their **[1654]** guardian ad litem?

A Yes.

Q And how does the minor get in touch with you?

A Sometimes the minor is—well, in most cases the minor is referred by Planned Parenthood and sometimes from doctors, and sometimes from the court system.

But most minors come to me prior to going to the court system.

Q Okay. And do you assist the minor in getting to court?

A Yes, I do.

Q How do you do that?

A I provide counseling and complete a form and then I accompany the minor up to the court to make arrangements with a court and with the minor to obtain a court hearing date and to obtain a legal representation.

Q Could you describe what happens when you and the minor go to the court to make an appointment?

A We go up to the clerk's office; I indicate I want my standard form situation. Most of them know me up there on sight and are prepared to help me and we usually go to a private office. We have been using Judge Agerter's office or chambers, he is usually gone.

Q What was the purpose, if I might interrupt, of going to a private office?

A For confidentiality.

[1655] Q Who did you go into the private office with?

A We go in with our representative of the clerk of court, myself and the minor, and we proceed in contacting the attorney and making arrangements so that attorney can provide legal counsel to the minor or the clerk.

* * * * *

[1660] * * * *

BY MS. BENSHOOF:

Q Ms. Ring—

A Yes.

Q —you are a social worker with the Olmsted County Social Services, is that correct?

A That is correct.

Q And you do pregnancy counseling?

A That is correct.

Q And other counseling with other kinds of clients?

A About three months ago they asked me to take on child protection because luckily, or for some other strange reason, pregnancies have been down a bit in Olmsted County so my case load has gone down a bit.

So I have been asked to do other things.

Q Apart from the regular psychological counseling do you do any other kinds of counseling with clients?

A Mainly I have done pregnancy counseling but in the last three months I have now gotten involved in child protection.

Q How long have you done pregnancy counseling in Olmsted County?

A I think it will be 12 years in August.

[1661] Q So you counseled both adults and teenage women for 12 years in Olmsted County?

A Yes.

Q When these women come to you is privacy or confidentiality of their conversation with you a major concern?

A We do our best to provide confidentiality to clients.

Q When a teenager comes to you for pregnancy counseling do you tell her parents that she is pregnant?

A No, I do not.

Q It would be contrary to your professional ethics to do so, wouldn't it?

A Well, if a teenager is coming to me for counseling, in terms of the pregnancy, I think it would be a violation of my professional ethics to advise her parents.

Q Would it also deter teenagers from seeking you out for help if they thought you would tell their parents?

A I think that would be a great barrier, yes.

Q That would be based on your 12 years of experience with teens, right?

A Most likely.

Q When teenagers come to you for abortion counseling do they come to you in some instances because they don't feel they can go to their parents?

A I think on some occasions that might have been the situation.

Q So for some of these teenagers are you familiar with their [1662] family situation, just being a social worker in Olmsted County?

A In some cases, yes, we are aware of their family situation, because that family has had a long history or record of involvement with our agency.

We do handle those situations in a particular way because—if I am allowed to give an example—if I have a mother who is working for our agency, working with a social worker at our agency, and there is a file, we keep a file or record of all of our clients, what I do is we separate the minor's information from the parents' so that if the parent wanted to read their file they would not find any information on that minor in that file in terms of seeking an abortion.

Q How long have you separated the minors from the patients all 12 years?

A I can't answer how long we have been doing that. I know we have been doing it for some time. I don't know if we were as conscientious when we had a different law in effect.

Q But you are conscientious about seeing that the minor's parents do not involuntarily find out about the minor's pregnancy, aren't you?

A We work at it, yes.

Q Because you think that if a parent finds out about her daughter's pregnancy, by looking at your file, that could have some very bad ramifications, is that correct?

[1663] A I think so.

Q And you have seen situations with bad family ramifications when they found out about a teenager's pregnancy, haven't you?

A Yes, we have dealt in some circumstances with a parent finding out about their teenager being pregnant and not being able to respond or handle that in a positive way for the teenager.

Q What are the negative ways that you have seen?

A Well, my goodness, I think it probably would take some time to explain, you know, some of that.

I think probably putting it in simple terms there is a real breakdown in the family relationship, the relationship between the parents and the minor is strained. Sometimes even more complicated than that.

Q Well, have you ever seen situations of physical violence or being kicked out of the home?

A I haven't seen the direct ones; I have been involved in threats of ones.

Q Do you believe those threats are real?

A Yes, I do. I have been involved in some of those threats so, yes, I do.–

Q When you say you have been involved in these threats, you mean they have threatened you?

A Well, we have had situations with minors where they have told their parents that they were electing to get an abortion **[1664]** and parents have responded in sometimes negative or violent ways and that is often why I have accompanied minors. This has occurred mainly when we had the old law where minors—that that occurred, those situations of violence or threats or violence occurred when a minor didn't tell their parents but these minors had to tell their parents because they needed financial support in obtaining an abortion and I went with them under those circumstances to tell the parents because they just didn't have any choice or option in that matter and we really had to spend some time working through some of those problems.

Q You mean you went with the minors to tell their parents so they could get money because they were afraid of violence?

A Well, they wanted the money to obtain the abortion and that was their only avenue of obtaining that abortion.

Q Right. But you accompanied the minor to tell the parents because the minor was afraid of violence?

A The minor was afraid of violence, yes.

Q You acted sort of like a bodyguard?

A No, I did not. I acted as a person who was going to provide support and help to that minor because that minor didn't have any other, you know, option at that time in working that situation out. I wasn't sure if the minor was accurate or was making an accurate statement that her parents would indeed react a certain way so I went with that minor to work through **[1665]** the problems.

* * * * *

TRIAL TESTIMONY EXCERPTS OF ELDON HALL, JUDICIAL OFFICER FOR ST. LOUIS COUNTY

[DIRECT BY MR. ACKERBERG]

[1730] * * *

Q On the second petition that was approved, what was the time lapse between the time the minor contacted the court and the time that the petition was approved, if you recall?

A I would say six hours, maybe.

Q Six hours?

A Yes. Six working hours.

Q And in each of the cases was the standard decision—was the petition approved on the basis of mature and capable of giving informed consent to an abortion without parental notification?

A Very much so.

Q Have there been any lapses in confidentiality under the two bypass proceedings that have been held?

A Certainly none that I have been made aware of.

Q Is there a procedure in place now for minors to gain prompt access to the court for purposes of judicial bypass?

A Yes, there is.

Q What are they?

A The procedure itself is a written procedure which has been directed, I believe, through the district court administrator, Mr. Beck, and the process internally within the court, at

least from my end, is to be available, make an immediate response to the request—immediate.

* * * * *

TRIAL TESTIMONY EXCERPTS OF SUSAN STACY, ADMINISTRATIVE ASSISTANT IN GUARDIAN AD LITEM OFFICE OF HENNEPIN COUNTY

[DIRECT BY MR. GALUS]

[CROSS BY MS. BENSHOOF]

[1776] * * *

Q Okay. Is there some sort of quota or guideline rule of thumb; I don't want to put words in your mouth, but do you have some limit?

A We try to keep the limit at six a day.

Q And is it your policy to make exceptions to that limit?

A If it is an emergency or is necessary, yes.

Q Okay. Under what circumstances is it the policy of your office to waive the six-a-day rule?

A If we are told by the clinic that it is necessary that the **[1777]** girls get in on that day because of how advanced their pregnancy is, that they would be in the second trimester, it would be more expensive for them, if they traveled a long distance, and it would be a very great inconvenience for them to come back another day, that sort of thing.

Q Do any other circumstances come to mind where you take more than six?

A No, I think that is about it.

Q Do you frequently waive the rule of six or is it infrequently waived, or what?

A Fairly often it is waived.

Q Do you know how recently you have exceeded six?

A Yesterday.

Q How many did you have yesterday?

A Seven. Tomorrow there are eight.

* * * * *

[1779] * * *

Q Based upon your experience in booking and scheduling these hearings, do you have any estimate as to the average amount of time between the—that elapses between the request for the hearing and the date of the hearing?

A Usually it is just a matter of days. They certainly have the option of when they want to come in.

I know a girl called yesterday and wanted an appointment for the end of March which was three weeks or over. That is truly exceptional, but that was her choice.

Q So sometimes the hearing dates are selected to suit the young woman's choice?

A Usually.

Q And sometimes it is the first available appointment?

A Right.

Q Well, when you say—I believe in response to my question you said it typically is just a matter of days between the time of the request and the time of the hearing.

Could you elaborate on what you mean by days, a matter of days?

A If somebody called on Thursday it would probably be Monday unless there was some extenuating circumstances.

Otherwise they would call on Monday and get in on Tuesday, Tuesday to Thursday, that sort of thing.

* * * * *

[1784] * * *

A Our guardians are always instructed as to the confidentiality in any matter involving juvenile court so that, of course, carries over into the parental notification calendar, that this is confidential, they are not to tell anyone about the girls they may see there, what goes on, or any other information they may get from their interview.

Q As a superintendent of this group of guardians, have you ever received a complaint of any breach of that confidentiality?

A Never.

Q Have there ever been any occasions when any out-of-the-ordinary confidentiality problems arose?

A There have occasions where the guardian has known one of the girls. There have been other occasions where the girls will see someone else from their school, their class, whatever, in the halls and they are concerned about that. We had one instance where a girl showed up with both her mother and grandmother and the guardian that was scheduled that day was the grandmother's best friend.

Q On those occasions—on that occasion where—or those occasions where the guardian has known the girl, what if anything was done about that?

A In the one where the guardian was the grandmother's best friend they saw each other in the hall and they said, I guess, we both know why we are here, do you want to talk to someone **[1785]** else or me, and it was left up to the family and they chose to talk to someone they knew rather than a stranger. The girls that are concerned about meeting a friend in the hall, we try to put them in a different room. We bring them in at a different time so they don't have to run into the people they know.

If the guardian knows one of the girls and they feel it would be a problem, not so much for them but for the girls, then I fill in and I do that one.

* * * * *

[1794] * * *

BY MS. BENSHOOF:

Q On direct examination you ran through with Mr. Galus the **[1795]** fact that you supervised the training of the guardians to hold parental notification hearings, is that correct?

A Susan and I do that jointly, yes.

Q Do you interpret the standard of maturity to be anything different than capable of giving informed consent?

A No.

Q And in figuring out whether or not a minor is capable of giving informed consent, wouldn't it be correct to say that you rely on the knowledge and counseling that they have received at the clinics to a great extent?

A Yes.

Q How would you interpret the phrase best interest, when you train the guardians, or when you hear a petition yourself, a petitioner yourself?

A I consider the best interests that maybe the girl is not mature but it is not in her best interest to continue with the pregnancy since she does not want to.

I feel it is not in teenagers' best interests to become mothers.

Q In your experience with the guardian have you seen a lot of teenage mothers?

A Yes.

Q Isn't it true that when you—well, strike that.

After you interview a girl, and I guess you have seen 500, do you make a recommendation to the judge, is that **[1796]** correct?

A Yes.

Q Have your recommendations nearly always been on maturity grounds?

A Usually.

Q But usually can you put a percent on it?

A 90 to 95 percent, I am sure.

Q You have seen 500 girls. Have you ever had a recommendation to the judge turned down?

A You mean my recommendation?

Q Your personal recommendation on the 500 girls?

A No.

Q And to the extent of your knowledge in supervising other guardians have they ever had a recommendation turned down?

A Not that I am aware of.

Q We have had some people in there testifying in Hennepin County, Susan Smith, Judge Oleisky and there has been testimony that there have been three girls that have gone through the Hennepin County system that didn't at least initially get their petitions granted.

One was a girl who was frightened and turned mute; one was a girl who wanted to be turned down because she thought she would get married; and I understand in those cases they came back, and there was a third girl.

Do you know about the third girl?

[1797] A Yes, I do.

Q Was that one of your clients?

A Yes, she was.

Q Was the other two your clients also?

A One of them was.

Q Which one?

A The girl that didn't want the abortion because she thought her boyfriend would marry her. I talked to her the first time she came through court; not the second time.

Q And those, the other two cases, did ultimately get abortions?

A Yes.

Q So you were the guardian for the third person who didn't get a parental notification petition granted in Hennepin County?

A Yes.

Q Could you explain the circumstances of that case?

A The girl was quite young; I think she was 14 or 15, she was from Wisconsin; she came with her mother and when I talked to her she kept talking about killing her baby. She told me when her baby was due, how upset she was about it. She said that her mother had told her that it was best for her to do that. Her mother was definitely pushing her to have the abortion. She made it very clear that that was not what she wanted to do.

The recommendation that I made to the judge was that [1798] I could not in good conscience recommend that order be granted given the way she felt under the circumstances, and about the whole subject of abortion.

Her petition was denied. In that particular instance we had not asked the mother to come into the hearing, we thought it would be too difficult.

After the hearing we walked out and told her what had happened; the mother started to cry, the girl started to cry, it ended up the public defender had the girl at one end of the hall, I had the mother at the other end, they were both hysterical, the girl was begging the public defender to take her back into court, she would say anything the judge wanted her to if he would only sign the order, she could not stand to see her mother upset; the

mother was crying and saying I can't let her have a baby; she is only 14 years old, she will be stuck on AFDC the rest of her life.

I don't want that for her. It had been a tremendous hardship for them to come to Minneapolis, the mother was working in some type of a menial job where she was trying to keep her family together, she was a single parent, she was very concerned that if she had to take another day off of work she would lose her job. Their car was a wreck; she didn't think it could make another trip to Minneapolis. She didn't know what to do.

When I was trying to talk to her she wanted to know [1799] what had happened; why the judge had turned down the petition. I told her that we had recommended that, we didn't feel it was in the girl's best interest because of her strong feelings about abortion and I said don't you think your daughter is going to resent you for pushing her into this and she said of course she is; I know that, but it is a chance I am willing to take, this is more important.

It was very difficult for me, she was saying some of the same things I know I would have been saying in her position.

It was very, very difficult for the girl to see her mother so upset and feel that she was definitely the cause of it.

They did leave. I did hear later that she did have an abortion, they sent a letter to the last-known address of the father. I don't believe the parents had ever married, but they obviously had to make a second trip back to the clinic. I have no idea how they accomplished that.

Q So then in this instance you were really feeling that the girl was, if not mature, at least capable of making the decision to be a mother in—

A Yes.

Q So it was an anomaly as far as the statute goes because she was making a decision to be a mother?

A Yes.

[1800] Q And do you ever see, as a guardian, teenagers who have two biological parents, both of whom know about the pregnancy?

A Yes, that has happened.

Q Why do the girls go to you if both parents know?

A Sometimes there was a misunderstanding; they didn't understand that they had to get a signature.

Other times the parents have been informed or have found out about the pregnancy and just have refused to sign saying that they wanted the girls to go to court; they want to make things as difficult as possible for them.

Q So the parents view is sending the girl through the court system as a punishment?

A Yes.

Q Do the girls view it that way also?

A Probably initially. I don't know if they do after the fact, but before that I am sure they do.

* * * * *

[1801] Q When you see the girls initially at their interview with you, what is their demeanor, what do you observe?

A They are nervous, some are better at hiding that than others, but I think all of them are nervous about going into court. They don't know what to expect.

They are concerned about what we are going to ask and even more concerned about what the court is going to ask; what the judge will think of them, what will he say, what will he do, how they will feel. It is very typical for them to say, "Am I going to be embarrassed, will he make me feel bad, what is he going to think about me."

Q So they feel they are being judged by the judge?

A Definitely.

Q And do they feel that they are more or less being judged?

A Yes.

Q Do they believe there is a good chance they will get turned down?

A They are concerned about that.

They ask how many times are these things granted, what do you think my chances are, does the judge usually sign them, that sort of thing.

Q If you say to them that the judge usually signs them, does that reassure them?

A I don't know. I hope so.

Q About what percent of teenagers that you see have parents **[1802]** with them?

A About a quarter of them, 25 percent.

Q Do you ask questions during the interview, of the parent also?

A Sometimes. I usually try to talk to the girl alone first and then toward the end of the interview, if she wants, we ask her mother to come in so we can explain the procedure, what is going to happen from that point on and what they can expect. I like to talk to the girls alone initially so we can find out if it truly is their decision or if someone is coercing them into it.

Q When you see the girl and a parent, is it your observation that oftentimes or sometimes the relationship problems or the parental problems are rehashed in front of you?

A Not very often, no.

Q And have you ever had any situation where one parent will come in and the other parent is let's say seriously ill?

A Yes, that has happened several times that the girls say I can't tell my mother or my father; whatever, they have some kind of catastrophic illness and it would just be very, very upsetting or detrimental to their health to inform them of what was going on.

Q And in some of those instances has the other parent been present?

A Yes.

[1803] A Yes.

Q And you believe the girl and the parent?

A Yes.

Q Have you ever had any teenagers come before you who have told their parents about a pregnancy and suffered physical or verbal abuse because of it?

A Yes, a couple. I had a girl tell me not too long ago that she had told her mother about another pregnancy and had in fact had an abortion, the mother had known about it, but at that time her mother had been very, very verbally abusive to her and kept throwing that up to her, making comments about her character, her behavior, that sort of thing and she was certainly not going to inform her of any future pregnancies.

Q Isn't it your experience that this statute has never weeded out an immature minor for whom an abortion would not be in her best interests except for that anamoly you discussed?

A That is right.

Q Have you had teenagers as parental notification clients who have suffered from abuse and neglect?

A A few, yes.

* * * * *

TRIAL TESTIMONY EXCERPTS OF JODY DESMIDT,
LAW CLERK FOR HENNEPIN COUNTY
JUDGE OLEISKY

[DIRECT BY MR. ACKERBERG]

[1889] * * *

Q Are there any measures you take to allay whatever anxiety minors might have?

A I guess I just try to be real friendly with the girls when **[1890]** they come in. We have them sit, they sit in my office waiting, for example, if the first one is in with the judge, I will have the next girl sitting virtually across from my desk and I will just, if she asked me about the hearing, I will tell her it is real short and the judge is real friendly and I will ask them about the weather, just try to get them to be relaxed, you know.

Q And afterwards do they comment on the procedure?

A Yeah. I have heard some of them say it wasn't—

MR. PENTELOVITCH: Objection, about to give hearsay.

THE COURT: I think we have gone into that at great length on both sides about how the girls react, what their reasons are and so on.

You may answer.

THE WITNESS: I have had them say to me, well, that wasn't so bad—I guess they are nervous when they go in and when they come out they feel like, you know, the judge was nice to them and the hearing wasn't as bad as they had thought it could be.

* * * * *

TRIAL TESTIMONY EXCERPTS OF JANE SCHLEUSNER,
COURT REPORTER FOR HENNEPIN COUNTY
JUDGE OLEISKY

[DIRECT BY MR. ACKERBERG]

[1899] A I wouldn't consider it a duty but I do it because I feel that they are in a bad way and it is a little bit—I don't want their experience with us to be any more traumatic than it has to be or would be.

Q How do you do that?

A Well, for a little background, when you deal with a lot of attorneys like I do you tend to have to kind of be strong at certain points during the day and I don't—I am less that way, I am softer, I talk softer, I smile more and I might even joke with them if the need arises.

Q On occasion has Judge Oleisky stopped a trial in order to hear a parental notification hearing?

A Absolutely.

Q Well, once the hearing begins have you noticed what the demeanor of the minors are, generally?

A Well, for the most part I would say that they are paying very close attention to what is happening around them, they are tied in their seat, they seem a little nervous, they are trying to answer questions appropriately and they seem a little nervous. They are looking forward to it being over, I think. Some smile though too.

Q Where are your stenographic notes kept of the hearing?

A I keep them with my daily notes and I, every day at the end of the day, no matter what I have heard during the day, I keep them all together. I label the day and I file them in a box. The box is kept in my office for about four to six **[1900]** depending on how many I have, that is just for my convenience. The office is locked every night.

Then after that they go down to the vault, we have a vault in our building that is kept locked at all times.

* * * * *

TRIAL TESTIMONY EXCERPTS OF MARK MCDONOUGH,
FORMER LAW CLERK FOR HENNEPIN COUNTY
JUDGE OLEISKY

[DIRECT BY MR. ACKERBERG]

[1902] * * *

Q Have you had any experience with parental notification in the abortion context?

A Personally?

Q Yes.

A Yes. When I was first out of high school, my first year in college, the woman that I was dating regularly, steadily, whatever, got pregnant so we had to both deal with that at that time.

Q And did your girlfriend contemplate notifying her parents?

A I think we had the reaction that most young people do, when they find themselves in that position, and that is, "We can't tell our folks because they are going to kill us," or whatever; and, you know, I think now looking back it was **[1903]** simply we did not want to anger our parents and more importantly didn't want to disappoint them.

So that was our first reaction, can we handle this situation without letting our parents know about it.

Q Were the parents informed?

A Yes, and actively involved.

Q And what was the response of the parents?

A Well, it surprised—I guess it surprised both of us. I don't think either of us thought that our parents were that smart about things or that understanding about it, but it was an incredibly difficult time, something that takes you forever, I think, and our parents helped us through it.

It was a very trying time for both of us, both sets of parents were supportive to their children and their children's friends.

Q And neither you nor your girlfriend expected that response, initially?

A I think we did, but that wasn't our first thought.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DAVID KNUTSON,
ATTORNEY WITH HENNEPIN COUNTY
PUBLIC DEFENDER'S OFFICE

[DIRECT BY MR. ACKERBERG]

[CROSS BY MR. PENTELOVITCH]

[1910] * * *

Q Was there an occasion where the parent found out that her child was coming into the Hennepin County court for a parental notification hearing and threatened to send the police to pick up the minor?

A Yeah, I was told that the parent had asked the Burnsville Police to go to the juvenile justice center in Hennepin County and retrieve their child.

Q What did you do about it?

A I asked the guardian and Judge Oleisky if we could have an accelerated hearing and basically get that person out of the courthouse and over to whatever clinic she was going to attend before the police were to arrive.

Q Were you able to make such arrangements?

A Oh, yes.

Q Did you make notes when you were interviewing the minors?

A Yes.

Q What did you do with those notes?

A I destroyed them.

Q Why?

A Pardon me?

Q Why did you destroy them?

[1911] A I didn't have any filing system to keep them and there was no reason to keep them and I suppose from the confidentiality standpoint.

* * * * *

[1920] * * *

BY MR. PENTELOVITCH:

Q Now have you made any observations about the type of person who you have represented or who came through the public defender's office seeking representation on these parental notification hearings in terms of their social or economic background?

A Yes.

Q What are your observations?

A They are very much nonminority, they are very much white and they are very much middle class.

Q Is that a deviation from the experience you have with your other clients in the public defender's office?

A Markedly so.

Q Have you drawn any conclusions about the parental notification-judicial bypass system from the fact that the **[1921]** minors that you have represented have tended to be middle or upper middle class whites?

A Yeah, I think I probably have.

Q What is your conclusion?

A Well, I think the first conclusion I drew is that the procedure is one of jumping a number of hurdles to get into court and it seemed to me that the kids who were able to jump those hurdles almost by definition were going to be mature, were going to be intelligent, or whatever word you want to use to describe that.

It seems like once they finally got to my office there was probably a weeding out process. They just all were middle class and it seemed to be by and large middle class, I don't know, I can count probably on one hand the number of minority kids that I represented in the process for those three years and of the minority kids that I represented, well, let's say maybe ten minority kids at the most, most of these kids seemed to come from a middle class-type of background.

Q Approximately how many minors did you personally represent?

A Well, from a numbers standpoint I really wouldn't know. It would be hundreds, it would probably be between a third and a half of all the kids that came through Hennepin County from 1981 through 1984 and I just have no idea.

Q But many hundreds it would be?

[1922] A Yes, I would think so.

Q And yet 10 or less were minorities?

A Yeah, that is my impression.

Q And the majority of those minority individuals were from a middle class or better social-economic background, is that correct?

A Yeah.

* * * * *

[1924] * * *

Q Did you get any indications from any of these minors that the reason they were seeking judicial bypass rather than notifying their parents was that they were concerned about being abused or had been abused in the past?

A Yes.

Q How frequently did that occur?

A Well, this is just a rough estimate; probably 20 percent and maybe 25 percent of the cases.

Q And do you have a percentage of your minors who were reluctant or unwilling to tell their parents because of their parents' religious or moral beliefs?

A I would say an equal percentage, maybe a little higher.

* * * * *

TRIAL TESTIMONY EXCERPTS OF PATRICK CONNOR, FORMER RAMSEY COUNTY PUBLIC DEFENDER

[CROSS BY MS. PINE]

[1984] * * *

Q Following Judge Petersen's heart attack did it become substantially more difficult to get an appointment for a minor. Was scheduling more difficult?

A Scheduling was more difficult, yes, because instead of having one centralized judge or area to go to to schedule we had to try to fit in the hearing with one of the several judges that were available.

Q Could you give us an idea of in what ways it became more **[1985]** difficult; what kind of things would happen that had not happened previously or the things that would happen at that time?

A Well, when Judge Petersen was off the bench we had some meetings between the various administrative personnel and the juvenile court and the public defender's office set up two days a week that would be earmarked for these hearings and Judge Petersen did his best to be available during those times we had earmarked. We tried to continue on that basis as I recall, but it turned out that there was no municipal court judge available and I recall it being on Mondays and Thursdays that we tried to have the hearings. If there wasn't a judge available we wouldn't be able to have the hearing on that day. Something that I recall happening is having to typically tell

the girls that we couldn't promise them a hearing on a given day when they called and we talked about a hearing they would have to call back to our office unless we could return the call to them at home or whatever, and then we would verify whether or not that hearing date was available after having called municipal court, seeing whether a judge was available.

Q Wasn't it sometimes true that at the time the minor called back you had not yet been able to get an appointment?

A That did happen on occasions.

Q So the minor would then have to call again?

A Correct.

[1986] Q In your time in the public defender's office representing minors, was there ever a time when a minor called on a first occasion in an attempt to get an appointment and never called back?

A That did happen on occasion.

Q What was your impression as some of the reasons why the minor never called back?

A On the occasions that I had spoken with the minor personally and they didn't call back, I recall there being a couple of times that I had the sense that the girl was frightened, up tight when we talked on the phone, and then when she didn't get back to our offices, you know, a day or two later whatever, I remember a few times thinking to myself it wasn't real surprising she hadn't called back, she did sound frightened.

Q Do you think—do you have any impressions as to what might have happened with some of those minors?

A In every—well, this only happened a few times and in the instances I can think of they did call back eventually, let's say the following week, rather than, you know, initially when we asked them to call back so they eventually did get in and have a hearing but it was later than what we had initially talked about.

Q What would you say the—usually how long did it take you to get an appointment for a minor from the time she called, what would you say on the average, give us the average and give **[1987]** us the longest amount of time?

A The average would be if a girl called on a Monday or a Tuesday the average would be to get her on that following Thursday. If she called Wednesday, let's say half the time we would still be able

to get her in on Thursday, the other half of the time we would have to go over into the next week.

If she called on Thursday or Friday it would certainly obviously go into the next week.

There were occasionally times when we had already scheduled as many minors as we had earmarked with the judge and so on that could be heard on a given date and as a result the girl may have to wait until the next week. So a girl may have called on Monday, Tuesday, Wednesday and not gotten in until as late as Thursday of the following week. That is as long as I recall it ever happening.

Q So would you say that if you looked at the problems the occasional problems in getting appointments promptly with the court, in other words, the delay due to the court's schedule, and you combined that with difficulties the minors may have had in getting away from school or getting into court and combined that further with any delay that may have been due to the intimidation on occasion, there could be substantial delay before she actually got into a court hearing?

A Yes. As I said, like I said, in the case of a couple of girls, for whatever reason they didn't call back immediately, **[1988]** they called back a week later, there certainly would be a delay of a couple of weeks, and perhaps as long as three weeks before they got in.

* * * * *

TRIAL TESTIMONY EXCERPTS OF JUDGE NEIL RILEY,
JUDGE OF HENNEPIN COUNTY DISTRICT COURT
[CROSS BY MR. ACKERBERG]

[2009] * * *

Q How would you describe the tone you sought to set when the **[2010]** minors came in for these hearings?

A It was nonthreatening. I sympathized with the predicament that they were in. I didn't tell them that but it must have been very obvious.

Q During the proceedings did you review the report of the guardian ad litem?

A Yes.

Q And did you ask questions of the minors?

A Limited pretty much to what I have already testified to.

Q Were the proceedings confidential as a general matter?
A Not as a general matter; they always were.
Q They were held in camera?
A Yes.
Q When was your decision rendered?
A Right then and there.

* * * * *

TRIAL TESTIMONY EXCERPTS OF EDWARD EHLINGER, DIRECTOR OF PERSONAL HEALTH SERVICES FOR MINNEAPOLIS HEALTH DEPARTMENT

[DIRECT BY MS. PINE]

[CROSS BY MR. GALUS]

[2030] * * *

BY MS. PINE:

Q Let me go back to one thing that you talked about in giving us the basis for your opinion.

You mentioned that there might be other possible causes. Do you have an opinion on the relative importance of the parental notification law in explaining these trends?

A Well, I think in looking, as I mentioned looking at all of the factors that could influence these age groups, the other factors that would probably affect both of these groups fairly equally, whereas the parental notification law would be a factor that would affect only the 15 to 17-year olds and therefore, all other things being equal, that parental **[2031]** notification law would be an important factor.

Q In your opinion why would you say that the law might have this effect on the birth rate and the decreasing abortion rate for teenagers?

How would it operate?

A Well, the law is geared to have pregnant women, pregnant girls tell their parents that they are pregnant or tell them that they are planning on having an abortion and this may be a frightening experience for these women or they may not know the

ways to get around the parental notification through the legal system, which would then have them postpone or not tell their parents at all. And part of the delay, teenagers are not—often deny their pregnancies and any delays add onto the already delayed access they have to care and services for their pregnancy.

Q So you believe the requirement of notice, or alternatively going to court, might be what—can you reiterate that again?

A It might be a deterrent. The wanting or needing to tell their parents about their wish for an abortion, or telling their parents that they are pregnant, or the onus of going through court may be a deterrent for women seeking any kind of care.

Q And when you say deterrent, do you mean deterrent to having an abortion?

A That is the factor that I think would be deterred.

* * * * *

BY MR. GALUS:

[2038] A In terms of, you know, I am not sure the exact question that I answered you, my impression was you asked if that—there was a getting at whether there was a firm link between or if there were any other causes or any other explanations for some of these numbers and the rate, the birth rates and abortion rates and I said there are other causes, there are other things that have to be considered and that there are some assumptions that have to be made.

Q Do you recall me asking you on Wednesday morning last the question in substance as follows: Dr. Ehlinger, is your opinion of a connection between the parental notification statute and the data, Minneapolis data regarding abortion rates and birth rates, just speculation on your part? Do you recall me asking you that question in substance?

A In substance.

MR. PENTELOVITCH: I think the question is hearsay.

THE COURT: Objection overruled.

THE WITNESS: I remember you asking a question of that kind of substance.

BY MR. GALUS:

Q And do you recall responding to that question, "Yes."?
A I responded affirmatively to that question.
Q Do you recall using the term "Yes."?
A Yes.
Q And we talked at that time, did we not, also about your **[2039]** opinion as to other factors that may account for the data in that table, correct?
A That is correct.
Q And did you affirm to me at that time that in your opinion many factors may account for that data?
A That is correct.
Q And what are those factors?
A There are a lot of factors I think that influence birth rates and abortion rates and I am not sure that I know of all of those factors myself, but some of the factors are the economic situation occurring in this state, the increasing poverty in young women in Minneapolis, which goes along with the decreasing insurance coverage for that population.

Some of the other political or—I am not sure they are political, but budgetary occurrences that happened at the federal level in 1981, and that also would affect the services at the city level and population changes in Minneapolis that have been occurring.

Q So in your view many factors influence birth rates and abortion rates in Minneapolis?
A That is correct.
Q Including the economic situation and levels or incidence of poverty, insurance coverage, budgetary occurrences at the federal level in 1981 and population changes?
A That is correct.

* * * * *

[2043] * * *

THE WITNESS: I think that attitudes toward abortions affect abortion rates and I believe that from my dealings with minority communities they have attitudes that are different than what Caucasian attitudes are. But I don't know what those attitudes are and how they would affect abortion rates. I could guess at some of those things but I really don't know and some of my assumptions that I had previously, in looking at national data, didn't match with my assumptions from Minneapolis, so I would feel uncomfortable, you know, stating one way or the other that these abortion rates were affected by this particular attitude among minorities.

* * * * *

[2049] * * *

Q Do you think the—well—I believe you testified that you thought the minority rate of the population in Minneapolis affected the abortion rate, correct?
A Yes, I did.
Q And that it changed, a change in the minority rate might affect a trend in the abortion rate, correct?
A That is correct.
Q And is it your understanding the minority composition of Minneapolis has changed in the period 1980 to 1984?
A From my—we don't have census data, but we do have information from the public schools that shows an increasing number of minorities coming into the Minneapolis public schools from 1980 onward.
Q And you told us last Wednesday morning that is one of the pieces of information that you believe might account for a change in the abortion rate?
A That is a possible factor, yes, sir.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. PAUL GUNDERSON, DIRECTOR OF MINNESOTA CENTER FOR HEALTH STATISTICS

[DIRECT BY MR. GALUS]

[CROSS BY MS. BENSHOOF]

[2085] * * *

THE COURT: Objection overruled.

The question is his opinion as to the effect of the bypass procedure on the gestational age of minors in Minnesota.

You may give me your opinion.

THE WITNESS: Based on the information shared in Exhibit 5(sic), there is no effect.

BY MR. GALUS:

Q Do you have any other basis for that opinion other than the gestational age data as set forth in the Defendants' Exhibit 35?

A I have two bases upon which I premise that opinion.

Q Would you please, taking one at a time, explain those other two bases to the Court?

[2086] A We have analyzed the married versus the unemancipated rates for the years in question and detect no difference, in fact the average gestation in weeks varies very little between the two populations.

Secondly, we have analyzed the resident women in Minnesota, age 17 and under, versus all women in Minnesota who use a medical clinic in this state for purposes of securing an induced termination and again we note that the results are essentially identical to that depicted here in Exhibit 35.

Q Do you have any opinion as to—

MR. PENTELOVITCH: Excuse me, Your Honor, I am going to move to strike the last answer, it is hearsay.

THE COURT: Objection overruled, the answer may stand.

BY MR. GALUS:

Q Dr. Gunderson, do you have an opinion as to whether or not 1980 was anomalous in terms of gestational age data for minors, that is patients aged 17 and under—do you have an opinion?

A Yes, I have an opinion.

Q What is your opinion as to whether or not 1980 gestational age data is or is not anomalous?

A My opinion is that it is not.

Q What is the basis of your opinion?

A An analysis of the 1979 data which would suggest gestation **[2087]** ages of the type which are exhibited in Exhibit 35.

THE COURT: But now the '79 is not shown in here.

THE WITNESS: That is right.

* * * * *

[2088] THE COURT: Objection overruled.

Is there any claim being made by plaintiffs that the statute results in greater complications for minors?

MS. BENSHOOF: Well—

MR. PENTELOVITCH: I will let her answer that.

MS. BENSHOOF: In Plaintiffs' Exhibits 1 through 9 and also in Dr. Hodgson's testimony there is a claim that the risk increases through delay, specifically the types of risks such as laminaria due to cervical—lack of laminaria use which relates to cervical injury, but we haven't demonstrated or said on any particular patients those risks have occurred except those who haven't been able to get it, who have gone to childbirth, which of course is much more dangerous.

THE COURT: Maybe you didn't hear my question or I didn't understand your answer.

Is there any claim on the plaintiffs' part that the parental notification statute has resulted in an increase in complications to minors resulting from abortions?

MS. BENSHOOF: Increased risk?

THE COURT: I am not asking about increased risk, I am asking about increased complications.

MS. BENSHOOF: No.

MR. PENTELOVITCH: I agree exactly with what she said; I think we have demonstrated increased risk but we have not proven any actual complication.

[2089] THE COURT: I will let him answer, but it seems to me the question is somewhat moot but go ahead.

MR. GALUS: Your Honor, we understand the contention to be that the statute is unduly burdensome for among other reasons, the reason that it endangers the medical health of those regulated by the statute and we think it fair

to put on evidence as to whether or not there has in fact been that effect, irrespective of what—

THE COURT: I agree, go ahead, you may answer, if you have the question in mind.

THE WITNESS: I have the question, I believe.

MR. PENTELOVITCH: I assume you were overruling the foundational objection?

THE COURT: Yes, sir.

BY MR. GALUS:

Q What is your opinion?

A My opinion is that there is no evidence that the complication rate has in any way changed as a result of the act itself.

Q The rate, that is the complication rate reported on Defendants' Exhibit 35, in percentage terms, does in fact increase between 1980 and 1983, does it not?

A That is right.

* * * * *

[2103] * * *

MR. GALUS: In Minnesota, under the age of 18, has the percentage of that population receiving first trimester abortions changed since 1980?

THE COURT: He would have to know the population and raw figures in order to figure out the percentage, is that what you are telling me; is that what you are asking him for?

MR. GALUS: Yes.

THE COURT: Do you have that data with you?

THE WITNESS: Yes, I do.

THE COURT: Okay, since 1980?

MR. GALUS: Yes, sir.

MR. PENTELOVITCH: I have the best evidence objection.

THE COURT: You can get it from him, he has it in front of him apparently.

MR. PENTELOVITCH: We would like—

THE COURT: You surely are entitled to it.

All right.

THE WITNESS: In 1980 75 percent of all abortions received by women age 17 and under was received by the end of the 12th week, the end of the first trimester.

THE COURT: Wait a minute now, I don't understand what I am getting. Give me your figure again with respect to **[2104]** 1980, did you say?

THE WITNESS: In 1980 75 percent of the abortions performed to women age 17 and under were performed by the end of the 12th week of gestation which is the end of the first trimester.

BY MR. GALUS:

Q That is in Minnesota?

A In Minnesota.

Q Okay.

THE COURT: What you are telling me is 75 of the abortions on the people 17 and under in 1980 were first trimester abortions?

THE WITNESS: That is right.

MR. GALUS: That is what is the—what is a comparable data for 1981, if you have it?

THE WITNESS: I am sorry, I have not calculated '81 and '82. I do have '83.

BY MR. GALUS:

Q All right, what is '83?

A '83 is 77 percent.

* * * * *

[2454] * * *

BY MS. BENSHOOF:

Q So if nationally 9.5 percent of all women get abortions in the second trimester compared with minors in Minnesota, 23 percent getting abortions in the second trimester, there is a public health problem in Minnesota, is there not?

A Yes, it is a problem, yes.

Q And if you look at that first line, 1978 to 1983, the problem for minors is not decreasing, is it?

A No, there is a slight increase there.

Q Yes. And the trend, and if you are not familiar please tell me, the trend in the United States, is, as a whole, not Minnesota, is for women to be getting abortions earlier, isn't that true, if you have been reading the CDC?

[2455] A Yes, overall that is the case, yes.

Q But Minnesota minors are not participating in that national health trend, are they?

A Not given the data you have quoted.

Q Well, it is your data.

A Uh-huh.

Q They are not participating in this national public health beneficial trend, are they?

A That is right.

Q And that is a public health concern, isn't it?

A Yes, it is.

Q And everyone in Minnesota should work to try to get minors back into the first trimester, shouldn't they, as a public health official?

A Correct.

Correct, that has been our stance as an agency.

Q There is also quite a substantial difference when you look at that chart between minors and teenagers age 18 and 19, there is a 5 percent difference in 1983, isn't that correct?

A In 1983?

Q Yes.

A That is 16, 16 percent?

Q Right.

A Yes, you are understating the difference.

Q It is a 7 percent difference?

[2456] A Correct.

Q Now as a statistician you don't just—I don't know if you can tell me off the top of your head, but what percent increase would that be for someone 17 and younger compared to those 18 and 19, do you want to use my calculator?

A I am sorry, I may not have understood the question.

Q My question is you don't just do substraction of 16 from 23 but rather in comparing the two—

A That is right.

Q —in comparing the two groups you would say one is 50 percent higher or whatever?

A Yeah, yeah.

Q If I gave you my calculator would you be able to give me the answer?

A Oh, yeah, yeah. The proportion of 18 and 19-year-olds in Minnesota in 1983 is only 70 percent that of the proportion for those 17 and under and that constitutes a fairly sizable difference.

Q Can you put that in terms of a percent?

A Well, in essence, round off, a 30 percent difference.

Q So in essence one could say, and correct me if I am wrong, that 30 percent more minors age 17 and younger get abortions in the second trimester than 18 and 19-year-olds?

A As a proportionate expression that would be correct, uh-huh.

TRIAL TESTIMONY OF DR. RICHARD SCHMIDT, PHYSICIAN AT GOOD SAMARITAN HOSPITAL IN CINCINNATI

[DIRECT BY MR. ACKERBERG]

[CROSS BY MS. BEN. HOOF]

[2125] • • •

Q Does the specialty of obstetrics and gynecology include abortion procedures?

A It does.

Q Are there medical risks to abortion?

A Yes, there are.

Q What are they?

A Well, there is, as with any medical procedure, there is a risk of mortality. There is a risk of complication, major and minor. There are medical post-abortal complications. There are long-term complications.

Q Well, one of the complications, one of the medical risks of abortion is death?

A That is true.

Q How many deaths have there been from abortion?

A Well, looking at the 1985 CDC Abortion Surveillance, there are a total of 175 deaths reported from 1972 through 1981.

Q Were some of those deaths within the first trimester?

A Yes, they were first trimester abortions over that same time period produced 83, a total of 83 deaths.

Q Complications are also a medical risk of abortion?

[2126] A That is true.

Q What complication risks are there?

A Well, in terms of medical complications, hemorrhage and infection are the commonest, perforation of the uterus; long-term complications include a substantial question of future infertility or a higher incidence of spontaneous abortion.

Q Are there some types of adverse effects that the medical community is uncertain about?

A Well, there is continuing debate about the long term effects of abortion on fertility and the incidence of spontaneous abortion, in fact that debate continues with many studies being done and various conclusions reached by various individuals in the case, that that is still a lively topic and the bottom line is not in.

Q Are teenagers especially vulnerable to certain kinds of complication?

A Teenagers are more vulnerable to virtually all the complications, the early complications hemorrhage and infection, they generally are slower to report them, slower to seek help and in terms of long-term complications they probably are particularly susceptible to cervical damage. The younger the teenager, why the more rigid the cervix and dilation of the cervix inevitably produces some cervical damage, some of which is visible, some of which may not be visible but may be reflected in subsequent pregnancy outcome. Some of that **[2127]** has been overcome by more gradual dilation of the cervix with laminaria and some of it is—some of the longer-term hazards may be improved by D&E, dilation and evacuation as opposed to D&C, but each of those still carries a risk which, as I point out, is still under extensive evaluation, but I think it is clear and I think there is widespread agreement that teenagers are more susceptible to cervical damage than older women.

* * * * *

[2133] * * *

Q Can parents of a minor provide medical history information that may be overlooked by the minor?

MR. PENTELOVITCH: Objection, Your Honor, leading.

THE COURT: Objection overruled, you may answer.

THE WITNESS: Yes, can and do very commonly. In virtually any medical procedure undertaken on a minor a history is sought from the parents. That is standard medical procedure.

Q Well, why couldn't a minor provide the same information?

A A minor may provide the same information; a minor may be very well capable of providing information that is within her **[2134]** knowledge.

Minors often have a rather sketchy view of their health status, when they were smaller children. They may be unaware of congenital problems, they may be unaware of family history which may be of significance.

Moreover, I think the teenager, under the stress of that particular problem, tends to minimize health problems. Her natural tendency is to want to dispose of that problem which is difficult for her and she tends not to pay much attention to the issues surrounding her own health history, health status and so on; which may be of significance.

Q Following an abortion is aftercare medically advisable?

A Yes, it is. Again following the pattern of other medical procedures, I think we would be negligent if we did not inform the parents of what to look for following an operative procedure, what to seek attention about, what to report, what to seek advice for.

And in other areas I think we would be negligent if we did not fill in the parents.

Q In her testimony Dr. Jane Hodgson stated that teenagers tend to have a higher incidence of infection after an abortion

because they delay post-abortion care and ignore complications.

Do you agree with that?

A I surely do, that is a common observation.

Q Does parental involvement have an impact on the quality of **[2135]** followup care that a minor might receive or seek after a medical procedure is performed on her?

MS. BENSHOOF: Objection, Your Honor, there is no foundation, the witness hasn't testified he has ever performed an abortion and talked to a patient about aftercare.

THE COURT: Give me the question again.

MR. ACKERBERG: Does parental involvement have an impact on the quality of followup care that a minor might receive or seek after a medical procedure was performed on her?

THE COURT: I will let him testify. I will overrule the objection, you may answer.

THE WITNESS: In my experience, which I believe is as broad as anyone's, in the circumstances surrounding abortion it is very important.

It is common in our emergency room; we have a tertiary level emergency room in our hospital. The common instruction given to patients in the abortion clinics in our area is to seek medical help if they have a problem from a major emergency room which is a perfectly logical and good thing to do.

As such we see abortion complications. In my experience at the Cincinnati General Hospital we manage many abortion complications and there is a very common pattern of, and particularly with young women, delay in recognizing either the effects of hemorrhage or particularly the effects of—**[2136]** of infection.

Picture, for example, and this is the kind of thing that we see fairly commonly, a young woman who has an abortion, her parents do not know about it, she has a little bit of fever, she may have some malaise, be not feeling quite as well. She may have some cramping, lower abdominal

pain. Her parents may very well interpret this as being a touch of the flu that a lot of other people have and is going around. It is in the interests of the child to hope that this really doesn't amount to anything because if she treats this as an illness, if for example, she has to go to a hospital, whether it is an out-patient facility, an emergency room, or be admitted to the hospital, this then involves hospital procedure which identifies problems. Their tendency is not to want to identify those problems so it is a natural tendency to hope that this, and believe that this is not a significant complication.

That is the way delays occur and can be avoided.

We see other examples where parents are involved, they may call too often, but indeed that is comparable to calling too late.

* * * * *

[2136] * * *

Q Have you had experiences with minors who are reluctant to inform their parents of the pregnancy?

[2137] A Minors are almost invariably reluctant to inform their parents. My own experience, and this extends, as I say, through private practice of some 35 years, and through our association with the teen-parent program, every teenager believes that her family relations are going to be utterly destroyed, and as well one not too distant example, I saw a 15-year-old girl whose mother I had taken care of, she called and asked my secretary if I could see her without—not knowing the problem, if I would see her without telling her mother and my secretary said yes, of course, and she came in and, indeed, she had an early pregnancy.

She did not want her mother to know about this. I said, what do you think is going to happen. She said, oh, my God, she will be horrified, she will disown me, I don't know that she is going to kick me out of the house but it is going to be terrible.

I said, well, now, look, I know your mother; I have delivered several babies for her, I have known her for years, I don't think that is going to happen and why don't we give it a try, why don't we call her up.

Indeed we did, her mother was not happy about it, but very quickly they resolved that problem and the teenager herself was, when presented with the prospect if she tried to do something without involving her parents the threat to their future relations, having this hanging over her was of **[2138]** significant concern.

As it turned out, she was aborted. She went to the local abortion clinic, her mother knew about it, her father knew about it, and I think they were off to a much more solid relationship.

That has been typical of my experience.

In over 200 patients treated in our teen-parent program, there are no horror stories. You hear about them, I believe some exist. We have had many parents of very poor economic circumstances, many broken homes, who were not happy about this but the general pattern in that clinic has been for parents to rally around the kids and be of significant help to them.

* * * * *

[2184] * * *

BY MS. BENSHOOF:

Q So that if we were—as a public health concern it would be good to urge all teenagers to get abortions in the first trimester, would it not?

A I think that is a good policy.

Q And if I want to show you in a hypothetical situation that there was a state in this country where teenagers under the age of 18 who got abortions, 25 percent of them got them in the second trimester that would be a public health problem, wouldn't it, or something to seek to reduce?

A It certainly should be reduced, yes.

* * * * *

[2239] * * *

Q Now you testified that you believe it is a good idea to notify the parents for various medical reasons.

If you take a hypothetical, if you had a young woman coming in who wanted contraceptive care or who had a pregnancy and she was accompanied by her mother and by her stepfather and

she had never met her natural father, if she had learned from her mother that there was a divorce and that her natural father had nearly beaten her mother to death, take that situation.

Would you, in that instance, urge the teenager, her mother, her devoted and loving stepfather, to get in contact with this batterer?

A No, I would not.

Q Why not?

A It would serve no helpful purpose and could conceivably do harm.

Q Do you see any medical purpose to getting in touch with, let's say a man who fathered a child but never married the mother and has never seen the child his entire life until she came to you for medical services with her mother?

[2240] A Would I feel it necessary to get in touch with that father?

Q Who has never seen—

A It is a hypothetical case, the circumstances of which I know nothing about offhand. As you put that as a blanket situation, no, I would not see any reason to.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. VINCENT RUE, EXECUTIVE DIRECTOR OF SIR THOMAS MOORE CLINICS IN SOUTHERN CALIFORNIA

[DIRECT BY MR. GALUS]

[CROSS BY MS. BENSHOOF]

[2264] * * *

THE WITNESS: My opinion is that parental notification, when the minor is confronted with a problem pregnancy and with seeking the resolution of that pregnancy, and an abortion, that the family is advantaged as well as the adolescent in notifying the parents and in having family communication about that topic.

THE COURT: I am sorry, advantages to the family?

THE WITNESS: There is both parental advantage as well as adolescent advantage.

BY MR. GALUS:

Q In what way or ways do you believe the adolescent, the pregnant adolescent is advantaged by the parental involvement?

MR. PENTELOVITCH: Objection, lack of foundation.

THE COURT: Objection overruled.

THE WITNESS: I believe teenagers have an unspoken [2265] wish to face their parents and draw upon their support and I think when they have the opportunity, and the encouragement from professionals as well as from the state to do so I think it is advantageous because they can benefit from the wealth of guidance and counsel that the parents have, the parents' information, the value system that the parents have, the support, the encouragement. So I believe that she has much to benefit there and the family unit itself is strengthened.

It has been my experience that the family unit is the major source of strength in a crisis and as a result crises for many families become catalysts for positive change.

* * * * *

[2284] * * *

Q Based upon your education, training and experience as a psychotherapist and a family therapist, do you hold any opinion as to whether or not parents are likely to support their pregnant daughter's decision to have an abortion?

A Yes, I have an opinion on that.

Q What is your opinion?

A My clinical opinion is that parents in the main are supportive of their daughter's decision to resolve her pregnancy and in the main that is abortion. There are other studies that affirm that and I will just cite some of them very briefly here.

Fishman, Kimball, Clerman(ph), Bracken & Bracken, Perez, Reyes and Falk, Rosenthal and Rothchild; Steinhoff and Zimmerman. It has generally been found that most parents who

influenced and/or pressured their daughters did so encouraging abortion.

I will add one other study, and that is Rosen(ph), that found a similar conclusion.

Q Based upon your education, training and experience as a family therapist and psychotherapist, do you hold any opinion as to whether adolescents actively perceive their parents' reaction to an adolescent pregnancy or to an abortion decision?

A Yes, I have an opinion.

[2285] Q What is that opinion?

A Adolescents are prone to considerable exaggeration. They are also prone to considerable distortion, both of their own feelings and their parents' feelings.

Some are hypersensitive to anticipated parental reaction. Chilman and others suggest that this may be the first sharing of adolescent sexuality that has occurred between the pregnant teenager and the family. I wanted to add one other thing and it slipped my mind; if you might repeat the question I will continue.

Q Well, does your opinion with respect to adolescent perceptions in the regards you have just testified about, is that based at all on your clinical experience?

A Yes, it is.

Q What is the basis of your clinical experience for that opinion?

A That adolescents benefit from notification?

THE COURT: No, that they properly perceive or anticipate their parents' reaction.

THE WITNESS: Oh, yes, thank you.

There is considerable distortion of how the adolescent perceives parental reactions and there is also considerable projection that is she projects her own feelings of rejection about herself to her parents' anticipated reaction to being notified.

[2286] BY MR. GALUS:

Q Have you observed those phenomenon in your clinical experience?

A Yes, I have.
Q On more than one occasion?
A Very definitely.
Q Based upon your training, education and experience as a psychotherapist and family therapist since 1975, do you hold any opinion as to the psychological vulnerability of adolescents when confronted with a problem pregnancy as you have used that term, or a decision what to do about that pregnancy?
A I think taken as I said earlier—
Q First of all,—
A Yes, I do have an opinion, I am sorry.
Q Could you tell us what that opinion is?
A My opinion as I said earlier is that I believe adolescents as a group are at risk in the psychosexual area. Adolescents' decisionmaking typically spans into what is called concrete operational thinking as well as formal operational thinking.
Q You had better define those terms as you use them.
A Concrete operational thinking as developed by Piaget could be called maybe more child-oriented childish thinking where an individual looks at concrete and specifics, plans for immediate versus future goals and may have what is called haphazard reasoning as opposed to formal operational thinking **[2287]** which has the following five characteristics:

First, to anticipate possible outcomes.
Second, weigh values of each outcome.
Third, test risks systematically.
Fourth, consider complex interactions.
Fifth, associates behavior with outcomes.

Now I mentioned that because adolescents will cross back and forth in terms of their competency as to decisionmaking.

In a problem pregnancy we see the interaction effect between an intense emotional set versus—in addition to the cognitive measures of dealing with a problem pregnancy.

The result is that teenagers may tend to be egocentric and make irrational and emotional decisions about them and the various choices that they encounter.

Adolescents lack—lack the benefit of adult experience, life experience. Young women very often are less analytical in their

approaches to a problem and rely frequently on peers or romantic notions or unrealistic scripts. Some people will say that adolescent decisionmaking could be characterized by egocentricism and/or romanticism.

So in addition to that I would conclude and say that teenagers are at risk, they are vulnerable because they don't have experience; they have very little information with respect to the birth control, sexuality, abortion area; one study by **[2288]** Reichelt and Whirley(ph) found teenagers scored only 42 percent of correct answers on a topic of contraception, abortion and venereal disease and only 36 percent with respect to birth control in general.

Q I would like you to focus your attention on what I understand to be your testimony about your opinion as to the psychological vulnerability of adolescents confronted with a problem pregnancy or decision as to what to do with that pregnancy.

Is there anything in your clinical experience that leads you to hold that view?

A Teenagers—
Q And if so would you tell us what it is?
A Yes, there is. From my clinical practice I have seen teenagers act in a very impulsive manner when confronted with a problem pregnancy. They are overwhelmed by feelings of inadequacy and self deprecation, embarrassment and hostility.

They are vulnerable at this point because they have not contacted anyone, they are alone in their decisionmaking, they are frightened and they fear as to their future.

Q Have you observed any adverse psychological sequelii in your clinical experience to an abortion?
A Yes, I have.
Q What have you observed in that regard?
A I have observed a number of reactions, some of which span **[2289]** short-term rather mild reactions of depression, guilt hostility, sadness, remorse, through insomnia, eating disorders, interactional problems both with parents, partner and others; restricted subsequent bonding to future—in future pregnancies.

I have witnessed anniversary reactions, I have witnessed suicidal ideation, suicidal attempts because of a prior experience with an abortion.

Q And have you borne this witness with respect to patients of yours in your clinical experience?

A Yes, I have.

Q Okay. What do you mean—what do you mean by having observed anniversary reactions?

A Anniversary reactions are emotional high points that occur generally at the time of the abortion the following year.

It may also coincide with the time when the fetal child were to be born and anniversary reactions may manifest themselves with intense crying spells, with intense depression, with psychiatric numbing, that is an inability to feel, through manifestation of intense hostility, to withdrawal.

Q Have you personally provided psychotherapy to patients experiencing the reactions you have just testified about?

A Yes, I have.

Q What did you mean in your answer to my last question about suicidal ideation?

A Suicidal ideation is a thought process an individual goes **[2290]** through when he or she is extremely depressed. She considers options, ways of destroying herself. It is more serious, I will add, when the methodology is identified.

Q You observed that in one or more patients that you have personally provided psychotherapy for?

A Yes, I have.

Q Apart from your clinical experience concerning the adverse psychological sequelii that I have just enumerated, is there any other basis for your opinion as to the risk of pregnant adolescents for such adverse psychological sequelii?

A There are a number of studies that talk about psychological sequelii. Cates identified that pregnant teenagers are more at risk emotionally than are adults.

Adler found abortion is a stressful experience. Bold examined health experiences of Harvard women post-abortion including depression, anniversary reactions, guilt, despair. Smithonna found that women who treated abortion as a moral issue encountered considerable role and decisionmaking comflict.

Duetch found that never-pregnant adolescents manifest higher levels of self esteem than first time and repeated abortion

subjects. Repeated abortion adolescents showed significantly more signs of instability and personality conflict than the never-pregnant group.

There are many others that have identified adverse psychological sequelae.

[2314] * * *

BY MS. BENSHOOF:

Q Dr. Rue, what is your personal feelings about abortion?

A My personal feelings about abortion are that abortion is basically the taking of human life, and it ought to be only necessary to prevent the death of the mother.

Q And is it your opinion that life begins at the moment of conception?

A Yes, it is.

Q And so it would also be your opinion that the IUD and some birth control pills takes human life?

A Not some birth control pills, not being a medical doctor, but my understanding is that the IUD is abortive-fashioned and therefore it does destroy life after it has commenced.

Q Even though you personally oppose abortion are you still in favor—are you still in favor of keeping abortion legal in the United States?

A I am not in favor of legal abortion in the United States.

Q Are you familiar with the article—I imagine that you are—that you wrote entitled The Familial Context of Induced Abortion, Chapter 5?

A Yes, uh-huh.

Q In referring to page 125 of that article, would this quote accurately reflect your views: "Abortion shreds the **[2315]** soul of humanity and the fabric of relationships. It exists for women and yet it is against women, men and children. Like an anesthesia abortion comfortably numbs all from experiencing the burden of pregnancy. Abortion has become a social eraser, individually, quickly and secretly, eliminating all traces of a problem that is pregnancy and yet traces always remain. Within the depths of humankind the indelible marks of violation appear."?

A Yes.

Q Based on that view of yours, I take it that you would never believe that family problems might be a reason for an abortion?

A That is correct.

Q And that you never believe that mental, psychological, emotional problems would be a justification or basis for an abortion?

A That is correct.

Q And that you do not believe that incest would be the basis of an abortion?

A That is correct.

Q What about rape?

A The same.

Q Would you say that your views around abortion are well-known?

A Well, I don't know with respect to how many people read my **[2316]** articles. I don't have an answer to that. Am I asked to give talks, yes.

Q You spoke at the National Right to Life convention in June 1985, is that correct?

A If you will tell me where that was I can affirm whether or not I was there. I don't recall at this point.

Q Can you remember speaking at any National Right to Life conventions?

A Yes, I can.

Q And that convention received a fair amount of publicity, correct?

A I don't know which one that was. If you give me the location I could remember being in that city, but I have had a lot of speaking engagements.

Q Well, it would be a correct assumption that the National Convention received a fair amount of publicity?

A Well, that is speculative. Frequently the pro-life groups complain of not receiving sufficient publicity.

Q Would you say that your two clinics have a reputation, or clinic and branch office, have a reputation for being anti-abortion?

A No, I don't believe so.

Q Would you say that some of your clients are familiar with your views on abortion?

A Yes, I would agree with that statement.

[2317] Q Would it be a correct characterization of your views that you believe that there is a relationship between increased abortion or legal abortion in this society and the rise in child abuse?

A I think there is a correlation to the extent that it is causal. We don't know at this point. There are some studies that are suggesting that that is the case.

My own professional opinion is that I believe they are related.

Q And you did say, did you not, that if violence begats violence and abortion is the violent truncation of life, then to what extent does abortion actually enable child abuse, is that correct?

A That is correct.

Q And you have very strong feelings, do you not, about the fact that the laws in this society allow women to make the choice without the consent of the sexual partner or husband?

A I have an opinion on that.

Q And isn't it your opinion that sexual partners or husbands should be able to have a say in the decision whether a woman should have an abortion?

A To the extent that a sexual partner is involved in the conception of a pregnancy I believe it only logical, just and fair that that person ought to be involved in the decisionmaking regarding the product of that sexual encounter.

[2318] Q You said to the extent, don't all pregnancies start with a sexual partner?

A Well, not all. But let's—for our sake, yes, in terms of most problem pregnancies, unwanted pregnancies, they are the product of intercourse.

Q And isn't it true that because the man has been excluded from this decision there has been an increased inequality between the sexes and that the universal value of patriarchy has decreased and this inequality, "has the potential to breed displaced male aggression via child abuse, spousal abuse or self abuse."?

A No, that is not the direct quote and I disagree with the infusion there of patriarchy. I don't believe I ever used that word. If you would strike that out I would agree with that statement.

Q Except for the word patriarchy you agree with that statement?

A That phrase, patriarchy, yes.

Q Didn't you use that phrase patriarchy before in your testimony before Congress on the Human Life Amendment?

A I don't recall saying that word, I may have, but I don't recall it. My view is basically eliminating the male from the abortion decisionmaking does increase the inequality between the sexes.

Q And that you support, would you not, laws which would **[2319]** require forced consent or at least notification of sexual partners of women?

A I would support spousal notification laws regarding abortion.

Q What about sexual partners who are not married?

A Again I would support notification of sexual partners, yes.

Q But not consent?

A I don't have an opinion about consent, but certainly I would very strongly encourage, recommend, spousal or partner notification.

Q Would you also support such partner notification in the case of rape or incest?

A Yes, I would.

* * * * *

[2328] * * *

A If I am understanding your question you are saying when a minor does not want to contact her parents why don't I call up her parents and simply say, "Surprise, your daughter is pregnant."?

Q Yes.

A Because that is a violation of the confidentiality, the relationship, the privileged information I have with that minor.

Q And a minor's mental and emotional health can be as important as her medical health, can't it?

A Well, I am in the mental health field so I guess I am biased that way, yes.

Q And do you think that if minors thought you would be calling their parents, they would delay or maybe never seek you out for these kind of discussions about their pregnancy?

A Well, I don't have an opinion on that. I don't know.

Q But you do think it would be a violation of their confidentiality to—

A Yes, that I believe, that I know.

Q Is confidentiality important to you as a therapist?

A Yes, it is.

Q Why?

A Because it respects the right of privacy of the individual to communicate sensitive material to me in a relationship, in a context that is safe.

[2337] * * *

Q You have run into a situation with a battered wife and children?

A Uh-huh.

Q It is possible in such a situation of a daughter's pregnancy could cause death of either the wife or the daughter, isn't that true?

A I have never witnessed that.

Q But you do believe that could happen, do you not?

A It is a very, very remote possibility.

Q But you do believe that could happen?

A It is possible.

* * * * *

[2349] * * *

Q Now if a woman was married but separated from her husband and the woman had been battered and there was an order of protection against her husband and she was living and trying to raise her children herself, and you were trying to help the woman and her children, would you consider the batterer part of the family in the context of wanting him notified if the teenager is pregnant?

A Let's divide the answer into two parts.

Q Okay.

A First the batterer is very definitely a part of that family and second, with respect to any decision as grave as notification these exceptional cases, we must examine the context, and individual circumstances of both the teenager, her mother and prior problemsolving and whether or not there has been abuse to this adolescent. If there has been I don't see notification in the best interests of that adolescent.

* * * * *

[2373] * * *

Q But isn't it true that both of those eminent scholars who you respect and who are in your field oppose mandatory parental notification laws by the state?

A Most professionals in my field share their perceptions, namely that obligatory notification is not in the best interests of minors. I would respectfully disagree with that. It hasn't been my clinical experience.

* * * * *

BY MR. GALUS:

[2414] * * *

Q Have you, in the course of your counseling of adolescents, or psychotherapy involving adolescents, or family therapy involving families, a member of which is an adolescent, have you had occasion to deal with families where there was a custodial parent and a noncustodial parent?

A Yes, I have.

Q On those occasions have your ever had occasion to involve the noncustodial parent?

A Yes, I have.

Q And to what end and for what reason?

A Because that noncustodial parent is part of the family system and because of the nature of the problem pregnancy it is important and I encourage that that noncustodial parent be involved in the decisionmaking.

Q And has your encouragement been accepted in some cases?

A I would say in the majority of cases it has been accepted.

Q Based upon your experience in those cases, where your encouragement in that regard has been followed; namely encouragement to involve the noncustodial parent, have you had any ability to observe the results in terms of forming an **[2415]** opinion as to whether or not communication between the adolescent and the noncustodial parent has served any good?

A Yes, I have.

Q What is your opinion in that regard?

A Time and time again I have seen the relationship improve between this young woman, the teenager, and her noncustodial parent where a relationship was strained because the trust, the faith, the love was there, the sharing was beneficial in most instances.

* * * * *

TRIAL TESTIMONY EXCERPTS OF MARCUS KJELSBERG, HEAD OF BIOMETRY DIVISION OF SCHOOL OF PUBLIC HEALTH AT UNIVERSITY OF MINNESOTA

[DIRECT BY MR. ACKERBERG]

[2421] * * *

Q Dr. Kjelsberg, do you have an opinion as to what weight can be attached to the data in Exhibit 27 in hypothesising whether or not the statute has affected the abortion rates for minors, for Minnesota resident minors?

* * * * *

[2423] * * *

THE COURT: And I will let the witness give his opinion as to the statistical significance of these figures.

MS. BENSHOOF: The statistical significance of figures has nothing to do with the law.

THE COURT: Well, vis-a-vis the law, if he has an opinion as to that effect, I am going to let him answer. You may answer.

THE WITNESS: All right. I might say statistical significance has a very technical meaning in our profession. I will take the general meaning here and say that the figures given there, that minus 25 percent and the minus 11 percent are certainly consistent with a hypothesis that the law has an effect on the abortion rate; but I would consider that as a hypothesis and very speculative.

BY MR. ACKERBERG:

Q Why would you consider it speculative?

A Well, these are figures that I consider to be pretty much **[2424]** in isolation. They are—one would like to—and one would like to have data in order to make a case for the law having an effect to see that these data are supported when one looks at trends over time, when one compares different geographic areas, you would like to look, I think, at the age specificity, that is to look and see what the trends over time would be by single years of age to see whether or not—what the patterns would be over time.

To me, based on my experience, is that it is very, very hazardous to pick an event in time as an explanation for some alteration in vital statistic trends because they are the result of very, very complex social phenomenon.

* * * * *

TRIAL TESTIMONY EXCERPTS OF DR. ARTHUR HOROWITZ, PHYSICIAN AT MEADOWBROOK WOMEN'S CLINIC

[CROSS BY MR. GALUS]

[2499] * * *

Q From time to time do you know whether or not women coming for abortion services sometimes ask for an appointment a week or a week and a half later?

A Yes.

Q Okay. To your knowledge does Meadowbrook have a policy of dissuading those women for setting an appointment a week or a week and a half later?

A Only inasmuch as the gestational ages involved with the—if the woman knows when her last period was and what her gestational age is, and if she would not be unduly delayed or placed into more jeopardy, significantly more jeopardy; for instance if she went from the first trimester into the second trimester by delaying for a prolonged period of time, we would suggest that she come in sooner.

Q Assume a woman asking for abortion services from Meadowbrook in the first trimester of her pregnancy, okay, and assuming further the woman says, well, I would like to

come in a week and a half later, and assume further that that is still within the first trimester and there is no apparent compelling circumstances or particular medical problems, Meadowbrook doesn't try to talk that woman out of that date, does it?

A We probably would not, but this is a very hypothetical situation because most of our patients want to get in as fast **[2500]** as possible and they might have a preference, say, for a Monday or a Friday or something like that. It would be somewhat more unusual for them to request, "I would like to come in in two or three weeks."

Q My question was a week or within a week and a half. Does that never occur?

A I am sure it does occur.

Q How about a request for an appointment five days later, does that occur?

A I am sure that occurs.

Q Under those circumstances it is not a matter of Meadowbrook's policy to urge the woman to come in earlier, correct?

A It would not be, again within the limitation I set forth.

Q Again assuming that the date she requested still puts her within the first trimester?

A Yes.

* * * * *

[2510] * * *

Q I would like to now, if I may, focus your attention on the first trimester and the subject of risks of abortion in the first trimester.

Isn't it true that it is your expert medical opinion that there is probably not a very much greater degree of risk from week to week within the first trimester?

A The risk in the first trimester is relatively small and although it does increase from week to week within the first trimester, it isn't really that great.

Q Isn't it true that the degree of risk from week to week within the first trimester does not vary, does not—probably does not change very much?

A I think it does change but again it is—we are dealing with relatively small increases, incremental risks.

Q And when did you form that opinion?

A Again I can't really tell you.

Q Prior to 1984?

A Possibly—probably.

Q Doctor, turn your attention, if you would, to page 29 of your deposition, starting at line 13.

Do you recall being asked the following questions by me and giving the following answers:

"QUESTION: Doctor, I believe you testified earlier in this deposition that generally speaking the greater **[2511]** the gestational age the higher degree of risk there is associated with the abortion?

"ANSWER: Yes, that is on a trimester-to-trimester basis.

"QUESTION: In other words, increased risks can be seen in the second trimester as opposed to the first trimester?

"ANSWER: As opposed to the first trimester and, in fact, it may that there is an increased risk with progressive gestational ages within the second trimester, but I am not sure if this has been exhaustively analyzed."

Then there is a question and answer I would like to skip, but I would like you to turn your attention to line 28.

Do you recall being asked the following questions and giving the following answers:

"QUESTION: The evidence, at least to your mind, is unclear whether the degree of risk varies within the second trimester?

"ANSWER: Yes. I think it may well be as the gestational age progresses within the second trimester risk may increase.

"QUESTION: In the first trimester from week to week within the first trimester is there a greater degree of risk?

"ANSWER: Probably not very much."

Do you recall giving those answers to those questions?

[2512] MR. PENTELOVITCH: I will make the objection this is improper impeachment because it is consistent with his testimony, if he is offering it as deposition testimony prior—

THE COURT: It is not impeachment, a deposition of a witness, of a party, can be used for any purpose.

MR. PENTELOVITCH: I agree with that.

THE COURT: It is in.

BY MR. GALUS:

Q And you reviewed this deposition carefully, didn't you?

A Yes.

* * * * *

TRIAL TESTIMONY EXCERPTS OF HENRY DAVID, DIRECTOR OF TRANSNATIONAL FAMILY RESEARCH INSTITUTE

[DIRECT BY MS. BENSHOOF]

[CROSS BY MR. GALUS]

[2531] * * *

Q Are there any studies in the United States comparing only adolescents who give birth, or who have abortions, in a controlled study, for example in one particular hospital?

A Well, there was a study done in the State of Hawaii which is the only study which comes close to that and that was a study done by Dr. Patricia Steinhoff (ph) from the University of Hawaii, and it was published very recently. I have an advance **[2532]** copy of the paper and they found, they checked their records for the years 1978, 1980, and found 313 abortion cases and 393 controls—by controls being women who delivered.

Q These are only adolescents?

A Yes. Well, they are young women, which means they may go up to age 24. I will be glad to mention some of the conclusions if you wish.

Q Yes, please.

A I will read: "The data provides striking evidence that women who utilized abortions were able to realize their family goals. They avoided subsequent unwanted pregnancies, subsequent births were overwhelmingly intended and wanted, and occurred in a positive emotional atmosphere. Among the very young women"—this would be women 15 to 17—"the use of induced abortions leads to postponement of the first birth well beyond the second birth of the women in the control group." In other words, those women who delivered had a second child fairly rapidly after the first; whereas the woman who had the abortion was able to delay it longer. And it raised the social, educational, and economic level of the household and the subsequent family.

* * * * *

[2533] * * *

Q Has the World Health Organization, based on international studies, issued any statement on the sequelae of abortions?

A Yes. In 1978 there was an expert committee on induced abortions covering all ages, and from which I take this quote: "There is now a substantial body of data reported from many countries, after careful and objective follow-up, suggesting frequent psychological benefit and low incidence of adverse psychological sequelae."

Q And that was reported out by the committee appointed by the World Health Organization?

A And endorsed by the World Health Organization in publishing the report.

Q And that included people on the committee from every— other countries?

A No, if we had that we would have a committee of 158 people. I would guess that the committee was about 12 experts from around the world.

Q There has been testimony in this case by a—not a psychologist, a family relations expert, that adolescents are more at risk for adverse psychological sequelae than adults.

[2534] Could you comment on that observation?

A Yes. I am not aware of any scientific study which compared sequelae of abortion to sequelae of birth coming to such a conclusion. There has been no scientific follow-up study. There are many case histories, but there are no scientific follow-ups and our Danish study would indicate just the opposite. The women under age 20 had the lowest rate of admission to psychiatric hospitals compared to all other age women. The highest rate of admission to psychiatric hospitals after abortion were in women 30 to 34 years old; and among delivering women 35 to 49 years old.

Q So you would believe not only in your expert opinion but based on studies, that that observation is incorrect?

A Yes. I would go back to a study published by the National Academy of Sciences in the United States reported in the New England Journal of Medicine, June 1978, a study to which I was a consultant, and it was concluded that: "Feelings of guilt, regret, or loss, elicited by legal abortion in some

women, are generally temporary and appear to be outweighed by positive life changes and feelings of relief".

Nothing has happened in the scientific world since 1978 that would make me change that opinion.

* * * * *

[2544] * * *

A I have learned over the years that it is extremely important to respect the confidentiality of the adolescent. I have also learned that we must look at the adolescent as the adolescent perceives her or his world. They don't live always in our world. The world that we experienced as adolescents is different from the real world today and if a youngster for reasons of his or her own does not want to communicate, whether there are any factual reasons for not communicating, whether or not the youngster misperceives the opinion of his or her parent, whatever, I think we need to respect the right to confidentiality of the adolescent. And, I am not at all convinced that forced notification will do anything to alleviate that situation.

Rather my own clinical experience suggests that it will create far more stress because not only is the adolescent made uncomfortable by something happening that he or she did not wish [2545] to happen, but the parents are confronted by a situation with which they are extremely uncomfortable, and to expect parents to behave as they do in novels or in our best hopes and aspirations for ideal parent-child relationships simply does not square with the real feelings of real people and the real expressions of real emotions in the real world.

* * * * *

[2546] * * *

Q Do you have an opinion based on your original research and your extensive experience with others in your field, whether or not forced notification would increase or decrease a pregnant adolescent's emotional well being at the time of the abortion decision and the potential for any adverse psychological sequelae from abortion?

A It is extremely difficult to answer that because there is no scientific evidence. If somebody were to engage in a study comparing that, I wonder whether it would be worth the risk taken. It is not the kind of study which from an ethical point of view I would want to see authorized, because it means an invasion of

[2547] the confidentiality of the adolescent, it is a lack of respect for the adolescent as a person, and if that adolescent feels that all of these years his or her relationship with their parents was such that at this point they don't want the parents to know, I think it should be accepted, the adolescent's statement.

If the state wants to do such a study, of course that is possible, but I think the risk of creating havoc with adolescents is such that I, if I were to be on the ethical practices committee of an institution, I would not wish to see such a study done.

BY MS. BENSHOOF:

Q Do you believe that forced notification could increase a pregnant adolescent's emotional upheaval at the time of the abortion decision?

A I am going to hedge my answer because there is no scientific evidence one way or the other there, but as a psychologist who has seen a good many adolescents and knows adolescents I think fairly well, I would say the risk far exceeds the likely benefits.

* * * * *

[2578] * * *

BY MR. GALUS:

A Dr. Baird is a physician from Scotland.

Q Okay. And, speaking of your Danish Study Baird tells you there, does he not, that this is an impressive study but the United States has a different culture and social background to Denmark?

A That is what he said.

Q You responded Denmark has long been the leading indicator of social change, observers believe Denmark is ten years ahead of the United States. If so, problems of guilt surrounding abortion and measurable psychiatric morbidity may be expected to decline in the United States?

A That is what I said.

Q Does that continue to be your view?

A That is a hope and expectation, yes.

Q Is it implicit also in that view that as of the present time adolescents in the United States are more at risk for adverse psychological sequelae than adolescents in Denmark?

A Yes.

Q And will continue to be so at least for a period of ten years in your view?

A I can't predict, but it is possible.

* * * * *

[2584] * * *

Q Do you believe—well, based upon your education, training and experience, clinical experience and academic and scholarly research, do you believe that generally speaking adolescents find an abortion a more stressful situation than adult women?

A Depending on their ages. If you are talking about women under 16, they are likely to find it more stressful than those who are older and certainly more stressful than those who are married at 18 and 19 years.

Q Would you make that same generalization with respect to women 17 and under?

A It depends on their family situation, their marital situation and such.

Q The stress encountered by a particular adolescent will, in that particular case, depend upon a lot of variables?

A Correct.

Q You have generalized however, have you not, at least insofar as the group 16 and under, that group of women seeking an abortion will be in a more stressful situation than older women?

A It is very likely, yes.

Q Is that your opinion?

A Yes.

Q Do you have that same opinion with respect to the comparison—[2585] comparing the group of women 17 and under to older women?

A It depends on the individual concerned and on the family situation in which they find themselves.

* * * * *

PLAINTIFFS' EXHIBIT NO. 10

[LETTERHEAD OF HENNEPIN COUNTY]

DATE: April 4, 1984

TO: Judge Oleisky

FROM: Susanne Smith

SUBJECT: Parental Notification Calendar: Statistical Update

I. *CASE VOLUME*

August - December 1981	191
January - December 1982	474
January - December 1983	454
January - March 1984	118
TOTAL:	1237

II. *HEARING DAYS/FREQUENCY*

		# of days on which cases were heard
1981	(191 cases)	74
1982	(474 cases)	169
1983	(454 cases)	143
	TOTAL:	386

Average number of cases per hearing day: 2.9

III. *PETITIONER'S AGE*

	1981	1982	1983	Total	/ %
Age 13	0	3	1	4	/ (.003%)
Age 14	5	9	3	17	/ 01%
Age 15	17	52	45	114	/ 10%
Age 16	67	157	156	380	/ 34%
Age 17	102	253	249	604	/ 55%

IV. *PETITIONER'S RESIDENCE*

	Hennepin County Resident	Non-Hennepin Resident
1981 (191 cases)	90	101
1982 (474 cases)	231	243
1983 (454 cases)	198	256
TOTALS	519 / 46%	600 / 54%

PLAINTIFFS' EXHIBIT 21
(ALL)

LETTER FROM GEORGE O. PETERSON, JUDGE OF
RAMSEY COUNTY JUVENILE COURT,
TO REPRESENTATIVE KATHLEEN VELLENGA

RAMSEY COUNTY
JUVENILE COURT

GEORGE O. PETERSEN
JUDGE

December 6, 1982

Representative Kathleen Vellenga
Minnesota House of Representatives
886 State Office Building
St. Paul, Minnesota 55155

Dear Representative Vellenga:

I have now completed the data gathering and computations you requested on September 20 and to which I referred on September 27.

From August 1, 1981 through November 30, 1982, our Court has conducted 258 abortion-consent hearings.

In 80 of those cases, the parents of the girl were divorced. In 35 of those 80 cases, the girl discussed her abortion with her custodial parent but did not wish to notify her non-custodial parent of her desire to have an abortion.

In 20 of the 258 cases, the girl lived with both parents but wished to notify only one of them of her desire to have an abortion.

In another 48 of the 258 cases, the girl discussed the proposed abortion with an adult relative but wished not to notify either parent.

In many of the remaining cases, the girl had sought out the advice and counsel of other adults before going to professional

counselors. Those adults include teachers, employers, parents of friends, parents of the potential father, ministers, priests and neighbors.

In 8 cases girls were seeking their second abortion.

Two girls already had a child at home.

Fourteen girls were living independently or were in foster homes.

During the first full year the statute was in effect from August 1, 1981 to July 31, 1982, we held 167 hearings, an average of 14 per month.

Since August 1, 1982, we have held 91 hearings, an average of 23 per month.

There were an additional 15 girls who called to schedule hearings but then did not appear.

By age, the girls we have seen are classified as follows:

Age	*Number*	*Percentage*
13	2	1%
14	11	4
15	26	10
16	86	33
17	133	52
	258	100%

The reasons they give for not wanting to tell one or both parents about the abortion are as follows:

Reason	*No.*	*Pct.*
Fear of damaging parent-child relationship:	76	29%
Parents opposed to abortion-have said would kick the girl out:	54	21
Parents opposed to abortion-would force the girl to keep the child:	14	5

Reason	*No.*	*Pct.*
Marital, financial or health problems already in home-this would aggravate:	47	18
Absent parent or parents not part of their lives and have no right to know:	35	14
Prior physical abuse feared to reoccur:	11	4
Fear of prior expressed threats:	10	4
One or both parents alcoholic:	9	4
Raped:	2	1
Totals:	258	100%

As you might imagine, the reasons girls express for wanting an abortion are many and varied. The desire to continue one's education and have a career is expressed in over 95% of the cases. Regardless of hopes and plans for the future, some feel they are simply too young to have a child.

The overwhelming majority of the girls we see are above-average students, have part-time jobs, are active in school and church activities, volunteer in the community, and have responsibilities at home.

All the girls are aware of their options and have considered the alternatives to abortion: single parenting, marriage and adoption.

I hope this information will be helpful in your deliberations. Please do not hesitate to call if I can be of futher assistance. I will always respond as soon as I am able.

Respectfully,

/s/ GEORGE O. PETERSEN
George O. Petersen
Judge of Ramsey County
Juvenile Court

GOP:ceb

PLAINTIFFS' EXHIBIT NO. 25

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA
THIRD DIVISION

Court File No. 3-81 Civ. 538

JANE HODGSON, M.D., et al.,

Plaintiffs,

v.

THE STATE OF MINNESOTA, et al.,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' [SECOND] REQUEST FOR ADMISSION

Defendants object to Plaintiffs' [Second] Request for Admission as ambiguous by failing to specify the time-frame applicable to requested admissions and failing to define "sit." The following responses are as of December 1983 and presume that "sit" refers to normal judicial work schedules without regard to (a) absences due to illness, vacation, judicial conferences, continuing legal education seminars and weather emergencies, (b) schedule departures required by caseload demands and emergencies and (c) the availability of judges outside normal work schedules.

Without waiving objection and with the noted qualifications, for the purpose of the above-captioned action only, defendants respond to Plaintiffs' [Second] Request for Admissions as follows:

STATEMENT 1. No judge sits in Roseau County on Wednesdays, Thursday mornings, and some Friday afternoons.

RESPONSE: Admitted as qualified.

STATEMENT 2. No judge sits in Clearwater County on Tuesdays, Wednesdays, or Fridays.

RESPONSE: Admitted as qualified.

STATEMENT 3. Judges Spellacy and Spooner sit in Itasca County each weekday from 8:30 a.m. to 5 p.m.

RESPONSE: Admitted as qualified insofar as the statement applies to Judge Spooner; denied insofar as the statement applies to Judge Spellacy.

STATEMENT 4. No judge sits in Cook County except for the first and third Wednesday of each month and during special term in March and October.

RESPONSE: Admitted as qualified.

STATEMENT 5. A judge sits in Virginia and Hibbing in St. Louis County each weekday from 9 a.m. to 4:30 p.m.

RESPONSE: Admitted as qualified.

STATEMENT 6. A judge sits in Goodhue County each weekday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 7. A county judge sits in Wabash [Wabasha] County Monday-Friday, and District Court Judge Lawrence Collins sits about once a month.

RESPONSE: Admitted as qualified.

STATEMENT 8. County Judge John Fahey sits in Carver County Monday-Friday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 9. County Judges Wolf and Johnson sit in Rice County Monday-Friday from 8 a.m. to 4:30 p.m.

RESPONSE: Admitted as qualified insofar as Judges Wolf and Johnson sit to 4:30 p.m.; denied insofar as Judges Wolf and Johnson sit from 8 a.m.

STATEMENT 10. Judges sit in Dakota County Monday-Friday from 8:30 a.m. to 4:30 p.m.

RESPONSE: Admitted as qualified.

STATEMENT 11. Judges sit in Freeborn County Monday-Friday and are almost always available during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 12. No judge sits in Hubbard County on Wednesday or Friday.

RESPONSE: Admitted as qualified.

STATEMENT 13. No judge sits in Watonwan County at least one day a week.

RESPONSE: Denied.

STATEMENT 14. Judge Christianson sits in Pipestone County an average of four days per week; and when he is not present, another judge is usually available.

RESPONSE: Admitted as qualified.

STATEMENT 15. Judge Lasley sits in Jackson County Monday-Friday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 16. A county judge sits in Cottonwood County Monday-Friday during regular business hours.

RESPONSE: Admitted as qualified.

STATEMENT 17. A judge sits in Redwood County Monday-Friday from 9 a.m. to 5 p.m.

RESPONSE: Admitted as qualified.

STATEMENT 18. No judge sits in Murray County on Friday mornings, and Judge Holt occasionally travels to other counties.

RESPONSE: Admitted as qualified.

STATEMENT 19. A county judge generally sits in Nobles County Monday-Friday, but there are days when no judge is available.

RESPONSE: Denied.

STATEMENT 20. Judge Crippen is scheduled to sit in Rock County on Wednesdays, and Judge Christensen sits every Thursday morning. There are often several days during the week when no judge is sitting.

RESPONSE: Admitted as qualified.

STATEMENT 21. Judge Marquis Wood sits in Chippewa County five days a week, from 9 a.m. to 5 p.m.

RESPONSE: Denied.

STATEMENT 22. Judge Jim Zeug sits in Renville County about four days a week.

RESPONSE: Admitted as qualified.

STATEMENT 23. Judge Collins or another county judge sits most of the time in Stevens County.

RESPONSE: This request for admission is objected to as ambiguous and not susceptible to admission or denial.

STATEMENT 24. Both a district court judge and a county court judge sit in Anoka County every weekday during regular business hours. The scheduled judges are on call for emergencies 24 hours a day, seven days a week, so a judge is always available.

RESPONSE: The first sentence is admitted as qualified, except that five district court and five county court judges sit in Anoka County every weekday during regular business hours. The second sentence is admitted.

STATEMENT 25. A county court judge sits in Pine County each weekday from 8 a.m. to 5 p.m. However, when the judge is on vacation or attending judicial conferences, no judge is available in Pine County.

RESPONSE: The first sentence is admitted as qualified. The second sentence is denied.

STATEMENT 26. No judge sits in Sherburne County on Tuesdays and Thursdays, unless a traveling district judge happens to be in town.

RESPONSE: Admitted as qualified.

Dated: December 23, 1983.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

By: /s/ PETER M. ACKERBERG
Peter M. Ackerberg
Special Assistant
Attorney General

515 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-8954

PLAINTIFFS' EXHIBIT NO. 27

Table 1

Abortions and Abortion Rates, Minnesota Residents Under Age 20, 1980-1982

	1980	*1981*	*1982*	*Percent change, 1980-1982*
Number of Abortions				
Women under age 18	2,327	1,820	1,564	-32.8%
Women aged 18-19	3,380	3,064	2,799	-17.2%
Abortions per 1,000 Women				
Women under age 18*	20.3	16.7	15.2	-25.1%
Women aged 18-19	40.6	38.4	36.0	-11.3%

---

* Denominator is women aged 15-17

Sources

Number of abortions: Minnesota Center for Health Statistics, Minnesota Department of Health, *Reported Induced Abortions 1980, . . . 1981,* and . . . *1982.*

Number of Women: Minnesota Department of Health estimates of women aged 15-19 for each year, divided into 15-17 and 18-19 according to the proportions in population estimates created by interpolation between the 1980 census figures and 1985 projections provided by Market Statistics, adjusted to national totals estimated by the Census Bureau.

PLAINTIFFS' EXHIBIT NO. 28

Table 2

Birth Rates, Women Aged 15-17 and 18-19, Residents of Minnesota and Four Comparison States Averaged, 1981 and 1982

	1981	*1982*	*Percent change, 1981-1982*
Minnesota			
Age 15-17	17.3	16.7	-3.5
Age 18-19	59.4	55.8	-6.1
*Four States (Average)**			
Age 15-17	22.9	21.7	-5.2
Age 18-19	70.6	67.3	-4.7

---

* Iowa, Nebraska, South Dakota, Wisconsin

Sources

Birth data: National Center for Health Statistics, U.S. Department of Health and Human Services

Population data: Four comparison states, interpolation between 1980 census figures and 1985 projections provided by Market Statistics, adjusted to national totals estimated by the Census Bureau; Minnesota, The Minnesota Health Department totals for ages 15-19, divided into 15-17 and 18-19 in proportion to the population estimates as described above.

PLAINTIFFS' EXHIBIT NO. 41

EXCERPTS FROM DEFENDANTS' ANSWERS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 20: State the numher of county and district court judges who sit in the courthouse in each county; specify separately:

a. Days of the week when a judge is sitting at the courthouse;

b. Hours of the day when a judge is sitting at the courthouse:

c. Days or times when no judge is sitting at the courthouse:

d. Where a litigant or attorney would have to travel for a hearing on those days or times when no judge is sitting at the courthouse.

ANSWER:

First Judicial District. Carver (2), Dakota (5), Goodhue (1), LeSueur (1), McLeod (1), Scott (2), Sibley (1).

a. Monday-Friday.

b. 8:30 A.M. to 4:30 P.M. in Carver County and 8:00 A.M. to 4:30 P.M. in all other counties.

c.-d. There are rare isolated dates when there may be no judges "sitting" in a given county. The five district court judges travel irregularly through the seven counties. County court judges rarely travel outside their counties. On those occasions litigants or attorneys would travel to the nearest other county.

Second Judicial District. Ramsey County has one judge and three referees presiding over its Juvenile Court.

a. Monday-Friday.

b. 8:30 A.M. to 4:30 P.M.

c.-d. Absences occur only due to a judge's or referee's illness or vacation. Temporary assignments are made to fill such vacancies.

Third Judicial District. Each of the 11 counties is served by one or more county court judges. There are six district court judges.

a. Monday-Friday.

b. One hour every day by county court judge and 1½ days a month by district court judge in Dodge County. In addition, a county court judge serves Dodge County all day on Wednesday and Thursday every other week. From 8:00 A.M. to 4:30 P.M. in Fillmore and Waseca Counties. From 8:00 A.M. to 4:00 P.M. in Wabasha County. In all other counties the schedule is 8:00 A.M. to 5:00 P.M.

c. See answer b. above.

d. On those rare occasions in Dodge County, the litigant would travel to the nearest adjacent county.

Fourth Judicial District. There are 17 county court judges and 20 district court judges in Hennepin County.

a Monday-Friday.

b. 8:30 A.M. to 4:30 P.M.

c. None (except non-business hours).

d. Not applicable.

Fifth Judicial District. There are sixteen county court judges who sit regularly in the fifteen counties, which are divided into five sub-districts. There are seven district court judges who rotate regularly among the fifteen counties.

a. Monday-Friday.

b. From 8:00 A.M. to 5:00 P.M. in Blue Earth, Brown, Cottonwood, Lyon, Nobles, and Rock Counties. From 8:30 A.M. to 5:00 P.M. in Faribault, Martin,

Murray and Watonwan Counties. Martin County also has a county court judge sitting from 7:00 to 9:00 P.M. every Wednesday. From 8:30 A.M. to 4:30 P.M in Jackson, Lincoln, Pipestone, and Redwood Counties. From 9:00 A.M. to 5:00 P.M. in Nicollet County.

c. Not applicable.

d. Not applicable.

Sixth Judicial District. There are six district court judges, eight county court judges and six judicial officers serving the four counties in this district. Their schedules vary.

a. Monday-Friday in Carlton and St. Louis (Duluth, Hibbing and Virginia) Counties. Schedules in Cook and Lake Counties vary.

b. Typically 8:30 A.M. to 4:30 P.M. in all locations.

c. Seldom.

d. Nearest neighboring county or county branch (e.g., Ely, Hibbing or Virginia in St. Louis County).

Seventh Judicial District. There are four district court judges who preside over the ten counties. In addition there is one county court judge in every county except Clay and Otter Tail (which have two each) and Stearns (which has four).

a. Monday-Friday for every county except Mille Lacs County, which has a judge every Monday, Wednesday and Friday.

b. 8:00 A.M. to 4:30 P.M. in all counties.

c. See answer a. above.

d. Nearest other county (would only occur in Mill Lacs County).

Eighth Judicial District. There are three district court judges and eleven county court judges serving the thirteen counties on a shared or rotating schedule.

a. Monday-Friday in all counties but Big Stone (Tuesday, Wednesday, Friday), Grant (Tuesday, Thursday), Renville (Monday, Tuesday, Wednesday, Friday), and Traverse (Monday, Thursday) Counties.

b. 8:00 A.M. to 4:30 P.M.

c. See answer a. above.

d. On those days when a judge is not available in some county, he usually is available in the evening. In cases where a judge is unavailable for a 24-hour period, the litigant would travel to the nearest other county.

Ninth Judicial District. There are six district court judges and fourteen county court judges serving the seventeen counties on a shared and rotating basis.

a. Monday-Friday in all counties except Aitkin (almost every day), Clearwater (Monday, Thursday), Kittson (Wednesday, Thursday), Koochiching (almost every day), Lake-o-Woods (Thursday), Mahnomen (Tuesday, Thursday), Marshall (every other day), Norman (Monday, Thursday, Friday), Pennington (Tuesday, Wednesday, Thursday, Friday), Red Lake (Monday), and Roseau (Monday, Tuesday, Friday).

b. From 9:00 A.M. to 4:00 P.M. in Aitkin, Marshall, Pennington, Polk, Red Lake, and Roseau Counties. From 8:00 A.M. to 4:30 P.M. in Beltrami County. From 8:30 A.M. to 4:00 P.M. in Cass and Crow Wing Counties. From 9:00 A.M. to 3:00 P.M. in Clearwater, Hubbard, Kittson, Koochiching, Lake-o-Woods, Mahnomen, and Norman Counties.

c. See answer a. above.

d. The nearest adjacent county.

Tenth Judicial District. Every one of the eight counties is served by one county court judge except Anoka County, which has five, and Washington County, which has three. In addition

there are six district court judges who serve these counties on a shared and rotating basis.

a. Monday-Friday for all counties except Kanabec County, which has a county court judge every Tuesday and Thursday and a district court judge on other days each week irregularly. In addition, Sherburne County has a county court judge every Monday, Wednesday and Friday and a district court judge on other irregular days. Finally, Wright County has a county court judge every Tuesday and Thursday and a district court judge on other irregular days.

b. From 8:00 A.M. to 5:00 P.M. in Anoka County. From 8:00 A.M. to 4:30 P.M. in Chisago, Isanti, Pine, Washington and Wright Counties. From 8:00 A.M. to 4:30 P.M. in Kanabec County. From 8:30 A.M. to 5:00 P.M. in Sherburne County.

c. See answer a. above.

d. Nearest adjacent county.

INTERROGATORY NO. 21: State whether any of the judges identified in the preceding interrogatory preside over their courts on a part-time basis, and whether they change courts. If answered in the affirmative, indicate the schedules of those judges.

ANSWER:

First Judicial District. All are full-time. The five district court judges travel on an irregular basis throughout the district. Occasionally, county court judges are assigned to other counties temporarily to fill needs as they arise.

Second Judicial District. The juvenile court judge and referees are all full-time and do not change courts.

Third Judicial District. Every county has at least one full-time county court judge. The full-time district court judges usually are assigned to the following schedule: Dodge County, 1½ days per month; Fillmore County, 1½ days per month; Freeborn

County, 5 days per week; Houston County, 3 days per week; Mower County, 5 days per week; Olmsted County, 5 days per week; Rice County, 4½ days per week; Steel County, 3 days per month; Wabasha County, 3 days per month; Waseca County, 3 days per month; Winona County, 4 days per week.

Fourth Judicial District. All are full-time and do not change courts.

Fifth Judicial District. See answer to Interrogatory No. 20. In addition, a judge is assigned from 9:00 A.M. to 5:00 P.M. the first and third Wednesdays of each month in the Springfield and Sleepy Branches of Brown County Court. County court judges from Nobles and Pipestone Counties also occasionally share responsibilities in Rock County as the calendar dictates. On an irregular basis the sharing configuration of counties among county court judges is as follows: district A (Lincoln, Lyon and Redwood), district B (Brown, Cottonwood, Nicollet and Watonwan), district C (Blue Earth), district D (Faribault, Jackson and Martin), and district E (Murray, Nobles, Pipestone and Pock).

Sixth Judicial District. There is not a fixed schedule. All county and district court judges may sit in any court or branch thereof. All are full-time.

Seventh Judicial District. The schedule of rotation varies and has not been finalized for 1982. Sample copies of the 1981 schedule are available upon request. The eight counties are divided into the following three county court groups for rotation purposes: Becker, Clay and Otter Tail; Benton and Stearns; and Douglas, Todd and Wadena.

Eighth Judicial District. See answer to Interrogatory No. 20. All judges are full-time.

Ninth Judicial District. See answer to Interrogatory No. 20. There are no set schedules; rotations depend upon needs of calendars in each county. All judges are full-time.

Tenth Judicial District. Same as answer for Ninth Judicial District. In addition, the Minnesota Supreme Court was admin-

istratively assigned one county court judge from Mills Lacs in the Seventh Judicial District to serve Kanabec County as needed (presently about two days each week).

* * * * *

INTERROGATORY NO. 24: State which courts in Minnesota have set up procedures designed to process the abortion petitions of Minnesota. Describe in detail such procedures and attach written copies of the same. Specify whether those courts of one county may hear petitions of residents of a different county.

ANSWER: All courts have adopted some procedures. Those of the Tenth Judicial District are not yet formalized beyond use of guidelines provided by the Minnesota Attorney General's office. See, Affidavits and exhibits of Karen L. Ives, dated Aug. 26, 1981; Michael D. Calvert, dated Aug. 26, 1981; and Gregory Date, dated Aug. 25, 1981. Those other courts which have put their procedures into written or printed form are attached as Exhibits E-1 hereto; see Answer to Interrogatory 29, *infra*.

INTERROGATORY NO. 25: State which courts in Minnesota have set up procedures designed to process the abortion appeals of Minnesota. Describe in detail such procedures and attach written copies of the same. Specify whether those courts of one county may hear appeals of residents of a different county.

ANSWER: See answer to Interrogatory No. 24.

INTERROGATORY NO. 26: State the times for regularly scheduled abortion hearings within Hennepin, Ramsey, and St. Louis counties.

ANSWER:

1. *Hennepin County*. Based on the court's experience through December of 1981, it was determined that the demand usually necessitated scheduled hearings only four days each week. Thus, the hearings are

scheduled at 11:45 A.M. every Monday, Tuesday, Thursday and Friday. In emergencies, hearings may be held on Wednesday evenings or on weekends.

2. *Ramsey County*. Regularly scheduled hearings are at 4-6:00 P.M. every Monday and Wednesday. Other hearings are scheduled by appointment to accommodate work and school schedules.
3. *St. Louis County*. There is not a regular schedule. All hearings are set as needed and upon the request of the minor or her counsel.

INTERROGATORY NO. 27: Identify and describe the appropriate person by whom inquiries concerning abortion petitions and/or appeals are initially answered; include the name, address and telephone number of any such person(s).

ANSWER:

1. *Hennepin County*. Anyone at the Child protection Hotline (612-348-3552) in Minneapolis, or with the Public Defender's Office. Counsel and guardian ad litem are appointed without a prior court order. They then call the Clerk of Juvenile Court (348-6634) to schedule a hearing.
2. *Ramsey County*. Most initial contacts have been from a St. Paul abortion clinic where the minor has gone. They are referred to the Public Defender's office which has a 24-hour phone service (612-298-5797).
3. *St. Louis County*. Any one of three offices: Public Defender's office, 1726 London Road, Duluth, 218-728-4425; Midwest Health Center for Women, 611 Medical Arts Building, Duluth, 218-727-3352; St. Louis County Probate Court Clerk's Office, 301 Courthouse, Duluth, 218-723-3488.
4. *Anoka County*. Jean Stack, Anoka County Courthouse, Anoka, 612-421-4760 (Ext. 1355).

5. *Washington County.* Juvenile Section, Washington County Courthouse, Stillwater, 612-439-3220.
6. *All other counties.* Initial contacts are with clerks of respective county courts and/or public defender.

PLAINTIFFS' EXHIBIT NO. 56

MINNESOTA PROGRAM FOR BATTERED WOMEN, 1985 UPDATE

INTRODUCTION

This report is an update of the 1979 Report and the subsequent updates to the Legislature submitted by the Department of Corrections on the Program for Battered Women. The initial report described steps taken by the Department of Corrections to implement the Program for Battered Women; the next two reports detailed the expansion of the Program in the 1980-81 biennium and the maintenance of the Program in the 1982-83 biennium. This report will discuss current funding and new directions taken by the Program for Battered Women. More specifically, this report will:

—present the Minnesota Advisory Council on Battered Women and Department of Corrections recommendations for continuation of the Program.

—provide information on the 17 shelter programs,

—provide information on the 22 nonshelter service programs.

Based on the professional experience of the many individuals involved in providing services to battered women, it is believed that men assault their partners for two primary reasons. First, many men believe that they must maintain control of their partners which often includes the use of violence. This behavior most likely results from growing up in homes where violence is prevalent and where the children are not provided with alternative patterns to cope with basic human emotions such as anger and frustration. Second, there are few societal repercussions to the violent partner.

The public as well as professionals often assume that women must, to some degree, encourage their own battering by their behavior. However, it is now becoming generally recognized that if a man has not learned alternate ways of dealing with his

anger, he will most likely use violence against his partner regardless of her behavior. This is not to say that women do not participate in conflicts that occur in any relationship, it is to say that only in those relationships involving a person who uses violence to express anger will conflicts result in battering.

Data collected from law enforcement officers, human service providers, medical personnel and shelter programs in Minnesota indicate that:

—an estimated 187,115 incidents of assault on women by their partners have occurred in Minnesota since mandatory reporting began in 1978, an average of about 31,200 incidents a year,

—domestic violence has been reported in every county of the state,

—the majority of women who were assaulted were married to and living with their assailant at the time of the assault,

—women who were assalted range in age from 12 to 96 years.

A complete analysis of data collected from these sources is available in the Minnesota Department of Corrections, Program for Battered Women Data Summary Reports.

MINNESOTA PROGRAM FOR BATTERED WOMEN, 1985 UPDATE MN. DEPT. OF CORRECTIONS

The passage of the legislation for battered women in 1977 and the subsequent creation of the state Program in the Department of Corrections provided the incentive to initiate or expand local organizations for battered women. With the aid of the Advisory Council, the Program for Battered Women continues to support local programs through financial and technical assistance.

The Program for Battered Women and funded organizations also educate professionals on the problems and needs of battered women through workshops and speaking engagements.

As professionals have begun to examine their own interaction with abused women, they are joining with grassroots organizations to effect changes within the systems from which battered women seek help so that services may be more effectively delivered.

Finally, battered women's programs, through their educational effort, have reached thousands of men and women in violent relationships giving them the motivation to seek help for what was once considered a "family matter". These efforts have resulted in increasing numbers of women and men turning to the system for assistance.

The state of Minnesota has taken a lead in recognizing the devastating effects of battering on women and on the family structure. (See Appendix A for a list of resources available to battered women in Minnesota and Appendix B for maps showing the locations of funded programs.) Once a "hidden crime", battering has come to be recognized as perhaps the most frequently committed violent crime in the state. It is believed that children who grow up in violent homes are likely to become victims or abusers themselves as adults. Prisons, state hospitals, juvenile institutions and treatment centers are crowded with men and women who grew up with violence in their homes. Although to date this Program may have reached only a small percentage of those in violent homes, it continues to challenge society to accept the responsibility of openly confronting the problem of family violence.

PROGRAM IMPLEMENTATION

The following are the major steps taken by the Department of Corrections to implement the Program for Battered Women during the 1984-85 biennium:

—continuation of the Minnesota Advisory Council on Battered Women.

The role of the Council on Battered Women is to act as the advisory body to the Commissioner on issues pertaining to the implementation of legislative mandates relating to battering. The Council is a working committee that has actively participated in all phases of implementing legislation pertaining to battered women.

PLAINTIFFS' EXHIBIT NO. 57

Adolescent Abortion:

Psychological and Legal Issues

Gary B. Melton

University of Nebraska-Lincoln

Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association.

Lincoln: University of Nebraska Press (Children and the Law Series). All rights reserved.

Congress has amended Title X of the Public Health Service Act to require family planning clinics receiving federal funds to "encourage family participation."[50] The Reagan administration's interpretation of this language to require parental notice[51]—the "squeal rule"—stimulated a storm of protest, including 60,000 comments from individuals, 1,200 letters from organizations, thousands of form letters, and hundreds of petitions containing thousands of signatures. Two federal circuit courts ultimately enjoined enforcement of the rule, as inconsistent with Congress's intent to increase minors' access to family planning services.[52]

Summary. Although the Court is far from single-minded in its approach to adolescent abortion cases,[53] it is clear that the majority find ample basis for age-based regulation of abortion. The majority perceive pregnant minors to be likely to make poorly reasoned decisions, absent involvement by parents or other third parties (participants in the decision other than the minor and her physician). Moreover, the Court assumes great risk of severe and permanent emotional scars of the decision to abort, when the decision is made in adolescence. We turn now to an examination of the validity of the Court's assumptions.

Psychological Evidence

Vulnerability. In terms of medical risks, the Chief Justice's sanguine view of pregnancy carried to term and his fear about the dangers of abortion in adolescence are clearly misplaced. Teenagers are no more likely than adult women to suffer complications as a result of abortion. Moreover, the mortality rate from pregnancy *continuation* is five times higher for teenagers than the mortality rate associated with adolescent abortion—(Cates, 1981). This finding is consistent with research showing that women carrying unwanted pregnancies—often the case in adolescent pregnancies (Russo, this volume)—are at special risk for medical complications in pregnancy (Cates, 1982).

Research on psychological risks is less clear and less extensive. Research on the psychological effects of abortion has frequently been marked by substantial attrition in follow-up, inconsistency of definition, and other methodological flaws (Adler, 1976; David & Friedman, 1973; David, Rasmussen, & Holst, 1982). Although relatively recent studies have tended to be better designed and less obviously subject to investigator bias (Adler, 1979), there still are few studies which have isolated the effects of age on response to abortion (Adler & Dolcini, this volume).

Nonetheless, there is sufficient evidence to refute the Court's assumption that the effects of abortion on adolescents are "grave" and "markedly more severe" than the effects on adults (see generally Adler & Dolcini, this volume). Although it is undeniable that the decision whether to abort is stressful, it is also clear that the model response to abortion itself is relief (Adler & Dolcini, this volume; Olson, 1980; Osofsky, Osofsky, & Rajan, 1973). Although there is some evidence for relatively more negative effects on adolescents (e.g., Bracken, Hachamovitch, & Grossman, 1974), the magnitude of age differences is small, and reactions are generally mild. Although the somewhat more negative responses of adolescents may be related to developmental issues, the predominant factors seem to be ones related to adolescents' social situation rather than developmental differences per se (e.g., tendency to delay seeking an abortion; coercion by mother or others to have an abortion; see

Adler & Dolcini, this volume). Regardless, severe responses are very rare. In an analysis of health registry data in Denmark for 1975, David, Rasmussen, and Holst (1982) found only five admissions to psychiatric hospitals of females aged 19 or under who had had an abortion within the past three months, a rate of 11.4 psychiatric admissions per 10,000 abortions.

That abortion is frequently a relatively benign alternative for pregnant adolescents is unsurprising when one considers the social consequences of becoming a teenage parent, all of which carry their own psychological effects (see generally Marecek, this volume; Scott, 1984). Adolescent parenthood typically results in lower educational attainment than for peers of similar socioeconomic background and academic/vocational aspirations prior to the pregnancy (Card, 1977). Adolescent mothers also find their ultimate occupational attainment, income, and economic self-sufficiency (i.e., ability to stay off public assistance) to be lower than that achieved by peers who delayed childbearing (Card, 1977; Marecek, 1979). Not surprisingly, marriages resulting from adolescent pregnancies tend to be unstable, and females who begin childbearing at an early age ultimately have more children than peers who delay childbearing (see Marecek, this volume, for review).

Ultimately, unwanted children themselves may be the victims of restrictive abortion policies. Although findings are mixed and sparse, children born to adolescent mothers may be at increased risk for a variety of psychological problems, including poor intellectual and academic performance, low self-control, and passivity (Marecek, this volume). Most directly on point, a longitudinal study of children born to women denied an abortion in Czechoslovakia (David & Matejcek, 1981) has shown that, in their teen years, unwanted children experience a relatively high incidence of referrals for mental health services, relatively low educational attainment, and relatively high maternal emotional rejection (especially of boys). David and Matejcek concluded that, "[w]hile there is evidence in many individual cases of an eventual compensation for the original rejection on the part of the mother or both parents, the finding that group differences between the matched children are still apparent after 16-18 years of family life, and that these differ-

ences have actually widened, suggests that 'unwantedness' during early pregnancy constitutes a not negligible risk factor for the subsequent life of the child" (p. 34).

Incompetence. Just as there is no evidence for marked negative psychological effects of abortion in adolescence, there is no reason to believe that adolescents will be less competent in decision making about abortion than adult women. There is now a substantial literature showing that adolescents do not differ from adults in their ability to understand and reason about treatment alternatives (see, for reviews, Grisso & Vierling, 1978; Melton, 1981; Melton, Koocher, & Saks, 1983; Melton, 1984a, pp. 463-466; Weithorn, 1982; see also Weithorn & Campbell, 1982).

However, as the Supreme Court has noted,[54] there are major factors to be considered in making a decision about abortion other than the medical risks and benefits involved in terminating or carrying a pregnancy. The social and moral dimensions of the decision are sufficiently unusual and the importance of the problem sufficiently great that research is needed with a specific focus on age-related changes in competence to consent to abortion. At present, there is only one such study. In a comparison of minors and adults at three pregnancy clinics in California, Lewis (1980) found few age-related differences in knowledge of law or factors affecting the decision whether to abort, relinquish the baby, or keep the baby. Minors did not differ from adults in "the number of people consulted or expected to be consulted; the tendency to consult the boyfriend, the parents, or members of the peer group; the expectation that conflicting advice will be received from different sources; or the expectation that advice will favor continuation of pregnancy vs. abortion" (Lewis, 1980, p. 448). The major differences identified were ones which might be expected to follow logically from differences in minors' and adults' social status and economic situation. Minors were more likely than adults to perceive their decision as externally determined (e.g., the product of parental wishes), and they were less likely to expect to consult a professional about the decision (cf. Lewis, 1981).

If "maturity" in the abortion context means something other than the ability to understand and reason about factors relevant

to the decision, then determination of the typical level of maturity of pregnant adolescents will be more difficult and value-laden. As some commentators (e.g., Mnookin, 1985) have noted, conservatives may regard any minor who becomes pregnant as "immature," and liberals may perceive any unmarried pregnant teenager who seeks an abortion as demonstrating a "mature" response to the situation. Assuming, though, that maturity may refer to general psychological competence rather than specific competence, it is noteworthy that comparisons of personality functioning between adolescents who abort and those who carry to term generally show more adaptive, healthier functioning in the former group (Dixon, 1977; Falk, Gispert, & Baucom, 1981; Kane & Lachenbruch, 1973).

Family integrity. The Supreme Court has assumed that the involvement of parents in minors' decisions about abortions will usually be helpful. There is in fact evidence that the probability of a positive emotional response to abortion increases when adolescents feel supported by their parents in their right to make a decision and in the decision itself (Bracken, Hachamovitch, & Grossman, 1974; see Adler & Dolcini, this volume). Pregnant adolescents who decide to carry to term often find that they overestimate the negativity of their parents' reactions to their pregnancy (Furstenberg, 1976).

Even without legal requirements to do so, pregnant adolescents *do* often consult their parents, although commonly not until after discussions with male partners and girl friends. Among minors who carry to term, parents are commonly among the last confidants to be informed of the pregnancy (Allen, 1980). Similarly, in a sample of minors attending an abortion clinic in Minneapolis/Saint Paul, 37% informed their mothers, and 26% informed their fathers, but 71% had talked with their best girl friends about the pregnancy (Clary, 1982). In a Michigan sample of pregnant teenagers, few (14%) sought advice from parents when they first suspected that they were pregnant; most consulted with their male partner or girl friend (Rosen, 1980). Once pregnancy was confirmed, 57% involved their parents in the decision. The figures for adolescents who

decided to abort and those who decided to carry the pregnancy to term were similar.

Those minors who do consult their parents prior to an abortion tend to be those for whom parental support might be expected to be most important and who are most at risk for negative psychological effects of the procedure (Clary, 1982; Torres, Forrest, & Eisman, 1980). Mothers also seem to have greater influence when their daughters are experiencing substantial conflict about the decision (Rosen, 1980).

In Clary's (1982) sample, the most common reason for not informing mothers about the pregnancy and impending abortion was concern for the parent's feelings (i.e., disappointment, embarrassment), but about 30% failed to inform their parents because they feared negative results (i.e., physical punishment, retaliation). Minors were especially unlikely to inform their parents if they believed that one or both parents held strongly negative attitudes toward abortion.

It is impossible to know whether the adolescents' perceptions of the likelihood of hostile reactions from their parents were accurate. The evidence that adolescents who decide to carry to term often overestimated the negativity of their parents' probable reaction (Furstenberg, 1976) may not reflect the reality for adolescents who decide to abort without informing their parents. In some sense, however, it makes no difference. The *perception* of probable hostile—or even just disappointed—reactions in their parents might be enough to increase pregnant minors' delay in seeking medical attention, if parental notification were required. Delay in seeking abortion is already a major problem with minors (Bracken & Kasl, 1975; see Russo, this volume, for review); such delay substantially increases the medical and psychological risks associated with abortion (Bracken, Hachamovitch, & Grossman, 1974; Cates, 1981; Osofsky, Osofsky, Rajan, & Spitz, 1975).

Whatever the accuracy of teenagers' fears, the idyllic picture of American family life portrayed by the Supreme Court clearly does not match contemporary reality (Melton, 1984b). For example, in Clary's (1982) study, one-third of the minors seeking abortion came from single-parent families, and 13% more declined to inform their fathers because "we don't get along."

Even under substantially less stressful conditions than a daughter's announcement that she is or may be pregnant, sexuality is usually not a comfortable topic for parents and daughters. Among a stratified random sample of mothers of 10- to 18-year-olds in Cincinnati, only 31.5% reported giving their daughters reading material about sexuality, while 36.7% reported having explained intercourse, and only half had discussed birth control (Rothenberg, 1980; see also Fox & Inazu, 1980; Furstenberg, 1971). Instead, adolescents report receiving most of their knowledge about sex from friends and teachers. As one of us has noted elsewhere, "[i]t would be surprising to find that this view of sex as a forbidden topic [in the home] should suddenly turn toward open and detailed discussion of the options available to a pregnant adolescent" (Melton, 1983b, p. 471).

The distance between parent and adolescent in matters of sexuality is not entirely unhealthy. Maintenance of privacy—including privacy of information about personal matters—is an important aspect of individuation, a principal developmental task of adolescence (Melton, 1983b; Wolfe, 1979). Although it is unfortunate when adolescents cut themselves from sources of counsel about private decisions, it is equally unfortunate when authorities overlook adolescents' needs for privacy. In that regard, confidentiality is the major reason for choice of family planning clinics by adolescents, especially whites (Zabin & Clark, 1983).

Finally, the Court's view of the family may underemphasize the real power differentials within families. As a matter of law and of social, psychological, and economic realities, adolescents are rarely free to overcome the expressed will of their parents. Justice Stevens's contention that "a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval"[55] does not comport with common sense. The Court majority has recognized this point by requiring an alternative of judicial review *before* parental consent is sought.[56] Nonetheless, the Court's approval of parental notice requirements, at least for some minors, seems implicitly to suggest a belief that minors could be reasonably expected to seek

approval for an abortion through judicial review or other procedure established by the state, even when parents object to the plans for the abortion.

Summary. Although the research is scant on some issues, the available evidence raises substantial doubt about the validity of the premises underlying the Supreme Court's approval of age-based regulation of abortion. Contrary to the Court's assumption of marked vulnerability of minors who obtain abortions, age differences in response to abortion are small, and, in any event, most adolescents who obtain abortions report relief. Severe emotional reactions are very rare. On the other hand, deleterious psychosocial effects of many minors who complete their pregnancy are well documented. By the same token, the research available on consent to medical treatment and the single study currently available on consent to abortion give no reason to doubt adolescents' competence to make decisions about continuation of pregnancy. Additional research focused on the special aspects of the abortion decision is needed, however. Finally, although the Court's view of the helpfulness of parents of pregnant adolescents is undoubtedly true in many cases, the idyllic view of the family ignores the many variations in family life. Many teenagers seeking abortions believe that informing their parents, some of whom are staunch foes of abortion, would result in retaliation and effectively block access to abortion. The literature on parent-adolescent communication about sexuality also gives reason to doubt the helpfulness of many parents in advising their children about decisions regarding pregnancy.

The Effects of Parental Notice Requirements

Unless it actually results in parental consultation, a parental notice requirement is a meaningless hurdle delaying or obstructing minors' access to abortion. Moreover, except insofar as the purpose is to protect family integrity (i.e., parental control) per se, a parental notice status would be constitutional only if it actually results in better reasoned abortion decisions. Otherwise, no significant state purpose would be served.

There are no outcome studies available on notice statutes of the sort upheld in *Matheson*.[60] Nonetheless, there are several reasons to doubt the efficacy of the notice statutes. As we have already noted, it seems naive to assume that parental notice is likely to result in open and reasoned discussion of all of the options available to a pregnant adolescent. Moreover, while most parents might be supportive, it is also obvious that some parents will be retaliatory or obstructionist, especially if they are strongly opposed to abortion. Even if such a reaction would not actually occur, many pregnant minors clearly *perceive* that it would. The tragic irony is that parental notice statutes may actually heighten the medical and psychological risks for minors by stimulating additional delay (cf. Cates, 1981; Zabin & Clark, 1981) and inhibiting reasoned analysis of the various alternatives.[61]

Effects of Judicial Alternatives

In response to the plurality's suggestions in *Bellotti v. Baird*,[62] a number of states have enacted parental notice[63] or consent[64] statutes which provide the option of "bypassing" parents and seeking the approval of an abortion by a judge. As already noted, these statutes require a two-level inquiry. First, if the judge finds the minor to be mature, the minor's privacy must be respected. Second, if the minor is immature, the judge must determine whether an abortion would be in her best interest.

As a matter of practice, proceedings have turned out to be pro forma rubber stamps of minors' decisions. Most minors are found to be mature, and, perhaps unsurprisingly, abortions are almost always found to be in the best interest of immature minors. In Massachusetts between April 1981, when the *Bellotti*-style statute took effect, and February 1983, about 1,300 minors sought an abortion through the judicial bypass procedure (Mnookin, 1985). In about 90% of cases, minors were found to be mature. In the remaining cases, all but five petitioners' requests for abortions were approved, according to a best-interest standard. In three of those cases, the trial court's decision was overturned on appeal. In one case, the judge

invited the minor to seek approval from another judge, who granted the petition. In the remaining case, the minor decided to go to a neighboring state for the abortion. Similar findings have been reported in Minnesota, where only five petitions were denied from 1981 to 1983 (Donovan, 1983).

About three-fourths of minors obtaining abortions in Massachusetts obtain parental consent without going to court (Mnookin, 1985). It is estimated that, prior to the enactment of the statute, one-third to one-half of pregnant minors consulted their parents before having an abortion. However, it is unclear that the statute has in fact resulted in an increase in parental consultation. There has been a marked drop in the number of abortions performed on minors in Massachusetts, apparently as a result of minors choosing to go to neighboring states and bypass the judicial bypass procedure (Donovan, 1983; Mnookin, 1985). An analogous drop of 33% was observed in Minnesota during the first full year of its judicial bypass statute (Donovan, 1983). It is unknown whether the statutes are increasing the numbers of unwanted children born to teenagers.

There is evidence to suggest that the statutes are increasing delay in obtaining abortions and, therefore, increasing risk to minors (Donovan, 1983). Generally, it takes several days to schedule a hearing. In some instances, minors may have to travel several days to obtain access to the courts, because many judges who are opposed to abortion have recused themselves. Thus, there is a de facto waiting period with the necessity of minors' missing more school and, therefore, greater difficulty in maintaining privacy.[65] Moreover, the process—real or perceived—of obtaining a lawyer and going before a judge may be sufficiently formidable to deter many minors from promptly seeking a pregnancy test and, subsequently, an abortion.

No research has systematically examined the psychological effects of the judicial procedures on the minors who go through them. Most of the pregnant minors who choose the alternative of going to court are older adolescents (ages 16 and 17), who would be most likely to be already competent to consent to an abortion (see generally Melton, Koocher, & Saks, 1983). It is plausible that the process of preparing for court helps also to prepare for the abortion itself (cf. Meichenbaum, 1977, on

stress inoculation). However, it is not intuitively clear that rehearsal for court increases the thought and care applied to the decisionmaking process itself (Donovan, 1983). Also, although lawyers and clerks of courts have worked hard in some jurisdictions to minimize the trauma of going to court, there still is cause to wonder whether the judicial procedure does not *heighten*, instead of diminish, the psychological risks attached to abortion for minors. Some anxiety, embarrassment, and even sense of degradation about discussing personal matters with a lawyer and the judge would be unsurprising. It is possible that these issues are least significant, although still present, in jurisdictions which conduct abortion hearings in juvenile or family court (Donovan, 1983).

Research is needed to evaluate the effects of *Bellotti*-style statutes more extensively than has occurred thus far. However, the evidence available suggests that they have harmed, rather than helped, minors considering an abortion. Nothing has yet been uncovered to contradict the view of Justice Stevens and three other justices:

> It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties. . . . As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of the parent. Moreover, once this burden is met, the only standard provided for the judge's decision is the best interest of the minor. That standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protection accorded to her decision.[66]

PLAINTIFFS' EXHIBIT NO. 60

Transcription of Hearing on Venue
Amendment to M.S. § 144.343(6)

SEN. WALDORF: Yes, I would be happy to explain the amendment. It changes the venue from county to judicial district. There are a couple of important reasons for that. On the initial draft of this legislation which I was not part of, it has been in the House, I don't think sufficient ?? has been given to the fact that imposing county venue is somewhat restrictive in that two problems occur; one is availability in a court for the hearing process as well as the potential difficulty with anonymity. And so Mr. Chairman, I think the judicial district boundaries are more appropriate and would like to add the amendment.

JACKIE SCHWEITZ: But even in its weakened form, the law has been credited with saving the lives of unborn children in this state, as young women consult with their parents and decide not to choose abortion. Abortion statistics for 1983 will not be available from the Minnesota Center for Health Statistics for another month or more, but its reports from the previous year indicated that, after several years of relative stability, the rate of abortions performed on teenagers in Minnesota dropped 29% between 1980 and 1982. The birthrate for this same group was down 7% during this same time frame. The statistics support the observation of an abortion counselor quoted in the December 1982 of Family Planning Perspectives that Meadowbrook Women's Clinic, the state's oldest and largest abortion clinic, had observed that the number of teenagers seeking abortion there, had fallen by one third since the law went into effect, and similar statements made since then by other abortion clinic operators periodically quoted in these articles.

KATHERINE WELSH: These problems are as follows: The financial responsibility for implementation of this amendment in 87 counties, the provision of counseling services in

a non-biased manner which would address all alternatives available to minor women. The court in our county has a report to the court that helps them determine the maturity of minor women. Some of the questions contained in this report, regard to post-abortion care, physician's liability, and alternatives available for a non-planned pregnancy. How and by whom would these counseling services be provided? The problem of confidentiality is and always will be, encountered when dealing with smaller counties and smaller cities. We must remember that we are not dealing with delinquent women, but daughters of our friends, relatives, neighbors and public figures. For example, in our county, we had a young woman who came into chambers only to discover that the clerk was her next door neighbor that she baby-sat for. We have another one that we had to come in and use the back entrance and use the freight elevator and have the public defender interview this young woman in the bathroom on the third floor of the courthouse because her mother worked in the probation office across the hall from the chambers. Or we also had a public defender who denied access to this young woman because he was uncomfortable because it was the daughter of his partner in his law firm. We're talking about smali communities now. Time frame? The parent notification law is very explicit in stating minors must be heard within 24 hours. Through my experience since August 1, 1981, we have never heard a case heard (?) other than from 8:30 to 4:30, Monday through Friday. We have only had one hearing out of 200 that was on a Saturday. We are presently and will not in the future be comfortable with this law for minor women. It is my opinion that it is just another burdensome step for women who are already being harassed and are seeking abortion as an alternative. From personal experiences, I have dealt with the judges in eight counties. One of the judges told me in no uncertain terms that he *could give permission for a young woman to have an abortion in this court. I give you this statement only to point out that the judge did not understand his responsibility to the law and his blatant disrespect for it. I

would like to know what assurance we're going to get for these young women that they will be heard justly. I have documentations and observations that might make you feel more comfortable against this amendment. Most of the minor women that we have dealt with are 17 year of age. Observations of our studies also show women who seek abortions are more mature than the women who decide on other alternatives. I also have documentation that indicates in our clinic, in 1983, we dealt with 105 minors that satisfied the parent notification law through other means—other than the court bypass system, and we only had 58 that used the court bypass system. And I am servicing 24 counties in northern Minnesota, and these are the counties all included. In 1984, we found that the same for the minors, and I think that you have these forms. I would like to point out that it's not cost effective to set up this system in 87 counties. We must remind all of you that if you feel uncomfortable with the bill as it is, then you must be prepared to allocate the funds to enable the counties to give these services. So far it is common knowledge that indeed the private clinics are incurring the cost of providing these services, because as we all know, there were no state funds allocated in the passage of the parent notification in 1981. It is also common knowledge that the private clinics can and will not be able to provide these services in 84 counties. We are not alone in our position. I think you have some letters, one of them that support our position is the Minnesota Association for Court Administrators, and their letter is dated April 1st.

EXCERPTS FROM PLAINTIFFS' EXHIBIT 68

PAMPHLET FROM MEADOWBROOK
WOMEN'S CLINIC ON SECOND TRIMESTER ABORTION

Second Trimester Abortion

Meadowbrook Women's Clinic
6490 Excelsior Blvd. Suite E510
St. Louis Park, Minnesota 55426
(612) 925-4640

APPOINTMENT REQUESTS:
Monday - Friday until 9 PM
Saturday - 9 AM - 5 PM

PROCEDURE: Dilation and Evacuation, a method used for second trimester abortions 14 to 21 weeks L.M.P.

ULTRASOUND: An Ultrasound examination, is a painless diagnostic test, which will determine how long you have been pregant. The test is similar to X-Ray but uses sound waves rather than radiation.

LAMINARIA: Laminaria is a material which, when inserted into the cervix, absorbs moisture and expands, causing dilation of the cervical canal. This is a natural process which takes several hours or overnight to accomplish. When the doctor inserts the laminaria you will feel pressure or cramping. You will then rest in the recovery room for a short period of time. You will be given medication to prevent infection, and further instructions.

REMEMBER: *after you have had Laminaria inserted you may have cramping for several hours; non-prescription drugs containing acetaminophen, such as Datril, will help relieve it.

*you must not have sexual intercourse.

*you must not douche, use a tampon or insert anything into the vagina.

*you should use a sanitary pad (bleeding may occur)

*you may shower, but do not take a bath.

*do not eat or drink anything after 12:00 midnight.

*if the laminaria are expelled or fall out bring it/them with you when you have the abortion.

*if you have diabetes, rheumatic fever, thyroid problems, or if you experience seizures or are taking drugs, please consult the nurse for instructions.

*some spotting or light bleeding is normal. IF YOU HAVE SEVERE CRAMPING, A GUSH OF WATERY FLUID, FEVER, OR MODERATE TO HEAVY BLEEDING, CALL

OUR EMERGENCY NUMBER:
(612) 925-4645

*once the laminaria are inserted the abortion has begun. You must keep your appointment and follow all directions carefully or your health will be in jeopardy.

Clinic Abortion.

If you have had laminaria inserted very early in the day, it may be possible to do the abortion several hours later. Your nurse or counselor will let you know if this can be done.

If you are scheduled for an abortion the next day, please make certain that you are prompt.

It is likely that prior to the abortion you will have a small needle inserted into a vein in your arm through which medication can be administered to relax you. This will cause little discomfort.

The doctor will then remove the laminaria, cleanse the area, administer a local anesthetic, and using a vacuum aspirator alternately with a grasping instrument, remove the pregnancy tissue. You will feel some cramping, tugging and/or pressure. The physician or nurse may massage your abdomen, momen-

tarily increasing the pressure, in order to help your uterus contract and decrease bleeding.

You will rest in our recovery room and be given further instructions by your nurse.

AFTERCARE

Be sure to follow the instructions in the booklet you are given, and to return for a two-week checkup.

PLAINTIFFS' EXHIBIT 69

MEADOWBROOK WOMEN'S CLINIC
Suite 510 6490 Excelsior Blvd. Minneapolis, MN 55426
(612) 925-4640

Post Abortion Follow-up Care Book

EMERGENCY INFORMATION

All medical procedures carry some risk of complication.

If you have had an abortion at Meadowbrook Women's Clinic, P.A., Please read these instructions carefully and completely.

Our 24 Hour Emergency Number is:
1-612-925-4645

When you call this number you are talking to an answering service who will contact the doctor at his home.

Our doctors are available for emergency calls at any hour.

However, if you have a question about the standard medications, activity, bathing or intercourse please call during regular Clinic hours which are 8:00 am to 5:00 pm Monday through Friday.

YOU SHOULD CALL IF:

1. You have a fever of 100.4° or 38°C (See Temperature).
2. If after reading the section on Bleeding, your questions have not been answered.
3. If after reading the section on Cramping, your questions have not been answered.

1-612-925-4645 is a 24-hour, seven-day per week telephone number. For a medical emergency during regular office hours, you may call collect. If you call after office hours, please do not call collect because the phone is answered by an answering service. Call our number and leave your name and telephone number and a doctor will return the call.

WHEN CALLING PLEASE HAVE THE FOLLOWING INFORMATION:

1. Temperature within the last hour.
2. The number of sanitary pads used within the last two (2) hours.
3. The telephone number of your pharmacy.

TEMPERATURE

You should check your temperature three times per day for three days following the abortion.

It is important to check your temperature because an elevation of temperature (fever) may indicate a pelvic infection. If a temperature of 100.4°F or 38°C is recorded you must call MWC or your own doctor.

Be sure that you have not had anything hot or cold in your mouth for at least 1/2 hour before taking your temperature (coffee, pop, a cigarette).

Don't hesitate to call a doctor if the fever is associated with cramping or a general pelvic discomfort. If your temperature is in a range of 99.6° to 100.2F and you are unsure of what to do, recheck it in 1-2 hours. If at that time it is unchanged or rising call MWC or your own doctor.

BLEEDING

The amount of bleeding after an abortion varies from woman to woman. It may be very scant (light) or as heavy as a normal period. Sometimes the bleeding may persist intermittently for as long as four weeks. Usually, however, women have very little bleeding immediately after an abortion or during the next two-three days. During this time, the uterus contracts and reduces bleeding. Anywhere from 3 to 8 days later the uterus may relax, thus allowing small amounts of blood to accumulate. Eventually the blood collects and is expelled in the form of clots. Accompanying this release of clots may be some mild to strong cramping. If the bleeding becomes progressively heavy or persists for 24 hours, MWC or your own doctor should be notified.

Bleeding should not require more than one pad (regular size) per hour for more than 4 to 6 hours in a row.

Often a woman has been lying or sitting for a length of time (such as overnight), she will notice an increased amount of bleeding with activity. This is blood that has accumulated in the vagina and has not been expelled. Change your pad and note whether or not the bleeding continues as heavily. More than likely it will diminish.

Remember, you must use sanitary pads, not tampons, for two weeks following the abortion.

CRAMPING

It is normal to have slight to moderate cramping after an abortion. This is a natural response by the uterus to contract back to its non-pregnant state and also to control bleeding. This cramping should not become progressively worse. If after 24 hours the cramping intensifies, you should call us or your doctor.

Some patients experience cramping long (3-8 days) after an abortion. If this is not accompanied by fever (100.4°F or 38°C), this is unlikely to be dangerous. Acetaminophen (Tylenol, Datril) is a suitable medication to take during this time. However, if strong cramps persist more than 24 hours, it may mean that clots are trapped in the cervix. Please call the clinic. If the cramps are relieved by the passage of clots there is no need to call.

MEDICATION

You will be given: Tetracycline (an antibiotic to help prevent infection). There are 16 tetracycline pills.

Take the tetracycline, on an empty stomach, one hour before each meal and at bedtime (4 times a day) until they are gone. DO NOT TAKE WITH MILK—no harm will be done; milk just inhibits the tetracycline from working. Start the medication one hour before dinner the day of your abortion and again at bedtime. The following day take them four times each day and continue until they are gone.

Acetaminophen (to help ease your cramps). Brand names of this drug are Tylenol, Datril, and a few others. Two tablets of acetaminophen may be taken every 3-4 hours. Stomach upset is less likely to occur if you have eaten first.

If you have chosen to use birth control pills, start taking them THE SUNDAY FOLLOWING YOUR ABORTION. Take one a day AT THE SAME TIME EVERY DAY. If you do not start on birth control pills immediately following the abortion, you may not have a period for 6 to 8 weeks. If you have no period after your first cycle of pills, there is no need to be concerned. You should start your second package on Sunday and you should have a period at the end of the cycle.

If you have any questions about your pills or prescription check with us if you live in town. If you live out of town, contact your doctor or nearest family planning clinic for proper instructions.

PHYSICAL CHANGES

Several changes take place in a woman's body during pregnancy. The changes are related to the presence of hormones, and reverse themselves following the termination of pregnancy. Among the changes are breast tenderness, breast fullness, explusion of milk from the breasts, fluid retention, complexion changes, and nausea.

Wearing a bra with good support may be of some help in decreasing breast tenderness. Do not stimulate the breasts, since this may cause or increase milk excretion.

Frequently the nausea will subside very soon after an abortion. Some of the other changes may not reverse as rapidly. Be patient; relief of the unpleasant symptoms will occur.

EMOTION

It is not uncommon for women to feel depressed or blue a few days following an abortion. Just as hormonal changes in your body can cause you to feel low or moody prior to a menstrual period or following childbirth, the same phenomenon applies after an abortion. Don't be alarmed about such feelings; they are usually of short duration and will disappear once your hormone levels return to their pre-pregnancy state. You may also experience a feeling of well-being and relief. "Highs" and "lows" are normal and common, as is no significant change in your feelings.

If you wish to talk about your feelings with one of our counselors, please call at any time. Post abortion counseling is available on an individual or group basis. Please call MWC for information. If you prefer additional counseling, talk with your counselor about a referral.

CONTRACEPTION

You have watched films and talked with a nurse practitioner and counselor about birth control. With their help you have selected a method that is the most appropriate for you. There is no perfect method of contraception, but any method is better than taking chances. You may resume intercourse two weeks after your abortion. Unless you are using some form of birth control you are already taking a chance. Ovulation (the releasing of an egg from one of your ovaries) will begin again soon after your abortion. You could be risking pregnancy as soon as two weeks from today. During your reproductive years you have about 400 menstrual cycles—in other words you have 400 opportunities to become pregnant! In time, your luck will run out if you don't contracept. The single most important thing you can do for yourself following your abortion is to select a method of contraception—and use it.

ACTIVITIES

There is no medical reason why you can't resume most of your normal activities following the abortion. You can bathe, drive your car, and return to work or school. Let your body tell you if you are over-doing it. Too much activity may fatigue you or increase your bleeding or cramping. If this happens, discontinue the activity and rest. There are, however, two things you must not do until after your two-week checkup. Under no circumstances should you have sexual intercourse nor should you insert **anything** into your vagina, including tampons, douches, etc. Medication we prescribe will be explained. Remember that

your cervix has been dilated and opened. Until it closes again, anything placed in the vagina may cause infection.

TWO-WEEK POST-ABORTION CHECKUP

It is extremely important that each woman have a checkup two weeks after the abortion. This two-week check is provided by Meadowbrook Women's Clinic physicians at no charge at either the clinic or one of their two private offices. If you are unable to return to see one of our physicians, please consult your own doctor for this examination. If you do not have a physician of your own, you should ask your counselor for a referral.

Meadowbrook Women's Clinic
Meadowbrook Medical Building
6490 Excelsior Boulevard, Suite E510
Minneapolis, MN 55426
612-925-4640

Sinykin Associates
Meadowbrook Medical Building
6490 Excelsior Boulevard, Suite E507
Minneapolis, MN 55426
612-920-5166

Sinykin Associates
Metropolitan Medical Building
825 South 8th Street, Suite 312
Minneapolis, MN 55404
612-338-6996

Some of the problems which may occur if you do not have a checkup are:

1. Anemia
2. Continuing Pregnancy
3. Ectopic pregnancy (pregnancy in the tube)
4. Damage of the cervix
5. Failure of the uterus to return to its non-pregnant state

If you return to your PMD for your two week check-up your doctor should run a pregnancy test.

This should be negative (not pregnant). Some doctors however are using a very sensitive test and the results may be positive even though you are not pregnant.

If this occurs, ask your doctor what type of test was used. Then call the Clinic. Our number is 925-4640. Call during business hours.

Meadowbrook Women's Clinic will not be responsible for any **hospital** costs resulting from a complication of the abortion, nor any fees charged by another physician. Any treatment provided by one of our own staff physicians, related to your abortion, is free of charge.

IT IS NOT UNUSUAL TO PASS SOME CLOTS OR TISSUE-LIKE MATERIAL FROM THE VAGINA FOLLOWING AN ABORTION. Since you are using pads, these are more likely to be noticeable than with normal period flows. These clots do NOT indicate that you have had an incomplete abortion. Physicians who do not specialize in abortion are not always able to determine whether the cramping or bleeding you are having is normal. Therefore, before agreeing to hospitalization or surgery which may be unnecessary, please ask your physician to contact ours. We may be able to help resolve the problem without more expense to you. In this way we can share accurate follow-up information and provide the best possible service for you.

FUTURE PREGNANCIES

Women who have had abortions are understandably concerned about the effects on future pregnancies. Recent studies indicate that the most important factor bearing on future pregnancy outcome is timing. Pregnancies occurring within 3 months of an abortion, miscarriage, or a vaginal delivery have a somewhat greater likelihood of ending in miscarriage. After 3 months the risk of miscarriage is the same for women not having had abortions (about one in eight). After one abortion the bulk of the scientific evidence shows no increased risk if proper timing is

observed. Some studies show a slight increased risk of prematurity or low birth weight babies after 2 or more abortions. Other studies, however, disagree with this finding. The important thing to remember is that the physician caring for you during a subsequent pregnancy should be made aware of the fact that you have had an abortion. This will enable him/her to give you proper and appropriate care.

TO PHYSICIAN SEEING OUR PATIENTS FOR FOLLOW-UP CARE:

Ms. _____ had a _____ vacuum aspiration abortion _____ a D&E with Laminaria abortion to terminate a pregnancy of _____ weeks gestation on _____ 19____. Her RH factor is _____. She (did) (did not) receive RH Immune globulin.

Type of contraception in which the patient is interested:

_____ Oral 1 month supply given of

_____

_____ IUD
_____ Diaphragm
_____ Sterilization
Special considerations _____

_____

POST-ABORTION CHECK-UP FORM

Please return to Meadowbrook Women's Clinic, P.A.
Suite E510, 6490 Excelsior Blvd., Mpls., MN 55426

Date of Abortion: _____

NAME: Ms. _____

Physician Name _____

Address _____

City, State Zip _____

Results of Examination _____

_____

_____

Date Signature of Physician

PLAINTIFFS' EXHIBIT 70A

EXCERPT FROM PHONE TRAINING MANUAL FROM MEADOWBROOK WOMEN'S CLINIC

PHONE TRAINING MANUAL
MEADOWBROOK WOMEN'S CLINIC
Parental Notification for Minors

Minnesota has a state law requiring parental notification prior to an abortion, if the patient is under 18 years old. The requirement is not for consent, just notification. Parents cannot prevent their daughter from having an abortion.

The law specifies that both biological parents be notified, even if only one parent has custody of the child. There are two general ways of meeting the requirements of this law: 1) furnishing proof that parents have been notified, or 2) obtaining court permission to bypass the notification requirement.

When making an abortion appointment for a minor, you must tell her about this law and determine which method of compliance she will use. Do this before you actually make the appointment because the timing of the appointment will depend on how she decides to handle notification.

A. *Exemptions From Parental Notification Requirement*:

There are three situations in which a minor is not required to notify her parents:

1. *She is an emancipated minor*—this means that the woman is married, has had a child and is raising it, or lives apart from her parents and is self-supporting. She must furnish proof of her status (ie. copy of her marriage certificate, copy of her child's birth certificate, or paycheck stubs, rent receipts, etc.)
2. *She would die if the abortion was not done.* This must be certified in writing by a physician. (This has not happened in 2 years.)
3. *She is a victim of sexual abuse, and it has* been reported.

Sometimes a parent will say that the other parent is not allowed to see the daughter. This usually does not mean that the parent doesn't have to be notified. Ask whether the custodial parent has court documentation saying that parental rights have been terminated for the other parent. If not, then he or she must be notified.

B. *Determining How the Patient Will Notify Parents*:

Start by asking her whether she has discussed the abortion with her parents. If she says yes, ask whether they are both her biological parents. (For example, if the parents are divorced, the patient may live with one parent and the parent's new spouse. Unless that spouse legally adopted the patient, he or she is not the patient's parent. If the minor has been legally adopted by either step-parent, then the absent biological parent would not need to be notified.) If both legal/biological parents know about the abortion, tell her that there is a notification law and that we need proof of notification. That can be done in one of two ways:

1) Both parents can come with her and sign the consent form, or
2) If one or both parents are not coming with her, she must bring a notarized letter from that parent or both parents stating that they consent to their daughter's abortion. Emphasize that the letter must be notarized and that if she does not bring it we cannot do the abortion that day. We are very strict about this.

If the patient says that both parents are coming with her, you should tell her that if plans change and one parent doesn't come, she needs to bring a notarized letter from that parent.

Make an explanatory notation in the "special" column on the appointment page. The notation will indicate the method of notification the patient is using. Write "PWP" if both parents are coming to the clinic with the patient. If she is bringing a notarized letter, write "NL". If she is bringing one parent and one letter, write both "PWP" and "NL" in the column.

Sometimes a patient has discussed the abortion with only one parent, but cannot or prefers not to discuss it with the other parent. There are three situations which fall within this category:

One Parent Knows

— *the other parent lives far away or cannot be located.* In this case, it may not be possible or desirable to get a notarized letter from that parent. Instead, the parent can be notified by a certified letter or the patient can go to court to waive notification. These options are described later.

— *the other parent is deceased.* In this instance, the patient must bring proof that the parent is deceased. This is usually a copy of the death certificate from the State Health Dept.

— *the patient prefers not to tell the other parent.* Sometimes the patient and one parent decide not to tell the other parent about the abortion. In that case, the law requires the patient to go to court, even though one parent does know about the abortion.

Neither Parent Knows

When the patient prefers not to tell either parent about the abortion, then she goes to court.

C. *Instructing the Patient on Notification Procedures*:

Once you have determined how the patient wants to handle notification, you can give her the necessary instructions and make her appointment. The notarized letter was described above. The certified letter and court options are handled as follows:

—*Court*

When the patient is going to court, first find out where she lives and where she'll go to court. According to the law, she should have access to court in any Minnesota county. However, the easiest counties are Hennepin and Ramsey. If she *lives* in either Hennepin or Ramsey counties, she must go to court in the

county in which she resides. Minors who live in counties *other* than Ramsey and Hennepin may go to *either* court. We most often send ours to Hennepin County Court because they can have everything done in one day if they are a vac patient.

For *Hennepin County*, tell her she can go to court and have the abortion on the same day. Hennepin County sees minors at 10:30 AM every Monday, Tuesday & Thursday.

Give her the phone number for Hennepin County Courthouse (the number is posted at the front desk) and tell her to call there first to schedule a court appointment. All court appointments in Hennepin County are at 10:30 AM. Then she will call us back and we will give her an abortion appointment on the same day.

Make the abortion appointment for 7:30. You should enter the appointment information, however, under a 10:00 or 10:30 slot on the appointment page. (Her abortion will actually be done in the afternoon). Write "7:30" next to it.

Tell the patient she will come here first at the time we gave her. She will have her lab work, exam, counseling done before leaving for court. This is because the judge wants the patient to be informed about the abortion before she goes to court. Then she is given a map and directions to court, she goes there, gets her court document to bring back, and returns to the clinic for her abortion procedure. She will not get back to the clinic until about 1:00.

For *Ramsey Court*, her court appointment and abortion appointment will probably be on different days. Give her the phone number for Ramsey County courthouse and have her make that appointment. Then she will call us back, and set up an appointment here for counseling *only* before the court appointment. This appointment should be made for the early afternoon, under "indecision counseling" in the second trimester appointment book. She needs to come here first because the judge wants her to be counseled about the abortion before she goes to court.

When she calls to make the counseling appointment, she can also make the abortion appointment for any day after going to court. She will be examined, etc. on the day of the abortion.

After making the abortion appointment for a court patient, write "CT" in the "special" column on the appointment page. This indicates to the staff that she is going to or has been to court.

It is important to remember that a patient *cannot* go to court if the parent in question knows about the abortion. Court is only for minors who do not want to tell one or both parents about the abortion. If the parent knows about the abortion he or she must provide a notarized letter or receive a certified letter. (If they don't want to go along with the abortion and refuse to provide a notarized letter, the certified letter is the only option.)

—Certified Letter

The law specifies that a certified letter must be received by the parent hours before the abortion is done. When making the abortion appointment you must determine how far ahead to make the appointment. The letter is considered to have been delivered to the parent the day after it is mailed. Then the abortion appointment can be made for the third day after the letter is mailed. Make the appointment in the late morning of that day, so that the abortion will actually be done after noon. For example, if the patient calls on Monday, and the letter is mailed on Monday, then the parent gets it on Tuesday and the appointment can be made for Thursday.

Write "CL" in the "special" column on the appointment page.

If they *are not sure* where the absent parent lives, we can send a letter to last known address.

How to Send a Certified Letter

— there is a file on "Certified Letters" at the front desk. It is in the drawer next to the furthest left chair. In this file, you will find the forms you need to send the letter. You will also find xeroxed copies of how the forms should look when they are filled out.

— first, pull out a copy of the letter which is sent to the parent. Sign it with Dr. Fred Lyon's name. Fill in the blank spaces with the appropriate information.

— enclose it in an envelope. Take a copy of the small white and green slip labeled "Receipt for Certified Mail". Refer to the xerox copy for how to fill it out. It is always the same. After filling it out, tear off the bottom green part, moisten the back, and put it on the lower left corner of the envelope. The top part gets handed to the mailman when he comes to get the mail.

— write restricted delivery above the green "certified mail" tag on the front of the envelope. This means that the letter can only be delivered to the addressee.

— the other form you need is a green cardboard tag. It should be filled out on both sides. On the side which says "return to" write our address. On the other side, fill out questions 1–4. On question #4, the "article number" is the number on the green "certified mail" tag which you put on the front of the envelope.

After filling this out, tear off the adhesive tape and fasten the tag to the back of the envelope, so the letter cannot be opened without removing that tag.

— be sure to write our return address on the envelope. Just write:

E510
6490 Excelsior Blvd.
St. Louis Park, Mn. 55426

— after the letter has been posted, it is ready to be mailed. The last step before mailing is to enter information about your letter to the record we keep of certified letters, in the same file at the front desk. You should write in the patient's name, the date the letter was sent, the address it was sent to, and the date of the abortion.

— the mailman comes to the clinic every day at about noon. The letter must be handed to him. Until then, tape the letter on the edge of the counter where the clipboards are. Whoever is at the front desk when the mailman comes will give it to him.

— if the mailman has already come that day, and it is urgent that the letter go out that day, take it to the Post Office by 5:00 (the window must be open). You can also take it to Byerly's, as they have a Post Office there.

PLAINTIFFS' EXHIBIT NO. 73

MEMO TO: All Staff Scheduling Abortion Appointments

FROM: Char Baker

DATE: July 10, 1984

RE: Compliance with the Parental Notification Law for Minors

PARENTAL NOTIFICATION LAW	*CHECKLIST*
1. Every patient must be asked her age: Identification should be requested and photocopied and placed in the patient's file establishing the woman's identity and age. This should be done for all 18 and 19 year olds and any woman who appears to be under age 20.	Driver's license, birth certificate or notarized *Statement of Age* form
2. All minors (women under age 18) must be established as emancipated or unemancipated.	
3. *Emancipated minors* are women who are under 18 years of age but:	
• are married; or	Marriage License
• have continued a pregnancy to full term; or	Child's birth certificate
• have managed own affairs and are living apart from parents	Copies of 1 (one) year's rental receipts
Emancipated minors must sign a "statement of emancipation".	*Minors Exceptions* form

Parental Notification Law	*Checklist*
4. *Unemancipated minors* have to meet one of the following conditions:	
• provide authorization for the abortion in writing from both of the parents (if living), or the legal guardian or conservator, if the minor has one; or	*Parental Notification* form
• provide written notarized authorization by the living parent that the second parent is not living; or	*Abortion Decision Acknowledgment By Parent (When Other Parent is Absent)* form
• provide written verification by the parent accompanying the minor that the absent parent is aware of the abortion decision; or	*Verification of Absent Parent Signature* form
• both parents (or guardian or conservator) are notified in writing of the abortion by MHCW forty-eight (48) hours prior to the appointment; or	*Letter to Parents* form Certified mail return receipt
• provide written notarized verification by both parents stating they are aware of the minor's abortion decision; or	Notarized *Parental Notification* form
• have been a victim of sexual abuse, neglect	*Minors Exceptions* form

or physical abuse by the minor's parent(s), guardian or person responsible for the minor's care. MHCW must report this immediately (if a report has not been made) as required by Subdivision 3 of Section 626.556 of MN. Statutes	Written proof of reported abuse
5. Unemancipated minors who do not desire parental notification of both parents can utilize the *Court Bypass Procedure*.	
6. *Scheduling LEC Minors*:	
• Only schedule LEC appointments prior to abortion clinic (1 hour prior to counseling schedule) or following the abortion clinic (allowing 1 hour for the LEC work-up).	Check with Teen Counselor for court appointment and counseling Check with Nurse for lab and exam work-up
• Out-of-town minors can be scheduled for the LEC work-up at 8:00 a.m. on scheduled court days.	Check with Teen Counselor for court appointment and counseling Check with Nurse for lab and exam work-up

PLAINTIFFS' EXHIBIT NO. 92

DEPOSITION TESTIMONY EXCERPTS
OF DR. JANE HODGSON (JULY 11, 1985)

[DIRECT BY MS. BENSHOOF
AND MR. PENTELOVITCH]

[25] • • •

Q Could you give us any approximation about what percent of your patient load throughout the years have been teenagers?

A I would estimate at least 30 percent.

Q Prior to the—

A May I add?

Q Go ahead.

A When I began practice in Saint Paul, I—in order to pay the rent, I took the job as gynecologist at the University Health Service and provided gynecology care for all of the University of Minnesota women students. And that was very—so that the group of patients I saw there were all college level. And I—I continued in this role for a matter of six or eight years until I was too busy to continue it.

Q So during the six and eight years you were Director of Gynecology for the University of Minnesota, nearly all [26] of your patients were teenagers—

A Correct.

Q —or just above that?

A Correct.

Q Thank you. And what years was that?

A That was from 1947 till probably till the—about 1945—'55.

Q Other than the present Minnesota abortion parental notification law, have you had any experience in your career working under parental notification laws or policies, either in the field of contraception or abortion

A Well, there has always been a reluctance on the part of hospitals and physicians to deliver any kind of medical services to a minor without parental notification. And the laws have

never been really spelled out. They differ, depending upon the—the organization you're working with.

Each—each clinic, each organization, each hospital has their own regulations in that regard, partly on a defensive basis and partly so that they can be sure to collect the bill.

I've had—as far as I was concerned, I—I—sometimes I would insist upon it and other times I was indifferent as to whether or not I felt that each case [27] should be judged on its individual merit and as long as—so that I was always aware of it, shall we say, but it was never any major problem.

Q When you were aware of it, you stated that it wasn't a major problem for your medical practice. Why wasn't it? Do you believe you acted differently than other doctors?

A Yes, I do.

Q How did you act differently in regards to your teenage patients?

A Well, if I thought that it was bad medical care for us to involve the patient's parents, I would not involve them. And on—on the other hand, when it was important, I would insist upon it.

I also always insisted upon a private interview with a teenager before discussing the problems with a parent. If a mother brought her daughter in to see me for any reason, I always excluded the mother from my interview with the patient and insisted on seeing her alone because I found that the histories were much more accurate, particularly in regards to confidential matters.

Q So you found even when a minor came in with their parent that they would not reveal the truth about sexual matters when the parent was present?

A That's correct. And they would—often contradictory and it was much more time consuming and I felt that I [28] could—I could determine the situation much—make a diagnosis much better if I saw them separately, on the whole.

Q Throughout your history of treating teenagers in the last 45 years, have you found that confidentiality was an important concern?

A I think that privacy is extremely important to a teenager who is notably sensitive about their immaturity. They're anx-

ious, apprehensive, often ignorant about the realities of life and the—to them, their privacy is extremely important, particularly at that stage in life where their parents are concerned.

There's that stage where they go through the closed door syndrome, where they go to their room and close their doors and never speak to their parents, and I think everyone goes through that if you've had a teenager.

Q In providing contraceptive care, do you find that to be equally true?

A In regard to any matter. In regard to their physical or social wellbeing, I think that teenagers tend to be very private.

Q You stated that you've worked under various institutions with different policies on parental notification or consent. Do you find that minors are more willing to seek out medical care when they're assured of confidenti**[29]**ality?

A Oh, that has been demonstrated in any number of articles.

Q Do you find that true in your own experience?

A Oh, exactly. Absolutely.

* * * * *

[50] * * *

BY MS. BENSHOOF:

Q Dr. Hodgson, you've testified that you've received many referrals and are still receiving referrals from other doctors in the state on their patients needing abortions. Do you have an opinion as to why there are not more abortion providers in Minnesota?

A Well, there are a number of reasons. I think one of the obvious ones is the unfavorable publicity surrounding the procedure and the delivery of services, the clinic bombings and—and the violence and the—the actual **[51]** terrorism.

There are a number of doctors throughout the country that have had their offices bombed. One right here in the Twin Cities has had a lot of damage done. So that is the most obvious reason.

I think the fact that abortion is never taught in medical school or very few of the medical schools, that there's a great

lack of teaching in the field. And it's only recently that it—it has even been discussed in the textbooks. That's one reason I published this in 1981 as a textbook on the field.

Many doctors are not trained in it. It is a specialized procedure. Simple though it is, it is a subspecialty that requires a certain amount of expertise.

And doctors have been—in the past, the older group, anyway, have been so intimidated by the—the teachings of—against invasion of the uterine cavity, the pregnant uterine cavity, for any reason whatsoever all through the past that this has been thoroughly engrained and it's difficult for conservative doctors to overcome this attitude.

In addition to that, there has been, up until the present time at least, a relative shortage of doctors in the country so that everyone that—many that—were too busy or it didn't involve their specialty and they **[52]** didn't want to undertake—withstand the glare of the publicity that would surround it.

So all of these things enter in and—and the law, of course, was the chilling effect up until '73. And now, even the restrictive laws that we do have are—are chilling, as far as teenagers are concerned. I think doctors would be very—most doctors are very reluctant to undertake the teenager—the minor, simply because of this notification—mandatory notification law.

Q Do you believe that there are doctors in Minnesota who do or would do abortions for adult women who are reluctant or do not do abortions for their teenage patients?

A I would say that I think they're much more prone to refuse—to refer the teenager—the minor than they would the adult. And I—I also believe, but I cannot document it, that there are a number of physicians throughout the state that are doing procedures, the occasional one in their office. And these are not reported and we have no way of knowing, but I—I believe now with the increased availability of equipment, more and more physicians are buying suction machines; the hospitals are getting more or less standard equipment now to treat the incomplete abortion.

Many physicians now are invading the uterus for a woman that has already started to bleed and they are **[53]** using suction for incomplete abortion procedures so they are becoming more

familiar with the technique. And as time goes on, I think that they will be doing more, but it's very, very slow and we have—don't have nearly enough providers at the present time.

Q So you think that doctors who have the equipment and are technically capable of doing an abortion still, for other reasons, refer patients to you?

A Yes, I do. I think they don't want the hassle. There are so many problems involved, plus the fact that they—there still is a stigma to being abortionists.

Q Do you think that doctors are concerned about their name being known as doing abortions?

A Absolutely. If they belong to a church where there are—where there's a strong feeling in opposition to abortion services, why they're going to be affected. Obviously—even though they may personally or medically have no objection to it.

Q You've mentioned that you've been Medical Director of all of the clinics or most of them in Minnesota in the past few years. As Medical Director, was it part of your job to get other physicians to work at the clinics?

A Yes, and I have trained any number of young doctors in the specialty. It has been difficult, really, to find—very—very difficult in the past to find qualified **[54]** physicians who were anxious to learn.

Q Did you, in seeking physicians to be employed at these various clinics, have conversations with doctors who then turned you down?

Q I'm sorry. Would you repeat that?

Q When you were Medical Director and sought to engage the services of doctors to do abortions at the various abortion ciinics, did you have conversations with doctors to become employed at those clinics, after which conversation the doctor refused?

A Oh, yes, very many. Particularly, this was the case in opening the clinic in Duluth. It was impossible to get local Duluth physicians. It still is. We are—we have to import physicians from Hibbing and Bemidji and—I can't think. It's a town near Grand Rapids. Anyway, small communities some distance from Duluth, all of whom I have trained personally.

I have frequently approached the Duluth—the Saint Louis Medical Society and given presentations and they—they have requested me to appear before their residents and—and discuss the technique and all. But they're a very conservative group there and so we've been unable to get any of the Duluth physicians involved.

Q What reasons do they give you?

A Economic and social pressures, primarily. And then some **[55]** of them ideologically are opposed. Members of the—the specialists in the Duluth clinic tend to be, the older members.

Q What do you mean by ideologically?

A Well, that feel that abortion services are immoral and so they don't want to have any part of it.

Q And when you say social pressures, that's not the same thing as ideological?

A No, not necessarily. Some may be in sympathy with the provision of services, but because they feel they cannot go contrary to the—the opinion of their church or their friends or their family, they don't want to create any waves so they abstain from performing the service.

There are many facets to the problem and, obviously, the—I think as time goes on and it becomes more and more of a standard procedure, this is lessening and people are much more free to discuss it and the fact that a million and a half are being performed every year in this country I think is—is making it more commonplace.

Q What factors, other than the number of providers, affect the accessibility in Minnesota of abortion for minors?

A Well, the geography of the state, for one thing. It is a very long state. The distances are many and—and the providers are all concentrated down in this one little—these five counties all close together, with **[56]** the exception of Saint Louis County.

And so they—a patient from International Falls, for instance, has a long trip. And prior to the Duluth clinic opening, why they had to come all the way down to the Cities. It still is a distance to go to Duluth. Some of them have to travel all across the state, both the width or the length.

And transportation is poor in many of these communities. Train services have been disconnected and—and no flights. Many—as far as Duluth is concerned, many of the patients have to—they have to drive by—with a personal automobile.

And I've seen many of the teenagers that hitchhike when I've been working here in the Twin City area, as well as in Duluth. And they will hitchhike in extreme kinds of weather which is another hazard, the sub-zero weather in the winter and the hot weather in the summer, and so—

Q You've had teenage patients who've been hitchhiking many miles—

A Oh, indeed.

Q —to get to you? Teenage patients?

A Indeed. Desperately, that have come in extreme heat and—and that was what prompted me to want to help open the clinic in Duluth because we were having so many from **[57]** the Iron Range, Canada, northern Michigan, that would come all the way to the Twin Cities and have to undergo such hardship, actually, to get here; and then the risks of sending them right home after a surgical procedure were relatively great and so I was repeatedly concerned about this for years.

And when we opened the clinic in Duluth, why we promptly—the very first month, there were more than 100 abortions performed and they've averaged about 125 a month on a very steady basis. They're drawing more and more from Canada and, of course, from the whole northeast section of the state. And this has alleviated, to a degree, the travel hazards and the burden on the teenager.

But it's still—we are one of the worst states in the nation, as far as accessibility, according to the Guttmacher studies on the importance of travel time and the accessibility of abortion services as far as providing those that are necessary.

They still estimate that they're—that we are only doing roughly 50 percent of the abortions that are—are wanted and needed in this state.

Q Have you had teenage patients who couldn't get to you or had to cancel an appointment because of the travel distance in Minnesota or lack of transportation?

[58] A Blizzard conditions. That's not at all unusual during the winter months, although these patients are usually so motivated that they'll get through and no other patients will.

It's sort of a joke at Saint Paul-Ramsey that when they close down the—all the clinics at the hospital, the only one they don't close is the Fertility Control Clinic because you can be sure that—that some of those patients are going to get through and come. So it's rare that a whole clinic would ever be cancelled. Some patient's going to make it.

Q So is it your opinion that whatever burdens exist for all women in Minnesota in abortion accessibility, these are accentuated in the case of teenagers?

A I think it's much different than a small state like Massachusetts, for example, or—or in the New York area where transportation's available. Yes, our problems are considerably different.

And the fact, too, that many of these teenagers are from rural—very rural communities, very sheltered. They don't know how to cope with—some of them have never been to the Cities before. And then there's the matter of finances of arranging for this travel, which is a—

Q For the teenagers?

[59] A For the teenager, which is an—the economic burden is great. They not only have to arrange for their—the payment of the service, but just simply the time consumed and the costs of travel and then, of course, the problem being away from school.

Q If a teenager is from a family in Minnesota that receives Medicaid for their medical services, does such Medicaid pay for the teenager's abortion?

A No. There is—there are no subsidies granted a patient—a teenager who chooses to terminate her pregnancy.

* * * * *

[70] * * *

Q Dr. Hodgson, we've—we've been discussing the mortality risks of abortion overall. Does that—do those risks change depending on weeks of gestation? And I'd like to refer you now to examine Plaintiffs' Exhibit 5.

A It has been very obvious that the risk increases with the stage of gestation. This has been repeatedly pointed out by—there are many, many articles to support this. This particular graph, Exhibit 5, is from the Center for Disease Control, Abortion Surveillance—I think the same graph is in my textbook on abortion and sterilization—illustrating that for the death-to-case rate increases with each week of gestation and this is roughly 50 percent per week after the eighth week.

Q So that for each week of pregnancy a woman delays an abortion, the risk of death increases 50—

A Increases by 50 percent, right.

* * * * *

[73] * * *

Teenagers tend to seek their care later and they tend to be more anemic. They're careless about their diets. They tend to have a higher incidence of infection because they delay their post abortion care. They ignore [74] the complication and they don't have the care that the older women do.

But overall, there's very little difference in the morbidity rates, when you adjust particularly for the stage of gestation.

Q So that—you've testified that one factor creating a complication for teenagers is that they have tighter cervixes so that's a different consideration.

A Correct.

Q What can be done—or what do you do as a physician to help eliminate the possibility of this kind of complication in an abortion for a teenager?

A One of the advances in abortion technology in the last decade has been the increasing use of laminaria which is a—prepared from Japanese seaweed. It's the stalk of the seaweed. It's a very hydroscopic—hydrophilic, I should say, material which absorbs water from the cervix and has a very peculiar effect that no one has really explained scientifically which makes the cervix very easily dilated.

And this—these—this material which comes in the—very much resembling a pencil, a very fine pencil, is inserted into the cervix and left for several hours, at least four to six hours as a minimum, and this causes softening and dilatation of the cervix

and facilitates [75] the dilatation and avoids the tearing and any muscle damage to the cervix. So that in the teenager, particularly, this is being used more and more commonly.

Q What gestational age—at what gestational age would you use laminaria when you do an abortion?

A Well, it wouldn't be a matter of age. It would be more frequent, of course, in the youngster because they have the tight, immature, very—

Q I meant the stage of pregnancy.

A Oh, in the early pregnancies—well, in any stage in—in the adolescent we're apt to use it because—depending on the stage of their pregnancy.

If they have a—a second trimester pregnancy, they would have to have laminaria; and often in the late portion of the first trimester, if the cervix is still very hard and undilated, they have to have it.

So it's an individual thing. It doesn't necessarily relate to—to stage of gestation or age, but particularly is it appropriate to use it in the teenager.

Q Is it correct to say, then, that your testimony is you tend to use—you consider laminaria medically advisable more often with teenage patients because of the condition of their cervixes than with adult patients?

A Oh, very definitely.

Q And is this a recent development in abortion technique?

[76] A Well, it has gradually increased in popularity. I would judge that 50 percent of the clinics all over the country do use it, at least in select cases. Some use it routinely in every case.

Q First and second trimester?

A Yes. In—at San Francisco, for example, it was the protocol to insert laminaria in every woman, every age, every stage of gestation, regardless, and—which is really superfluous treatment for the woman who's had several children and it accomplished very little. But they felt so strongly about its performance, they didn't want to deprive anyone of possible benefit.

So this necessitated two visits to the clinic which had a real handicap, too. They would be sent home with the laminaria in

place and then come back the next day. We'd insert it late in the afternoon or in the afternoon and then the next morning, they'd come in—back for their procedure.

Q When you teach abortion techniques, do you point out to other doctors about the use of laminaria in teenage cervixes?

A Oh, very definitely. I feel very strongly that they should have the benefit. A number of synthetic materials have been manufactured in an attempt to find something cheaper because the laminaria is rather expensive and **[77]** nothing has really proven as satisfactory as yet as the laminaria.

Q You've testified that insofar as mortality rates, abortion is one of the safest surgical procedures in the United States. Is it your opinion that considering morbidity or complication rates, it is still one of the safest procedures or that—is that included in that opinion?

A Yes. It is about one two-hundredth the risk of an appendectomy, for instance.

* * * * *

BY MS. BENSHOOF:

Q Dr. Hodgson, you testified that the mortality risks for abortions increases 50 percent with each week of pregnancy. Is there also an increase in risk for complication rates or morbidity?

A Oh, absolutely. That also increases with each increasing—with each increased week of gestation.

Q For teenage patients, what are your medical recommendations insofar as lowering the risk of death and the risk of complication for these patients?

[78] A The most important way to eliminate complications in the teenager is to eliminate delay. And I have felt very strongly on this particular issue, even to the extent of incorporating it in a chapter on unwanted pregnancy in adolescents which was submitted as an exhibit. It is in Dr. Blum's textbook on adolescent pregnancy.

Q What year was that?

A That was written in 1981. Actually written in 1980, prior to the—to our law that was passed on parental notification.

But I—in this article—in this chapter, I stressed the importance of responding to the teenager on a—just instantly. When they telephoned, they shouldn't be left hanging on the telephone. They shouldn't be given the—the go-around as far as appointments. They should—

The receptionist should be alerted to the way that teenagers act. Often times, it takes them so long to muster up their courage and to phone a doctor's office that when they make that contact, you should be receptive and get them—urge them if you think there's any possibility of pregnancy or even fear of pregnancy. Whether they've missed a period or not, they should be urged to come in. Not tomorrow or the next day, but right then and there.

[79] And always keep an open slot for—for a—a teenager. I think this is very important. And when they get to the doctor's office, they shouldn't be kept in the waiting room for any length of time because teenagers will disappear out of waiting rooms and lose their courage and not show up again for another month or two.

So they should be taken care of promptly. They should be put in another room. They should be treated with—it's—it's really very serious, that they should be given immediate attention.

If they're not pregnant, or they're fearful of it, then they should be given contraception or advised in regard to it, advised as to th. risks of pregnancy and—and the alternatives and so forth. And the younger they are, the more this is the case.

And so I—I think it's something that the medical profession has been negligent about and I have earnestly tried to educate doctors in other fields as to the importance of—of delay.

* * * * *

[82] Q In evaluating pregnant teenagers, could you explain the risks of—what the particular risks are with continuing the pregnancy and going through childbirth for a teenager, as opposed to being able to obtain an abortion? I think you could start out your answer to that question by just what are the risks to the health of a teenager who is carrying through a pregnancy and childbirth.

A Well, the risks to a teenager are greater, of course, than they are for an adult simply because nature didn't intend it that way, even though women—even though teenagers are achieving menarche at an earlier age now than they did a few decades ago.

It's been estimated that the age of menarche is decreasing about four-tenths of a year every decade. And at the beginning of the century, women didn't begin menstruation until they were over 15. The average age was about 15.6 years, I believe. And now it's down to 12, a little over 12, just in the—within this last century.

But they're—when you see some of these children, it's obvious that they can't go through a pregnancy without having considerable distortion, from a physical point of view.

They're—they're apt to develop varicose veins. They develop abdominal changes in their—their **[83]** physique; muscle changes, abdominal changes. They lose the elasticity of their skin, the muscle—the elastic fibers are ruptured. They develop cardiovascular problems. They can have severe toxemia, which is based upon stress, which, of course, is always greater in the teenage pregnancy because of the social aspects. They may develop molar pregnancies.

I recall very vividly one of my first patients in Saint Paul was a 16-year-old that came in with a blood pressure of 200 and she had—as it turned out, we diagnosed a molar pregnancy.

Q Which is what?

A Which is a—it's a overgrowth of the afterbirth which destroys the—the fetus, per se, but the pregnancy continues and it's very—can be very dangerous. And this girl was really very seriously ill until we emptied her uterus of the molar pregnancy and she later recovered, but she was running a very dangerously high blood pressure and she could have had a cardiovascular accident and had a stroke or—or any number of complications; heart failure.

Q And do you think that the chances of developing such a pregnancy are higher in teenagers than adult women?

A The incidence of toxemia is definitely higher in the teenager. And the—

[84] Q Is molar pregnancy related to toxemia?

A Molar pregnancy causes—will cause toxemia. Yes, they can be related. They—

Q Are there differences in mortality rates for teenagers or for younger teenagers compared to the general adult woman population?

• • • • •

A Maternal mortality rates do run higher for the—for the teenager and—very slightly, however. And it has been argued that this is due to the fact that they don't have good prenatal care. And in—with select groups, they have been given special attention and watched very carefully through their prenatal period and the results are supposedly the same.

But it's just the nature of the teenager that they're not going to seek prenatal care early. They're not going to watch their diet. They tend to be very careless about **[85]** nutrition and dental care and observing all the rules of good prenatal care. And it's pretty difficult to make them all conform to this pattern.

Obviously, with an unwanted pregnancy, a patient is not motivated nearly as much to take care of themselves as an adult who is very much seeking that pregnancy.

So we see that—that teenagers are—are careless. They don't eat properly. They don't seek—they don't go to the doctor. They wait until the very last minute, if they have any prenatal care at all, and so the results are that the morbidity and the mortality rate is slightly higher in this group.

Q Do you have any idea about how much higher the risk of death is for teenagers under the age 15 compared to adult women?

MR. GALUS: Excuse me. What is—what is meant by adult women in that question?

MS. BENSHOOF: Women 20 to 24.

A Well, according to the statistics from the National Center for Health, from teenage—no, this is from "Teenage Pregnancy in Minnesota," actually. It's a—it's a—

[86] Q State.

A —publication—

Q From the State.

A From the State, in nineteen—1982. "Teenage Pregnancy in Minnesota." And they point out and these figures were originally obtained, I'm—I think from the National Center for Health Statistics and CDC. The children that—that the adolescent female is three and a half times more likely to die from toxemia of pregnancy than—than pregnant females in their twenties.

Q Excuse me. How many times?

A Three and a half times.

Q Isn't that one and a half (indicating)?

A Well, that's—I'm sorry. I read—yeah, it is one and a half.

* * * * *

[87] * * *

A The pregnant female is one and a half times more likely to die from toxemia. She's three and a half times more likely to die—the female under 15 is three and a half more times likely to die from toxemia. Those from 15 to 19 are one and a half times. I'm sorry to get that confused. They're 1.3 times more likely to develop anemia; and, of course, their nutritional reserves are depleted.

Q And is there a general maternal mortality figure for women under 15 compared to women 20 to 24?

A Well, this report claims that the maternal mortality is 60 percent higher for women under 15, and 13 percent higher for women 15 to 19 than for women 20 to 24.

Q You've discussed your—the statistical risks that a teenager faces either with pregnancy, terminating in abortion, or with continued pregnancy and childbirth, **[88]** and you had stated earlier in your testimony that it is 20 times safer for any woman to get an abortion in the first eight weeks of—of pregnancy than to continue the pregnancy and go through childbirth.

Do these statistical risks apply to teenagers who have specific medical problems or conditions?

A Well, teenager who has an underlying medical disorder, a complication obviously will carry much higher risks. This—this is just—these risks are figures for large group of—the overall group of women.

Q In your professional experience, have you ever had occasion to observe pregnant minors under the age of 18 who have had special health problems making abortions medically necessary, above the statistical necessity?

A Yes, indeed. I have had to carry some of them through pregnancy that have been very difficult. I can think specifically of youngsters with rheumatoid arthritis that are so crippled they could hardly move, and very severe diabetics. I can think of one that went through a pregnancy and later came into my office in the late '20s.

She was blind. And—

Q Do you think that having gone through pregnancy as a teenager attributed to this blindness?

A Well, the authorities in the field of diabetes—I can't give you any specific quotes on that, but the general **[89]** feeling over the years has been that allowing a pregnant woman to go through a pregnancy probably decreases her life expectancy about five years.

Q You mean a diabetic woman?

A A diabetic woman. And this would be even more true of a juvenile diabetic because they tend to be more—much more severe diabetics than the adult—the woman who acquires the diabetes in adulthood.

So for the juvenile diabetic to go through pregnancy, that really—it's—it's—to a degree, it's a life threatening thing if it's going to shorten her life three—five years; and, of course, precipitates the complications of diabetes which are retinitis and optic neuritis and blindness and—

Q So one of your patients did go blind?

A Yes, that's right.

Q You mentioned another teenage patient who had to go through a pregnancy with rheumatoid arthritis. What happened to her as far as future physical repercussions?

A Well, she was unable to care for that child and—because physically, she just wasn't able to. And I know she sought—she was pregnant a second time and sought an abortion. This was after abortion was legal and—

Q Was—during her first pregnancy, was abortion legal?

A No, it was not and she had had to carry—carry a [90] pregnancy through term then.

Q Were you her obstetrician?

A Yes.

Q Was it a wanted pregnancy?

A No.

Q What did she have to do to get through the pregnancy?

A Well, it was very hard—very, very difficult because she was in a good deal of pain and unable to care for herself, and it did not help the arthritis at all.

Q Was she bedridden?

A Essentially.

Q You stated she got pregnant a second time when abortion was legal?

A Yes.

Q Did you recommend that abortion for her would be medically necessary?

A Yes, she obtained one.

Q Have you ever had pregnant teenage patients who were drug or chemical dependent or alcoholics?

A Many, unfortunately. We—particularly at Saint Paul-Ramsey, we saw so many teenagers who were addicted drug abusers or alcoholics and they were aware of their inadequacies as far as parenthood is concerned. They—they seemed to just subconsciously realize that they couldn't parent a child and do it properly and it was [91] rather pathetic to see how they—their attitude toward the thing. They—in a way, they—it was very sad dealing with these young women.

And also, the women who are blind, the mentally retarded, even they would realize their inadequacies. Something seems to be subconscious that makes these women—they really become very objective about their own abilities.

And they worry, too. The—the ones that are on drugs worry about drugs that they have taken in early pregnancy affecting the pregnancy. And—

Q Is the physical risks for these women also higher?

A Oh, of course, because—

Q What could happen to them?

A Well, they're—a woman that is abusing drugs and—and alcohol and not eating properly can have all matter of nutritional deficiencies and is more susceptible to toxemia and infection and—

And prematurity is one of the big factors in teenage pregnancy. So many of the children deliver prematurely and they—the incidence of disease among the children. Particularly, nervous disorders are much higher. It's been estimated—again I'm quoting from "Teenage Pregnancy in Minnesota," page 52—that children born to females under the age of 15 have 2.4 times the number of brain [92] and nervous system disorders as children born to women over 15 and they're more likely to be of low birth weight and they have increased mortality rates, increased childhood morbidity and handicapping conditions such as blindness and deafness and cerebral palsy, and learning and behavioral disabilities.

Q You've discussed the physical biological effects of continuing pregnancies for teenagers. What are some of the emotional and psychological ramifications that you have seen in your career with pregnant teenagers?

A I think that's been the hardest thing for me to face and—and that was one of the reasons I wrote the editorial for "Minnesota Medicine" back in 1970 about teenage pregnancy in Minnesota. We were tolerating it. They report—there was a report of some pediatricians from General Hospital here on the—what happened to the infants of children under 15 that were delivered and how—what a high death rate there was among their offspring and the high incidence of a complication.

And there was—they reported on over a hundred cases, as I recall. And there was not a word said in the paper about averting these pregnancies, but allowing these youngsters, all 15 or less, to go through a pregnancy. And it was—it seemed—I pointed out the—what I considered the immortality of the situation [93] when we allow children to have children.

Q What about the psychological or emotional effects on children who have children?

A Well, it's not only hard for the mother involved, but it is—it has been definitely shown in numerous studies that these

children suffer from more psychological disorders, behavior problems, lower mentality, than—than in controlled groups.

And this—the pattern goes from one generation to another. It's sort of a vicious cycle. These are more apt to belong—to be born to women in a low income group on welfare and it's very difficult. They're—they're apt to become pregnant again, much more apt to—to become pregnant within the next two years than a—than a controlled group of the same age.

And they're sort of trapped in their environment and this vicious cycle of reproduction and welfare. And the children that are born into this type of situation tend to repeat the same thing. And I've lived long enough now to see this and see two or three or four generations, actually, of children having children. And it—it's very sad.

Q Have you ever had patients, teenage patients, who have gone through pregnancy, gone through childbirth, and whose mental or emotional wellbeing has been undermined **[94]** because of that experience?

A Yes. I think the psychological trauma is tremendous and that was one of the hardest things for me to face was to see the disillusionment in these youngsters as—they didn't know, many of them, even how they got pregnant, scarcely—the young ones—and they were products—the situation was something for—over which they had very little control.

I can think of children that I saw, their mothers brought them in. They were mothers who were seeking popularity in dating for their young high school daughters and would push them into social situations they weren't able to handle, allowing them to go to all night proms and that sort of thing at the age of 14. And these girls then would become pregnant and the mothers would bring them to me and be greatly distraught.

And then to have to—take care of these young women and—and follow them through a pregnancy, see them having to drop out of school, become socially ostracized, become more and more disillusioned and—and isolated, bitter. And their lives literally spoiled, their education stopped and at—and in that—at that time, and there still is a stigma to teenage pregnancy.

Q Have you ever had any teenage pregnant patients who've either attempted suicide or have been hospitalized for **[95]** psychiatric care?

A Yes. I saw a number of them at Saint Paul-Ramsey because in a—when you have a hospital service like that, you're aware of the inpatients in the other departments and I—a number of patients during the years that I was there would come in to the psychiatry ward with over—as overdose victims and it would turn out—I would be called to see them and it was amazing how many of them were pregnant or fearful of being pregnant.

And this has been pointed out in an article that we—that has been quoted frequently by Teicher, 1980, in which he pointed out that—that 22 percent of the adolescent suicidal cases were girls who thought they were pregnant or were pregnant, actually. And that is—

Q To follow that up—

* * * * *

Q Do you have an opinion as to whether the—whether or **[96]** not the psychiatric consequences of having an abortion are more or less than the psychiatric consequences of a teenager going through childbirth?

A From my experience, and also this is supported by numerous psychiatric studies that have been done comparing groups of women who have had abortions and women who have been denied abortions. Also, there have been studies done of the offspring of the women who have been denied abortions. And there's no questions that there is a higher incidence of mental and psychological disorders among the group that are compelled to go through pregnancy or denied abortion.

This has been repeatedly pointed out. There's a chapter in this—my textbook here by Figa Talamanica (ph), an Italian woman psychiatrist. A very extensive study. And she reviewed all the European and—and American literature on this subject and comes to the conclusion that as far as psychiatric complications are concerned or even minor psychological disturbances, that the abortion is less dangerous.

Q Is this true for minors as well as for adults?

A I—I think it's even more so because there are more—it's a more—pregnancy is a more complicated thing for a teenager than it is for an adult. So obviously, termination of that pregnancy is going to bring more relief.

[118] * * *

Q How many patients—pregnant patients seeking abortions do you think that you have personally seen and counseled as you've described?

A Minor, you mean, or—

Q Yes, minor.

A Oh, it runs into the thousands.

MR. GALUS: What is—what is minor? Under 18 or—

MS. BENSHOOF: Under 18.

A I'm sure it must be thousands. It would be hard to count, but I—it is several thousands of minors.

Q So you think you have a pretty good idea about how minors feel about abortion and pregnancy?

A Well, I—yes, I would expect so.

Q Based on this experience, what are any of the special problems that minors—that you see from your experience that minors have expressed to you or your patients have expressed to you?

A Well, it's—sometimes it's almost overwhelming the number of problems that these poor teenagers come in with. It's almost heartbreaking. You just wonder how they can keep from breaking under the strain.

I've already described the distances that some of **[119]** them have to come and the time schedules that they—they have to juggle in order to—if they want to protect their privacy; how difficult it is to make phone calls, even; and to raise the necessary funds just for these services; and how badly some of them need support and—and have no one to turn to.

I'm also impressed by the number of broken homes that these youngsters come from. I pulled at random—had them pull a dozen charts from the 1984 patients I had done in Duluth—

Q Minors?

A Minors.—this—this week and they were just simply random cases and—there were 12 of them. And 7 of them did not have fathers. They had stepfathers, but their own fathers had left and they were—and one—one of—there was one that was dead, as well, so that—but here were 7 out of the 12 that—that were the products of broken homes with no father figure in the house.

And the problems that some of these young women had were just so sad. They—couple of them didn't have a place to live. They—the harmony—there was so much disharmony at home that two of them weren't even living at home.

* * * * *

[121] * * *

Q When you consult teenagers, do you encourage—have some of them told one or both of their parents?

A Of the—the study that was done here in Minnesota—Ron Anderson at the University of Minnesota, and I think that was done about 1981—1980, I believe, or '81.

Anyway, in—in interviewing these patients, it was found that about 75 percent of them hadn't told both parents. Out of that group, another 25 percent would be willing to, but—but only about a third of those would be willing to tell both.

Q So do you have any idea about how many have told one or—

A How many had told one?

Q Right.

A Well, 75 percent had told one, but they hadn't told both. They'd be willing to tell one, but not both.

Q Right. I think your first testimony was that 75 percent had not told both.

A Yes.

Q I'm just wondering about—

A But they told one.

Q Some of them had told one. Is that your testimony?

[122] A No. I—I think that a—as I understood it, they'd all—the 75 percent had told one, but they hadn't told two; and that the—the remaining 25—that when—when it's—if you were to take all 100 percent of the group, 50 percent would not—

would not go along with the law. They will—they'll go to court. And that's the way things are working out when they're giving the—given the option.

About half of the minors that we see go to court and about half opt for notification and—isn't that right? I think that's what the figure—the way the figures go. Anyway—

Q What reasons do they give you for not notifying one or both parents?

A Oh, they are—they are numerous. They may be—be that they fear opposition, even to the point of violence and restraint, and they know that their positions—their parents' attitude on abortion or they're just not able to communicate with them.

Another common reason is that they don't want to hurt their parents. It's a matter of love for their parents and they don't want to spoil the relationship that they have with their parents.

Another reason is the health of one of the parents. Or a broken home where they've never seen or had very **[123]** little contact with the parent and they object to having to notify that one. They don't object to the—to the one person, one parent, but they objected to notifying the second one. So there are all kinds of situations.

But with the high incidence of single families—single parent families that we're seeing now, it's becoming more and more difficult to find that second parent. In this group of 12 patients of charts that I mentioned that I just pulled at random, it was amazing how there were—

There was one young woman whose mother hadn't been found since—or heard of since the girl was two years old and she was living with her grandmother. Her father had since gone to Chicago so he had to be notified, but the girl had to go to court anyway because the father—because the—they couldn't prove the death of the mother. There was no birth certificate, but they couldn't find her either so she went to court with her grandmother just to expedite the thing.

And it—it's—the situations are just too numerous to—to list almost. There are so many possibilities and so many very valid reasons why they—they simply cannot tell both parents.

Q Do you believe that it's medically contraindicated in some cases to tell both parents, one or both parents?

[124] A Absolutely. Some of these—there were two of the girls out of the twelve that said their stepfathers weren't speaking to them, that they had stopped communicating, and one had thrown her out of the house and I think that this is not the kind of—of reaction that is helpful in any way to family communication or helps to build better communication.

You can't suddenly expect a family that's not been communicating or talking freely about sexual matters to suddenly start just because the girl is pregnant. She's not going to suddenly open up, nor are the parents going to open up.

Q Do you have any examples from your patient history, and not necessarily limited to since this law, where teenage patients have reacted to trying to keep their pregnancies from their parents.

* * * * *

A There are many examples of situations in which patients have tried to keep their pregnancies from their families. And of **[125]** course everytime a patient goes to court here, they're—they're—that's what they're trying to do. And they—they have many difficulties sometimes in protecting their identity and—and keeping their parents from knowing where they're going and being able to get the family car. All of those things that make it very difficult, or having—

I remember a description last year of a patient, a teenager, who—she's now a counselor, who's describing to me how before abortion was legal, how she as a young teenager made an airplane trip all the way to New York early one morning and had her abortion and came back that same evening and her parents never knew she had left. And how—she just started to sweat, practically, while she was telling it to me and cried a little bit because it made such a—it had been so difficult for her to get through.

She was so happy that things were easier now for teenagers that they didn't have to go through what she did. But even with the law changed, they still have considerable trouble in protecting their privacy.

Q You mean the—the Roe v. Wade change?

A Yes, since Roe v. Wade. They still—the problems are still not solved because there are still problems with parents who will not be supportive of the child.

[126] Q Have you encountered patients where the parents have tried to stop an abortion?

A Yes, I have. One of the outstanding examples is a patient who was a deaf patient who was probably a victim of incest, although we never could document that, but very reluctant to—would give us no—could give us no story about the paternity.

She was a fairly intelligent 15-year-old and she—when she became pregnant, her mother took her out of school and kept her locked in the house. And it was only because she had a social worker on the basis of her deafness, the social worker discovered she was pregnant and wanted—and realized just what the situation was at home and managed to get the girl down to the clinic and make a diagnosis and get her down on a Saturday when she supposedly—had taken the girl to a birthday party for a couple of hours and we performed the abortion on the girl.

And—and this was prior to the notification law, just before—it was summer of '81 before the law became effective. And this patient—obviously, her mother was very violently opposed to—to abortion and was doing everything to keep the girl—to force her to continue the pregnancy.

Q Have you ever had any teenage patients who have tried **[127]** to abort themselves to keep their pregnancy private?

A Yes, I have. And one outstanding case was a 14-year-old girl came to—to Saint Paul-Ramsey who—her friends had tried to help her induce an abortion by introducing some metallic object into her vagina and had torn her several times. And she bled and the pregnancy had continued in spite of this.

And she finally arrived at Saint Paul-Ramsey with—at about four or five—four months pregnant, I believe, or five months, and the cervix was so scarred, it would not dilate with ordinary means and we had to do a hysterotomy, a—similar to a Cesarean section, a uterine incision, in order to deliver her of this pregnancy.

Q Did this affect her future childbearing?

A Well, it means that she will always have to have Cesarean section.

Q Subsequent to the law or even before the law was in effect, have you received referrals on minors from teachers or social workers advising you that parents should not be involved?

A Well, yes, I—very recently, within the past year, a very sad case up in Duluth of a counselor from one of the Canadian border towns, a high school counselor—

Q About how far away from Duluth?

[128] A About 200 miles from Duluth. He brought down a 16-year-old girl with whom he was—that had come to him finally in desperation for help. Her parents were both school teachers in the school system in this town and there was a very active anti-abortion group in that community. And any girl that would—that would seek an abortion would be so ostracized and if a parent had supported a daughter, he, the counselor, felt that they would lose their jobs, actually on the school board, but—because the school board was so actively opposed.

So her parents were very much opposed to abortion and when she became pregnant, she knew that she could not get any help from them and she was pretty desperate and she sought help from this high school counselor who was the father of several daughters himself. And he realized that this girl would have to be—would be forced to continue her pregnancy, under the circumstances in that small town, that nothing else could ever happen.

And he wrote this in a very powerful letter to me after he had been to Duluth and he said if she had had to continue the pregnancy, she would have only been given a rose, but—and no—and—but she would have been subsidized, also, for continuing the pregnancy. But because she sought to take her own initiative and—seek the abortion, that she would have been very severely **[129]** punished.

So he arranged some school project, some trip, whereby she could be excused from school and he personally drove her to Duluth. And while she went through the court procedure, he was telling us about the situation at home.

And then he drove her back that night and it was difficult getting it all in one day because the girl needed laminaria, and she needed—first, pre-counseling, and then laminaria, and then the

court—I mean the court procedure and the whole business all in one day and drive back to—to this town and it was—it was very difficult. But he was very sincere and it was quite a touching story.

Q Have you encountered situations where one parent has come in with a teenage patient and that one parent does not feel they can notify the absent parent?

A Frequently. In those cases, of course, it is necessary then for the minor to go to court. And so frequently when they go to court, they have a parent with them.

Q What reasons do the parents give you as to why they can't tell the absent parent or spouse? I guess it could be either.

A Well, it may be a matter of not wanting to renew the relationship, if it's someone—if the parent has **[130]** deserted that child and the spouse and there may be no reason.

I know one case recently in which the mother had been denied custody of her daughter and yet she and her father had to go to court and they—or notify this mother who had been denied custody. These strange situations come up all the time so that the two-parent involvement makes it doubly difficult.

Q Do you ever have any situations where the mother of the teenager is a battered woman?

A Yes.

Q Could you explain?

A Well, it—I don't understand what there is to explain. I mean some women are battered and—

Q Did they believe—did they express to you that they believed they would be battered more if the father of the teenager were informed?

A Oh, I—yes. Oh, I see what you mean. The family relationship would be indeed strained; and if it was bad to begin with, it would be doubly so. A problem pregnancy like that, particularly if there is trouble between the spouses, the parents, why it's just only going to aggravate it.

Q Are any of your teenage patients victims of incest?

A Unfortunately, yes.

[131] Q Do you think it's medically advisable to notify the father when the father is—of the teenager is also the parent of the fetus?

A Well, these situations are very delicate and I—I couldn't begin to set down any rules. I think each one has to be handled individually. But there are many situations where it's not wise to notify one parent or the other, yes.

Q Have—

A Each one has to be judged on an individual basis.

Q Have parents come to you stating that the absent parent is ill or another reason why they feel it would harm the absent parent to be notified?

A Well, illness is a very common reason that's given; particularly, potential heart attacks, and—and I think of women that were dying of cancer and the father didn't want the mother to know.

Q You've had a patient where the patient's mother—the teenager's mother was dying of cancer?

A Oh, yes, yes. I've had several of those. That's not uncommon.

Q And you've actually spoken to their father?

A No, I—I can't swear that I spoke to the father, but I certainly was aware of the situation and knew—knew what was going on.

[132] Q So the one parent felt that to tell the dying parent about the pregnancy would not be healthy?

A Well, would—would be cruel. Not necessarily unhealthy, but not a kindness, shall we say. Often these—this refusal to—to communicate is a matter of kindness and love; it's not a matter of being difficult or uncooperative or—it's a matter of consideration.

Q Have you had any patients who do not know who their father is?

A Yes. That was a very—there was a very funny situation that I just learned about at the Fertility Control Clinic in Saint Paul in which—

Q You're working there now?

A Well, I stop by there on a regular—yes, I'm working at a clinic there two days a week and I—I know—pretty well have my finger on the pulse of what's going on at the Fertility Control Clinic.

And there was a two-week delay for one minor simply because when they notified the so-called natural father, he refused to acknowledge his paternity and so there had been considerable debate over who the father was. And so then the battle ensued between the mother and this man as to the paternity.

And after various documents had been brought in and **[133]** this had been debated for a couple of weeks, he finally—he must have been a fairly good Joe because he wrote a letter saying that whether he was the father or not, he would give his permission for this girl—minor to have her abortion. He didn't know who the father was and neither did anybody else, apparently. So that was—but that was an unnecessary delay, purely resulting from the law.

Q You say this particular patient lived with her mother and there was this two-week delay because she didn't—because there was a question as to whether—who her real father was?

A Correct, correct.

Q How do decisions about confidentiality and privacy relate to your role as a doctor treating a teenage patient?

A Well, they're going to be much more cooperative and better patients.

Q Well, let me just rephrase that. Is confidentiality a medical and professional concern for doctors? Is it part of treatment?

A Of course, because with confidentiality goes relaxation and peace of mind. If you have a relaxed patient that isn't scared to death and—or worried, tense, why they're going to be a much easier patient to operate on, particularly under local anesthesia.

[10] • • •

(JULY 12, 1985)

BY MS. BENSHOOF:

Q You—you stated that nine—that you—it's your belief that 13 hospitals in Minnesota perform abortions?

A Well, it's available. They can be done. I shouldn't say they all are providing the service as a hospital, but they wouldn't refuse a staff physician if they wanted to bring one

there to be done. But they don't regularly have abortion clinics where anyone can just walk in off the street.

There are—the—the only one of which I'm aware—there are two of which I'm aware would provide them. That would be Hennepin County General and Saint Paul-Ramsey, where a patient could just go into a clinic and have one. Otherwise, any hospital, such as Mount Sinai here in Minneapolis, wouldn't perform them, but a physician on the staff could bring one in.

• • • • •

[14] A Well, it entailed many problems because we had to—because of the—the use of laminaria in the teenagers, for example. It is considered medically advisable in the young, immature patient with a tight, narrow cervix to insert laminaria.

This is what it is (indicating). It's actually the—the stem of the seaweed. And this is inserted initially and allowed to remain in the cervical canal for several hours; preferably a minimum of 6 hours, up to 24, depending upon the stage of the pregnancy.

And this swells up and becomes three or four times this size and helps to soften and dilate the cervix so that it is possible to later introduce the cannula, such as this (indicating), through the cervix without causing any lacerations or damage to the cervix.

In teenagers, ten weeks and over, it's—unless they have an unusually patent canal, cervical canal, it's advisable to do this procedure and so it really involves two procedures. Sometimes we send them home overnight and have them come back the next morning and remove the laminaria and perform the procedure.

So the court process added to this meant that there was really much more than could ever be done in a—in one day, particularly where patients had to come a long distance, get up early in the morning and drive to **[15]** a clinic. They—and it's necessary, according to the court system in—in use at the present time, they have to have a pre-counseling exam and a—a session and examination and be instructed—given informed consent and go to court; and then come back, get the laminaria, wait four to six hours as a minimum, and have a procedure, and then

to go home a few hundred miles. You see, it's—it's an impossible situation.

So what happens is that in many of the clinics, the laminaria is omitted and the tendency is to—to—for the sake of the patient; otherwise, she's not going to get the procedure done at all. So just from the standpoint of time, it made it very difficult.

* * * * *

[21] * * *

Q Dr. Hodgson, you were discussing the problem of the court and laminaria scheduling. Do you believe that not using laminaria on a minor increases medical risks?

A Yes.

Q Are there any other effects of this law that you believe increase such risks?

A Yes. The delay is the—the prime effect.

* * * * *

[23] Q Have you observed minor patients of yours when they've come back from the court process?

A Yes, and some of them are wringing wet with perspiration. They're markedly relieved, many of them. They—they dread the court procedure often more than the actual abortion procedure. And it—it's frequently necessary to give them a sedative of some kind beforehand.

[27] * * *

Q Where do they wait? In the clinic?

A In the courthouse. They will have long waits and—so it is not easy for them. And many—and they haven't eaten. They're—we don't want them to come back for a procedure with a full stomach so they only can have liquids in the morning so they're hungry, they're tired, they've been up and come a long distance.

Q Can they have lunch?

A No. So then they come back to the clinic and—for—if they receive their authorization, which they do, so I—I don't see what difference it really makes. They just go through this routine. They're not turned down. They're—they're—they aren't denied, but they're just delayed. Then they come back to

the clinic and they have to receive their preoperative medications.

Q What is that?

A An anesthetic—I mean Atropine and Fentanyl, which is an analgesic, and atropine prevents—is a preoperative medication to reduce secretions and prevent nervous reactions which could cause the blood pressure to drop precipitously during any kind of a procedure such as this. And frequently, we have to give an additional sedative of Valium to the teenager, particularly. Then they go through the procedure and they're—we have [28] to hold them in the delivery room—in the recovery room to be sure they're not going to bleed or have problems afterward.

If they require laminaria, that's a new—it's an additional problem. Are we going to give it to them that afternoon, make them stay all night in a hotel and come back the next day for the procedure when there may or may not be a physician available?

I've frequently stayed overnight where I hadn't planned on it up there simply to take care of some of these. I was doing cases up to 16 weeks so that the—it was necessary for the laminaria to remain in a longer period of time.

But the trend—the tendency, of course, is the patient said, "I have to get home. My parents"—if—if their parents aren't with them, they—they have to get home and they have a long way to go, maybe driving all night. And so the tendency, of course, is to cut corners, which is not right for the patient and it's hard on the physician.

And—but after the procedure is completed and they are discharged from the delivery room—the labor room—recovery room, they then have to drive a long distance. So this all is extremely burdensome and it's—it's hazardous, often.

[29] I hesitate about sending some of these women on a long trip. Many of them are unaccompanied. Even whether—where they're with parents, it's very burdensome; and if they're with young people, it entails a lot of risk.

I don't see where the—I fail to see—and I've tried to see where in any situation the additional burden of this law is of any benefit to physician, patient, or society.

* * * * *

[49] * * *

Q Well, do you have examples where you've contemporaneously recorded the efforts to see that you comply with the law on particular patients?

A Well, yes. One—I dictated—in my frustration, I dictated into my dictaphone when I was working over at Midwest Health Center in Minneapolis. This was a—over a year after the law went into effect and I had run into so many problems with the minors' scheduling that I—I thought this I must record and I dictated into the dictaphone and—and they had it transcribed and these are—are my dictations that I made in August of—the end of August and first part of September in regard to scheduling.

And these were patients, I had seen them all and was involved and actually contacted the court myself in [50] some of the situations. And I can briefly condense this, unless you want me to read it verbatim, as I dictated—

Q Well, just give the example—

A Essentials.

Q —of what your observation was.

A On 8-19-82, I performed an abortion on L.H. who was 15 years of age. She had been delayed one week in getting into the court because of the back-up in their appointments. They were—apparently, they were having a three-day seminar and they were making no appointments whatsoever for one full week so that meant that everybody was put off a week.

And then, in addition, there were—it was busy and there was a real backlog.

Q Did that mean that you could not go ahead with an abortion on your minor patients who needed to go to court?

A At that—for that particular week, yes. And she was ten weeks pregnant and she is approaching the twelfth week; and she was also only 15, and she had been delayed for a whole week.

Then I—following this, I saw another 17-year-old who had been delayed exactly one week from the time she was diagnosed and ready to be done, simply because of the back-up in the court system.

A third young woman thought she had an appointment [51] today—this is still 8-19-82—at the court which she had made herself. She had gone—bypassed the clinic and made the appointment, she thought, with the court.

Q This was a patient of yours?

A Yes. And she—they—the court—she went to court and they were unable to confirm her appointment and they refused to see her so she came over to the clinic. And she was planning to leave the following day, the 21st of August, to—with a vacation with her parents to South Dakota for three weeks.

She was at that time ten weeks pregnant so we tried to get her into court immediately so she could be done before she had to go with her parents on this three-week vacation.

And when our—our counselor tried to get her into court the following day—the 20th—they refused saying they were all filled up; they only accept five patients. So I finally had to intervene and I called over and talked it over with David Knutson, the public defender, and he gave her a special appointment for 10:00 o'clock the next morning.

* * * * *

[142] BY MR. GALUS:

Q Doctor, did any of those 12 patients suffer any complication, medical complication, following their abortions?

A Not that I'm aware of, medical complications. I think that there was considerable emotional and psychological [143] trauma.

Q Due to various sources?

A Due to various problems, yes.

Q Even prior to the enactment of the parental notification statute and its becoming effective, at least in part, in August of 1981, even prior to then—

A Oh, absolutely.

Q —didn't you observe severe anxiety and stress among your—

A Oh, absolutely.

Q Excuse me. I'll have to finish the question. Even prior to this law, haven't you observed severe emotional distress and anxiety among your teenage abortion patients?

A I wrote a chapter on that in 1975 on the emotional stress that these minors undergo. And it is our hope that we can help eliminate of them as part of their health care.

* * * * *

[179] * * *

Q Doctor, based upon your experience and training, is it your opinion that a—an unplanned pregnancy for a minor woman is an extremely traumatic event?

A Yes.

Q Do you believe that minors in such situations; namely, confronted with an unplanned pregnancy, tend to be under extreme psychological stress?

A They're under psychological stress because of the unplanned pregnancy, not because of the termination. The termination brings relief.

Q That wasn't my question. I'm not—without reference **[180]** to the termination, do you believe that pregnant minors who find themselves with an unplanned pregnancy tend to be under extreme psychological stress?

A As long as they're pregnant.

Q Do you encourage parental involvement in every instance?

A Not in every instance because there are a number of times that parents are not qualified to be supportive.

Q Do you think it is extremely important—that parental involvement's extremely important?

A I think it's very important if it's good.

Q Do you think it's only in the rare case where it's impossible to obtain?

A Unfortunately, it's rather frequent that it's not good. With the number of broken homes, as I've pointed out, and the frequency of alcoholism and—and unfortunately, we have a lot of parents that I do not consider to be good parents who do not consider the welfare of their child ahead of their own feelings.

Q What are the benefits of parental involvement for the youngster or the young woman who finds herself faced with an unplanned pregnancy?

A Well, good parental—and if it's a good parent, obviously, that's ideal and I would encourage that they—their protection and moral support and economic support and health support. In every way, it's very helpful. **[181]** I've always encouraged parental involvement if I thought it was a good thing.

* * * * *

[182] * * *

Q In connection with your testimony in the Bellotti case, do you recall being asked the following question and **[183]** giving them the following answer: "Question: Have you also encountered situations where parental involvement would be helpful? Answer: Yes, indeed. I encourage it in every instance. I think it is extremely important and to be sought after, but there is the rare case where it is impossible to obtain."?

A Yes.

Q Do you recall giving that testimony?

A Yes.

Q Okay.

A I still feel the same way.

Q Do you believe that young pregnant—young women often have exaggerated or unfounded fears of adverse parental reaction should their—one or more of their parents be notified of the—their decision to have an abortion?

A Oh, absolutely.

Q And that's the usual situation, is it not?

A Not—sometimes it's very real. It—it can be either. It can be imaginary and it can be very real.

* * * * *

[199] * * *

Q Do you believe in the compulsory termination of pregnancy for any category of women?

A No.

Q Whether by age or whatever?

A Well, I—I think you get to a gray area where perhaps we should have compulsory pregnancy in the very young, the children 11-12 who don't know and it's hard to explain to them

what a term—I don't think we, as a society, should allow these children to be forced to go through a pregnancy because it is—it is just cruel and unusual punishment for something that—that they really are not responsible for in our society today.

Q I think you misspoke and referred to compulsory pregnancy in the context of that—

A I'm sorry. What?

Q I think you misspoke and referred to compulsory pregnancy in the context of that last answer.

[200] MR. PENTELOVITCH: You meant compulsory termination.

A Oh, I'm sorry.

Q Do you think there's a case to be made for compulsory termination for that—that particular group?

A Yes. I don't think they should have to undergo compulsory pregnancy, certainly. And I don't think they're old enough to know what they want at that—what they really do want because they aren't—and it's very difficult for a youngster that age or as well as for mentally retarded to understand.

Q And what age group are you referring to in that connection?

A Under 14.

Q Do you believe that as a general matter, it is pretty obvious that the best medical solution once pregnancy has occurred in a teenager is the interruption of that pregnancy?

A Up to a point. Again there are always exceptions.

Q Do you believe, based upon your experience and training that presumptively that's the best medical solution in that circumstance?

A The better of some bad alternatives.

Q Abortion is a bad alternative?

A Is the better of bad alternatives. Obviously, we would **[201]** prefer to intercept in this thing before the—a teenager ever gets pregnant. Primary intervention is to be preferred, but as long as—once pregnancy has occurred, if we haven't taught that patient to contracept or to abstain or whatever, if we haven't interfered at that point, then society, certainly, the next best thing is to intervene and is to intervene as early as possible.

Q And by intervene, you mean terminate the pregnancy?

A I mean termination of pregnancy. And that is—medically that is safer; and psychologically it's better. It's better for society. It's better for that individual's future life and family and everything.

Q Doctor, in your opinion, is it the normal, healthy reaction of the average teenager to want to terminate her pregnancy?

A Yes.

Q And is it your opinion that that's essentially a normal type of reaction?

A Yes.

Q And is it further your opinion that the ones; that is, the teenagers or the minors, who want to continue the pregnancy are the ones that need psychiatric help, generally speaking?

A Well, they're more apt to. They are the more dependent, passive individuals who do not live in the future. **[202]** They're not looking ahead.

Q Doctor, based upon your experience practicing in Minnesota since August of 1981, are you aware of any single instance in which any of your minor patients has sought an illegal abortion or attempted a self-induced abortion as a result of any of the requirements or obligations imposed by the parental notification statute?

A I'm not aware. I have suspected a few.

Q You have suspicions?

A Yes, but I have no proof. I can't document it.

Q Again, based upon your experience in the practice of medicine and more particularly in obstetrics and gynecology in the providing of abortions in Minnesota since August of 1981, are you aware of a single instance where parents have prevented, through physical restraint or otherwise, a daughter from having an abortion by virtue of any of the requirements or obligations imposed by the parental notification statute?

A Well, I don't think that's the effect of the law. Where the law—the law, of course, allows—they—it's mainly a delay, but it is—as far as it causing parents to become violent, I don't think that's the case.

* * * * *

[207] Q Now, of those patients you have seen, can you think of any case where the patient benefited from the parental notification statute, either by giving notice to the parents or by going through the court procedure?

A I've honestly tried, because afterall, it is a law in our state and I have to abide by it. I have really looked and given it considerable thought and I honestly think there is no benefit whatsoever.

Q And there hasn't been to your patients?

A It has not been for my patients nothing but problems. And the very fact that they're all granted anyway, you wonder, well, what is accomplished. I think we have one benefit. May I mention that? I think that it has helped to educate our judiciary in regard to the problems of teenage pregnancy, and that's good.

Q So that's a benefit to the judges more than to the patients?

A A benefit to society.

Q But not a direct benefit to your patient?

A Not the patients, no. I think they—they have—they've suffered.

* * * * *

PLAINTIFFS' EXHIBIT 122

PERCENT IN SECOND TRIMESTER

Minnesota Residents

	1978	1979	1980	1981	1982	1983
≤ 17	18.4	18.7	21.9	20.1	20.6	23.3
18-19	14.7	14.0	16.6	15.1	15.2	16.5
20-24	10.0	10.4	11.2	10.3	10.6	11.4
25 +	7.8	7.4	8.5	7.5	8.0	7.4
TOTAL	11.7	11.6	13.1	11.5	11.5	12.1

Plaintiffs' Exhibit 122
(as corrected by Defendants)
3-81-538 Civ.

DEFENDANTS' EXHIBIT NO. 19

TEENAGE PREGNANCY IN MINNESOTA D.EX. 19

Fetal Deaths

Approximately 57 of the pregnancies in Minnesota teenagers age 15 to 19 terminated in fetal death. This is approximately 0.5 percent of the pregnancies.

Risks Associated With Teenage Pregnancy

Statewide data on maternal morbidity is unavailable. However, national studies provide statistics on some of the risks associated with teenage pregnancy. For example:

1. Maternal mortality is 60 percent higher for women under age 15 and 13 percent higher for women 15 to 19 than for women 20 to 24.
2. Pregnant females age 15 to 19 are twice as likely to die from hemorrhage and miscarriage than pregnant females in their 20's.
3. Pregnant females 15 to 19 are 1.5 times more likely to die from toxemia than those who are pregnant in their early 20's.
4. The pregnant female under 15 is 3.5 times more likely to die from toxemia than pregnant females in their 20's.
5. Adolescent females are 1.3 times more likely to develop nonfatal anemia or toxemia during pregnancy than women 20 to 24.
6. For females under 16 years, pregnancy may deplete nutritional reserves needed for their own growth and place them at greater risk to other health problems.
7. The adolescent female is more likely to begin labor prematurely and have a difficult labor, thereby increasing the hazards to her and her baby.

8. A baby born to a female under 15 years is 2.4 times more likely to die in its first year than one born to a female 20 to 24 years.
9. Babies born to women under 20 are from 1.3 to two times more likely to be of low birth weight than infants born to women 20 to 24. Low birth weight is associated with increased risk of infant mortality and childhood morbidity and handicapping conditions, such as blindness, hearing disorders, cerebral palsy, and learning and behavioral disabilities.
10. Children born to females age 15 and under have 2.4 times the number of brain and nervous system disorders as children born to women over 15.

Poor health status is frequently correlated to low socioeconomic status. Of the teenagers who become pregnant:

1. Eight of ten who become mothers at or below 17 years of age never finish high school.
2. Three of five pregnant teen brides are divorcees within six years.
3. Teenage mothers are less likely to work and more likely to be on welfare than mothers who first give birth in their 20's.
4. Young mothers will have 1.3 times more children than women who begin to have children at age 20 to 24.

The data presented document that teenage pregnancy is an issue in Minnesota, as it is nationwide. Although the data shows that only 3.4 percent of Minnesota's teenagers are faced with a pregnancy, the alarming fact is that pregnancy among teenagers is increasing at a more rapid rate than pregnancy in other age groups. The reasons for this increase are complex. Among the motivational factors of teenagers risking pregnancy are lack of information on contraception and consequences of pregnancy, rebelliousness, low self esteem, and a sense of limited life alternatives. Programs and policies must be developed which

address these factors and respect the varied developmental stages of this population.

During the 1980 legislative session we presented concerns for consideration in studying teenage pregnancy. At this time we would like to review those issues and offer recommendations for policy consideration.

1. Many parents believe that sex education should be taught in the home, yet many feel incompetent to approach the subject.

   How can the state reinforce the perspective of these parents and assist them in meeting their responsibilities?

2. Although teenagers who become pregnant receive the most attention, over 60 percent of Minnesota teenagers are not sexually active.

   What can be done to support responsible decisions relative to sexual activity?

3. Most teenage males believe that contraception and pregnancy are the responsibility of the females.

   What programs can be implemented to encourage male involvement in responsible sexuality and reproductive decisions?

4. Of the 5,240 teenagers having abortions in 1978, 51.6 percent reported never having used a method of family planning and 35.9 percent report not using family planning at the time of conception.

   What legal and other barriers exist to the provision of family planning services to Minnesota teenagers?

DEFENDANTS' EXHIBIT 35

MINNESOTA REPORTED ABORTIONS—1980-1983

1983 Minnesota Reported Abortions

Average gestation weeks for minors
(Patients age 17 and under) = 10.73

Complications per 1,000 for minors
(Patients age 17 and under) = 6.98

Complications per 1,000 for adults
(Patients age 18 and over) = 9.20

1982 Minnesota Reported Abortions

Average gestation weeks for minors
(Patients age 17 and under) = 10.36

Complications per 1,000 for minors
(Patients age 17 and under) = 6.39

Complications per 1,000 for adults
(Patients age 18 and over) = 6.74

1981 Minnesota Reported Abortions

Average gestation weeks for minors
(Patients age 17 and under) = 10.41

Complications per 1,000 for minors
(Patients age 17 and under) = .00

Complications per 1,000 for adults
(Patients age 18 and over) = 2.86

1980 Minnesota Reported Abortions

Average gestation weeks for minors
(Patients age 17 and under) = 10.73

Complications per 1,000 for minors
(Patients age 17 and under) = 2.58

Complications per 1,000 for adults
(Patients age 18 and over) = 2.26

10.44.40.UCLP, AA, 030, 0.149KLNS.

CtNo 3-81-538 Civ
Def. EXHIBIT 35

DEFENDANTS' EXHIBIT 62

MINNESOTA SUPREME COURT ORDER
DATED 8/13/81

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota, Supreme Court

I hereby Certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 3rd day of March 1986.

Wayne Tschimperle, Clerk of Court

By: /s/ WAYNE TSCHIMPERLE
Clerk

In Re Procedure Relating to Minn.
Stat. § 144.343, subd. 6 (1980).

ORDER

WHEREAS, the Minnesota Legislature recently amended Minn. Stat. § 144.343 (1980) to prescribe procedures for the notification of parents, guardians, and conservators prior to performing abortions on certain persons, 1980 Minn. Laws ch. 228, § 1; and

WHEREAS, Minn. Stat. § 144.343, subd.6(c) (1980) details the procedure to be employed in the event a pregnant woman elects not to allow the notification of a parent, guardian or conservator contemplated by Minn. Stat. § 144.343, subd. 2 (1980);

IT IS HEREBY ORDERED that the following procedure, effective this date, be employed to facilitate prompt judicial consideration of a petition pursuant to section 144.343, subd. 6(c):

(1) The petition shall initially be filed in and considered by the county court or, in the case of Hennepin and Ramsey Counties, in the district court, juvenile division. Section 144.343, subd. 6(c)(i)(ii)(iii).

(2) An order denying the petition shall be appealable on the record to one judge of the district court, including the district court of Hennepin and Ramsey Counties. Section 144.343, subd. 6(c)(iv).

Dated: 8/13/81

BY THE COURT:

By: /s/ ROBERT J. SHERAN
Chief Justice

SUPREME COURT
FILED
[AUGUST 14, 1981]
JOHN MCCARTHY,
Clerk

Court No. 3-81-538 Civ
EXHIBIT 62

DEFENDANTS' EXHIBIT 62a

MINNESOTA SUPREME COURT AMENDED ORDER
DATED 6/14/84

State of Minnesota, Supreme Court

I hereby Certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this 3rd day of March 1986.

Wayne Tschimperle, Clerk of Court

By: /s/ WAYNE TSCHIMPERLE
Clerk

C8-84-1051

IN RE PROCEDURE RELATING TO MINN.
STAT. § 144.343, SUBD. 6 (1981)

AMENDED ORDER

Effective July 1, 1984

WHEREAS, the Minnesota Legislature recently amended Minn. Stat. § 144.343 (1980) to prescribe procedures for the notification of parents, guardians, and conservators prior to performing abortions on certain persons, 1981 Minn. Laws ch. 228, § 1; and

WHEREAS, Minn. Stat. § 144.343, subd. 6(c) (1981) details the procedure to be employed in the event a pregnant woman elects not to allow the notification of a parent, guardian or conservator contemplated by Minn. Stat. § 144.343, subd. 2 (1981);

IT IS HEREBY ORDERED that the following procedure, effective this date, be employed to facilitate prompt judicial consideration of a petition pursuant to section 144.343, subd. 6(c):

(1) The petition shall initially be filed in and considered by the county court or, in the case of Hennepin and Ramsey Counties, in the district court, juvenile division or, in the case of a

unified judicial district, in the district court. Section 144.343, subd. 6(c) (i) (ii) (iii).

(2) An order denying the petition shall be appealable on the record to one judge of the district court, including the district court of Hennepin and Ramsey Counties or, in a unified judicial district, an order denying the petition shall be appealable on the record to two district court judges and if there be a division between said judges the order denying the petition shall stand.

Dated: June 14, 1984

BY THE COURT:

By: /s/ DOUGLAS K. AMDAHL
Douglas K. Amdahl
Chief Justice

OFFICE OF
APPELLATE COURTS
FILED
JUNE 14 1984
WAYNE TSCHIMPERLE
CLERK

Court No. 3-81-538 Civ
Exhibit 62a

EXCERPTS FROM DEFENDANTS' EXHIBIT 68

MAJOR STUDIES ON PSYCHOLOGICAL ILL EFFECTS OF INDUCED ABORTION

Compiled by Dr. Vincent Rue

M. Sims, "Abortion and the Psychiatrist," *British Medical Journal* Vol.2 (1963), pp.145-148.

R. White, "Induced Abortion: A Survey of Their Psychiatric Implications, and Indications," *Texas Reports in Biology and Medicine* Vol.24 (1966), pp.531-535.

C. Pare and R. Hermione, "Follow-up of Patients Referred for Termination of Pregnancy," *Lancet* Vol.1 (1970) pp. 635-637.

A. Colman and L. Colman, *Pregnancy: The Psychological Experience* (New York: Herder and Herder, 1971).

V. Calef, "The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse, and Abortions," *International Journal of Psychoanalytic Psychotherapy* Vol.1 (1972), pp. 79-96.

M. Bracken and M. Suigar, "Factors Associated with Delay in Seeking in Induced Abortions," *American Journal of Obstetrics and Gynecology* Vol.113 (1972), pp.301-309.

J. Osofsky and H. Osofsky, "The Psychological Reaction of Patients to Legalized Abortions," *American Journal of Orthopsychiatry* Vol. 42 (1972), pp. 48-60.

M. Perez-Reyes and R. Falk, "Follow-up after Therapeutic Abortion in Early Adolescence," *Archives of General Psychiatry* Vol. 28 (1973), pp. 120-126.

N. Kaltreider, "Psychological Factors in Mid-trimester Abortions," *Psychiatry and Medicine* Vol. 4 (1973), pp. 129-134.

J. Ewing and B. Rouse, "Therapeutic Abortions and a Prior Psychiatric History," *American Journal of Psychiatry* Vol. 130 (1973), pp. 37-40.

J. Huncherson, "The Self Concept of Women at the Time of Elective Abortion," *Dissertation Abstracts International* Vol. 33 (1973), 5493.

W. Lawrence, "Anxiety-adjustment and Other Personality Factors in Teen-age Patients Before and After Abortion," Proceedings of the 81st Annual Convention of the American Psychological Association, 1973, pp. 413-414.

P. Barglow and S. Weinstein, "Therapeutic Abortion During Adolescence: Psychiatric Observations," *Journal of Youth Adolescence* Vol. 4 (1973), pp. 331-342.

C. Martin, "Psychological Problems of Abortion for the Unwed Teenage Girl," *Genetic Psychiatric Monographs* Vol. 88 (1973), pp. 23-110.

E. Moore-Caver, "The International Inventory on Information on Induced Abortion," International Institute for the Study of Human Reproduction, New York: Columbia University, 1974.

M. Bracken, M. Hachamovitch, and G. Grossman, "The Decision to Abort and Psychological Sequelae," *Journal of Nervous and Mental Disease* Vol. 158 (1974), pp. 154-162.

B. Blumberg, M. Golbus and K. Hanson, "The Psychological Sequelae of Abortion Performed for Genetic Indication," *American Journal of Obstetrics and Gynecology* Vol. 2w (1975), pp. 215-224.

N. Adler, "Emotional Responses of Women Following Therapeutic Abortion," *American Journal of Orthopsychiatry* Vol. 5 (1975), pp. 446-454.

J. Evans, G. Selstad and W. Welcher, "Teenagers: Fertility Control Behavior and Attitudes Before and After Abortion, Childbearing or Negative Pregnancy Test," *Family Planning Perspectives* Vol. 8 (1976), pp. 192-200.

S. Lipper, et al., "Obsessive-compulsive Neurosis after Viewing the Fetus during Therapeutic Abortion," *American Journal of Psychotherapy* Vol. 30 (1976), pp. 666-674.

E. Greenglass, "Therapeutic Abortion and Psychiatric Disturbance in Canadian Women," *Canadian Psychiatric Association Journal* Vol. 21 (1976) pp. 45-460.

L. Jacobsen, L. Perriss, and M. Esquall, "Personality Patterns in Induced Abortion," in R. Kalmar, *Abortion: The Emotional Implications* (Dubuque, Iowa: Kendall Hunt, 1977), pp. 5-16.

I. Kent, "Emotional Sequelae of Therapeutic Abortion," Presented at 27th Annual Meeting of the Canadian Psychiatric Association, Saskatoon, September 1977.

F. Burkle, "A Developmental Approach to Post Partum Abortion Depression," *Practitioner* Vol, 218 (1977), pp. 217-225.

M. Bracken, "A causal Model of Psychosomatic Reactions to Vacuum Aspiration," *Social Psychiatry* Vol. 13 (1978) pp. 135-145.

M. Blumenfield, "Psychological Factors Involved in Request for Elective Abortion," *Journal of Clinical Psychiatry* Vol. 39 (1978), pp. 17-25.

J. Spaulding and J. Cavenar, "Psychoses Following Therapeutic Abortion," *American Journal of Psychiatry* Vol, 135 (1978), pp. 364-365.

J. Cavenar, A. Maltbie, and J. Sullivan, "Psychiatric Sequelae of Therapeutic Abortion," *North Carolina Medical Journal* Vol. 39 (1978), pp. 101-104.

J. Cavenar, "Aftermath of Abortion: Anniverary Depressions and Abdominal Pain," *Bulletin of Menninger Clinic* Vol. 42 (1978), pp. 433-438.

C. Brewer, "Induced Abortion after Feeling Fetal Movements: Its causes and Emotional Consequences," *Journal of Biological and Social Sciences* Vol. 10 (1978), pp. 203-208.

H. Fisher, "Abortion: Pain or Pleasure?" in D. Mall and W. Watts eds., *The Psychological Aspects of Abortion* (Washington, D.C.: University Publications of America, 1979), pp. 39-52.

L. Shusterman, "Predicting the Psychological Consequences of Abortion," *Social Science and Medicine* Vol. 13A (1979), pp. 683-689.

J. Cavenar, A. Maltbie, and J. Sullivan, "Psychiatric Sequelae of Therapeutic Abortion," *North Carolina Medical Journal* Vol. 39 (1978), pp. 101-104.

M. Liebman and J. Zimmer, "The Psychological Sequelae of Abortion: Fact and Fallacy," in D. Mall and W. Watts Eds., *The Psychological Aspects of Abortion* (Washington, D.C.: University Publications of America, 1979), pp. 127-138.

E. Payne, et al., "Outcome Following Therapeutic Abortion," *Archives of General Psychiatry* Vol. 33 (1976), pp. 725-733.

H. David, N. Rasmussen and E. Holst, "Postpartum and Postabortion Psychotic Reactions," *Family Planning Perspectives* Vol. 13 (1981), pp. 88-91.

P. Shaw, C. Funderburk, and B. Franklin, "An Investigation of the Abortion Decision Process," *Psychology: A Quarterly Journal of Human Behavior* Vol. 16 (1979), pp. 11-19.

J. Handy, "Psychological and Social Aspects of Induced Abortion," *British Journal of Clinical Psychology* Vol. 22 (1982), pp. 29-41.

J. Smetana, "Reasoning in the Personal and Moral Domains: Adolescent and Young Adult Women's Decision-making Regarding Abortion," *Journal of Applied Developmental Psychology* Vol. 2 (1981), pp. 211-226.

E. George, "An Empirical Study of Medical Termination of Pregnancy." *Psychological Studies* Vol. 25 (1980), pp. 118-121.

D. Moseley et al., "Psychological Factors that Predict Reaction to Abortion," *Journal of Clinical Psychology* Vol. 37 (1981), pp. 276-279.

E. Hunter, "The Role of Fantasies About the Fetus in Abortion Patients: An Adaptive Process," *Dissertation Abstracts International* Vol. 41, 1-B (1980), pp. 353-354.

N. Adler, "Abortion: A Social Psychological Perspective," *Journal of Social Issues* Vol. 35 (1979), pp. 100-110.

E. Freeman, "Abortion: Subjective Attitudes and Feelings," *Family Planning Perspectives* Vol. 10 (1978), pp. 150-155.

D. Williams and J. Ventimiglia, "Abortion or Birth? Discriminators in Problem Pregnancy Decisions," *Sociological Spectrums* Vol. 1 (1981), pp. 115-133.

E. Freeman, et al., "Emotional Distress Patterns Among Women Having First or Repeat Abortions," *Obstetrics and Gynecology* Vol. 55 (1980), pp. 630-636.

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*. A.P.A., Washington, D.C., 1980 pp. 236-238.

M. Zelnik and J. Kantner, "Attitudes of American Teenagers Toward Abortion," *Family Planning Perspectives*, Vol. 7

(1975), pp. 89-91. See also "Forward" by Christopher Tietze in H. David et al., eds. Abortion in Psychosocial Perspective (New York: Springer, 1978), p. vii.

R. Illsey and M. Hall, "Psychosocial Research in abortion: Selected Issues," in H. David et al., eds., *Abortion in Psychosocial Perspective: Trends in Transnational Research* (New York: Springer, 1978), pp. 11-34; G. Walter, "Psychologic and Emotional Consequences of Elective Abortions: A Review," in R. Kalmar ed., *Abortion: The Emotional Implications* (Dubuque: Iowa, Kendall Hunt, 1977), pp. 24-37.

M. Liebman and J. Zimmer, "Psychological Sequelae," p. 131.

R. Illsley and M. Hall, "Psychological Research," op. cit. p. 12.

V. Logrillo, P. Quickenton, G. Therriault, and M. Ellrott, "Effect of Induced Abortion on Subsequent Reproductive Function." Final Report. National Institute of Child Health and Human Development, Contract No. 1-HD-6-2802, April 18, 1980.

M. Sims, "Abortion and the Psychiatrist," *British Medical Journal* Vol. 2 (1963), pp. 145-148.

R. White, "Induced Abortion: A Survey of Their Psychiatric Implications, Complications, and Indications," *Texas Reports in Biology and Medicine* Vol. 24 (1966), pp. 531-535.

C. Pare and R. Hermione, "Follow-up of Patients Referred for Termination of Pregnancy," *Lancet* Vol. 1 (1970) pp. 635-637.

A. Colman and L. Colman, *Pregnancy: The Psychological Experience* (New York: Herder and Herder, 1971).

B. Major and K. Hildebrandt, "Attributions, Expectations, and Coping with Abortion," *Journal of Perspectives in Social Psychology* Vol. 48 (1985), pp. 585-599.

L. Cohen and S. Roth, "Coping with Abortion," *Journal of Human Stress* Vol. 10 (1984), pp. 140-145.

R. Furlong and R. Black, "Pregnancy Termination for Genetic Indications: The Impact of Families," *Social Work Health Care* Vol. 10, pp. 17-34.

C. Bradley, "Abortion in Subsequent Pregnancy," *Canadian Journal of Psychiatry* Vol. 29 (1984), pp. 494-498.

R. Black and R. Furlong, "Impact of Prenatal Diagnosis in Families," *Social Work Health Care* Vol. 9 (1984), pp. 37-50.

J. Lloyd and K. Laurence, "Response to Termination of Pregnancy for Genetic Reasons," *Zeitschrift Fur Kinderchirurgie* Vol. 38 (1983), Supplement II, pp. 98-99.

N. Kaltreider, S. Goldsmith and A. Margolis, "The Impact of Midtrimester Abortion Techniques on Patients and Staff," *American Journal of Obstetrics and Gynecology* Vol. 135 (1979), pp. 235-238.

J. Ashton, "The Psychosocial Outcome of Induced Abortion," *British Journal of Obstetrics and Gynecology* Vol.87 (1980), pp. 1115-1122.

P. Donnai, N. Charles and R. Harris, "Attitudes of Patients After "Genetic" Termination of Pregnancy," *British Journal of Medicine* Vol. 282 (1981), pp. 621-622.

G. Tollefson and M. Garvey, "Conversion Disorder Following Termination of Pregnancy," *Journal of Family Practice* Vol. 16 (1983), pp. 73-77.

R. Kumar and K. Robson, "Previous Induced Abortion and Ante-Natal Depression in Primiparae: Preliminary Report of a Survey of Mental Health in Pregnancy," *Psychological Medicine* Vol. 8 (1978), pp. 711-715.

R. Mester, "Induced Abortion in Psychotherapy," *Psychotherapy and Psychosomatics* Vol. 30 (1978), pp. 98-104.

P. Ney, "A Consideration of Abortion Survivers," *Child Psychiatry in Human Development* Vol. 13 (1983), pp. 168-179.

M. Gerrard, "Sex Guilt in Abortion Patients," *Journal of Consulting and Clinical Psychology* Vol. 45 (1977), p. 708.

M. Baker and K. Quinkert, "Womens Reactions to Reproductive Problems," *Psychological Reports* Vol.53 (1983), pp. 159-166.

J. Robbins, "Out of Wedlock, Abortion and Delivery: The Importance of the Male Partner," *Social Problems* Vol. 31 (1984), pp. 334-350.

W. Cates, "Adolescent Abortions in the United States," *Journal of Adolescent Health Care* Vol. 1 (1980), pp. 18-25.

K. Franco, B. Linder, R. Markovitch and N. Bronner, "Psychological Profile of Dysphoric Women Post-Abortion."

Unpublished research report, Medical College of Ohio, Department of Psychiatry, 1984.

M. Deutsch, "Personality Factors, Self-Concept, and Family Variables Related to First Time and Repeat Abortion-Seeking Behavior in Adolescent Women." Unpublished doctoral dissertation, American University, 1982.

N. Gould, "Postabortion Depressive Reactions in College Women," *Journal of American College Health Association*, Vol. 28 (1980), pp. 316-320.

B. Lask, "Short-term Psychiatric Sequelae to Therapeutic Termination of Pregnancy." *British Journal of Psychiatry*, Vol. 126 (1975), pp. 173-177.

DEFENDANTS' EXHIBIT NO. 69

Petitions

Abortion Notification Statute

Minnesota Statutes § 144.343, Subd. 6,

1981 Supplement

August 1, 1981 to March 1, 1986

Judical District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
1.	7	78	77	1				
2.	1	793	793		1			
3.	11	52	51		3			
4.	1	2314	2311	1	2	1	1	
5.	15	4	1		1			
6.	4	279	278	2				
7.	10	7	5		2			
8.	13	2	2					
9.	17	6	6					
10.	8	38	34	2	2			
	87	3,573	3558	6	9	1	1	

Abortion Notification Statute
Minnesota Statutes § 144.343, Subd. 6,
1981 Supplement
August 1, 1981 to March 1, 1986

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
First Judicial District								
Carver		1		1				
Dakota		62	62					
Goodhue		12	12					
LeSueur		1	1					
McLeod		0						
Scott		0						
Sibley		2	2					
Subtotal		78	77	1				
Second Judicial District								
Ramsey		793	793					
Subtotal		793	793					

J.A. 494

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Third Judicial District								
Dodge		0						
Fillmore		0						
Freeborn		8	8					
Houston		0						
Mower		1			1			
Olmsted		37	37					
Rice		3	3					
Steele		0						
Wabasha		0						
Waseca		0						
Winona		3	3					
Subtotal	11	52	51		1			
Fourth Judicial District								
Hennepin		2314	2311		3			
Subtotal	1	2314	2311		3			

J.A. 495

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Fifth Judicial District								
Blue Earth		0						
Brown		0						
Cottonwood		0						
Faribault		1		1				
Jackson		0						
Lincoln		0						
Lyon		1			1	1	1	
Martin		0						
Murray		0						
Nicollet		0						
Nobles		2	1		1			
Pipestone		0						
Redwood		0						
Rock		0						
Watonwan		0						
Subtotal	15	4	1	1	2	1	1	

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Sixth Judicial District								
Carlton		0						
Cook		0						
Lake		0						
St. Louis		279	278		1			
Subtotal	4	279	278		1			

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Seventh Judicial District								
Becker		0						
Benton		0						
Clay		0						
Douglas		0						
Mille Lacs		1		1				
Morrison		0						
Otter Tail		0						
Stearns		2	1	1				
Todd		4	4					
Wadena		0						
Subtotal	10	7	5	2				

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Eighth Judicial District								
Big Stone		0						
Chippewa		0						
Grant		0						
Kandiyohi		0						
Lac Qui Parle		0						
Meeker		0						
Pope		2	2					
Renville		0						
Stevens		0						
Swift		0						
Traverse		0						
Wilkin		0						
Yellow Medicine		0						
Subtotal	13	2	2					

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Ninth Judicial District								
Aitkin		0						
Beltrami		0						
Cass		1	1					
Clearwater		0						
Crow Wing		1	1					
Hubbard		0						
Itasca		0						
Kittson		0						
Koochiching		3	3					
Lake of the Woods		1	1					
Mahnomen		0						
Marshall		0						
Norman		0						
Pennington		0						
Polk		0						
Red Lake		0						
Roseau		0						
Subtotal	17	6	6					

Judicial District	No. of Counties	No. of Petitions Filed	No. of Petitions Granted	No. of Petitions Withdrawn	No. of Petitions Denied	No. of Petitions Appealed	No. of Petitions Affirmed	No. of Petitions Reversed
Tenth Judicial District								
Anoka		21	19	1	1			
Chisago		0						
Isanti		0						
Kanabec		0						
Pine		0						
Sherburne		3	3					
Washington		13	11	1	1			
Wright		1	1					
Subtotal	8	38	34	2	2			
	87							

DEFENDANTS' EXHIBIT 70

PARTIAL TRANSCRIPT OF REMARKS BY
SENATOR GENE WALDORF DATED 3/24/81

MINNESOTA SENATE COMMITTEE ON HEALTH,
WELFARE AND CORRECTIONS
March 24, 1981

Partial Transcript Remarks
Regarding Senate File 287 (Tape 1, Side A)
by Senator Gene Waldorf, Chief Author

SEN. GENE WALDORF:

Mr. Chairman, I don't want to burden you with more testimony. I think as a parent I'm almost ashamed to admit it after hearing about what we are, but I think it's utter nonsense to assume that even if families where there is good communication that a daughter is going to want to come to her parents and tell her about, and tell them about her problem. It's just nonsense, and everybody that's got kids that age knows it or that remembers they went through that period in time. They don't want their parents to know when they don't live up to what they think their parent's expectations are of them.

Just a week or so ago my daughter, we discovered, had skipped school on St. Pat's Day after she had asked me to allow her to go to the parade and I refused. And she skipped school and she got caught, and she went through a lot of trouble to convince the counselor at school not to tell her parents, because obviously she would be concerned about our reaction and how we might feel about her.

It wasn't any threat to her but I think that indicates what all minors, particularly those with this kind of problem, how they're going to feel. And I don't think that it's safe to assume that all of those who are unwilling to communicate that easily to their parents are in families where the parents are going to abuse them or are insensitive to their problems or will impose some other personal feelings on their children. I know in the

case of my own children that if they had that kind of problem, my primary concern would be them and their well-being and nothing else would take precedence over that. And I think I can speak for an awful lot of parents when I say that. Mr. Chairman, that's my wrapup.

. . .

SEN. GENE WALDORF:

One of the reasons for this bill is to make certain that the minor has good medical information available to—in the event that she has an abortion, that she has the benefits of support from her parents and whatever counseling they can offer. And I think in that case that you would agree that it's—and as most of the professionals have testified, that's an important factor.

DEFENDANTS' EXHIBIT 71

PARTIAL TRANSCRIPT OF REMARKS BY
SENATOR GENE WALDORF DATED 4/7/81

MINNESOTA SENATE COMMITTEE ON HEALTH,
WELFARE AND CORRECTIONS
April 7, 1981

Partial Transcript of Remarks
Regarding Senate File 287 (Tape 1, Side A)
by Senator Gene Waldorf, Chief Author

SENATOR WALDORF:

The reason for the bill is that under current law, common law, first if all, suggests that parents be notified in the case of medical procedures involving their minor children and there have been a number of exceptions, most were put into our statutes in 1971, dealing with specific cases. One of them, which is section 144.343, deals with pregnancy, venereal disease and alcohol or drug abuse. An exception is made there to the requirement of parental consent. That exception has also been implied to mean no requirement for parental notification. I might point out that this language was passed in 1971 as as result of an increase in venereal disease and specifically was not dealing with the abortion question at all because at that point in time abortion was still illegal. It—because of that interpretation of that consent exception, we are trying through Senate File 287 to deal with bringing the parent back into that—into that difficulty and allowing a—the parents of a minor woman to be notified in the event that she asks for an abortion procedure. By Supreme Court we are not allowed to require any kind of consent and I have taken great pains in this bill and with a great deal of very good assistance from our Senate counsel in trying to deal with that issue so that we don't, in the process that we are describing in this bill, inflict some kind of parental consent on the process. I might point out that even though the parents are notified of the requested procedure that the minor is still in control and can make the decision and as a matter of fact does not even—is not

even required in any way to consult with her parents. What I hope to accomplish in this bill is to bring back what I think is loving support for the minor who is faced with a very, very difficult decision, one that I think will stay with her and affect her for the rest of her life. The courts have repeatedly affirmed the importance of parental support for the minor children. I have a number of quotations from the *Quinlan* case and from other cases relating to this. I'll forego those unless the question becomes a discussion point.

DEFENDANTS' EXHIBIT 72

PARTIAL TRANSCRIPT OF REMARKS BY
SENATOR GENE WALDORF DATED 5/6/81

MINNESOTA SENATE SESSION, MAY 6, 1981

Partial Transcript of Remarks
Regarding Senate File 287 (Tape 1, Side A)
by Senator Gene Waldorf, Chief Author

CHAIRMAN:

We're back to Item No. 17 on the General Orders.

The Chair recognizes Senator Waldorf.

SENATOR WALDORF:

Mr. Chairman, members, let me briefly give you the reasons why Senate File 287 is before you. In the Supreme Court decision upholding the Utah statute, the Court restated the long-standing position that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. The guiding role includes counseling them on important decisions. The decisions include the physical, emotional and spiritual health of the child. The parent, if he or she knows about the decision to—of the child to have an abortion—can supply medical history to insure an informed decision on the part of the minor and include the moral implications of the decision. Neither the doctor or other professionals involved in providing abortions can give that support. Mr. Chairman and members, when we heard this bill in committee we had a great deal of testimony about the role of the parents and, unfortunately, a good deal of that testimony came from professionals who are dealing with minors on this very issue and counseling them on whether or not they should consider abortion as a viable option. The unfortunate thing about all of the testimony running through those professionals' presentations was that they—that they demean the role that the parents are taking today in counseling their own children. They suggested

that parents are abusive to their children. They suggested that parents don't accept their responsibility towards their children. That they don't communicate with them and that they have abrogated their role. I as one parent object to the fact that my own daughters, if they were to seek counseling on a matter as serious as abortion, might be, that my role as a parent in counseling them would be demeaned by those professionals and that I wouldn't have equal opportunity to provide counseling and love and care and concern for my own daughters. I think all of us recognize, and as well as the Court, that those who are in the situation at that age, 17 and under, have an awful lot of pressure on them that they can't deal with very well. The Supreme Court in the Utah decision again asserted by saying that there is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion.

(13)

FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CROSS-PETITIONERS

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Chief Deputy
Attorney General
CATHARINE F. HAUKEDAHL
Solicitor General

KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
525 Park Street, Suite 500
St. Paul, Minnesota 55103
Telephone: (612) 297-2040
Counsel for Cross-Petitioners

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

92 pp

QUESTION PRESENTED

May a state constitutionally require a physician to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion upon their daughter?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceeding.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties To The Proceedings	i
Table Of Contents	iii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Statutory Provisions Involved	2
Statement Of The Case	3
I. The Statute	3
II. Procedural History	5
III. Facts	8
A. The Parental Notification Requirement Generally	8
B. The Alleged "Burden" of Parental Notification	9
C. The Need for and Effectiveness of Parental Notification	12
D. The Requirement That Both Parents Be Notified	16
E. The 48-Hour Length of the Parental Notification Requirement	17
Summary of Argument	20
Argument	21
I. The Court Of Appeals Erred In Holding That Minnesota May Not Require Pre-Abortion Notice To The Parents Of Minors Without Providing An Alternative Court Bypass Procedure	21
A. No Prior Holding Of This Court Precludes A Requirement That A Physician Provide Reasonable Pre-Abortion Notice To The Parents Of An Unemancipated Minor	21

Page

B. The Minnesota Notice Law Constitutes A Legitimate Balance Among The Several Rights And Interests Of Society, Parents And Minors 22
1. The Right to Obtain an Abortion May Be Tempered by Legitimate State Interests, Particularly Those of Constitutional Dimension 22
2. The State's Interest in Parental Involvement in Their Children's Welfare Is Well-Established and Constitutionally Based .. 24
3. A Parental Notice Requirement Strikes a Permissible Balance Between the Interest in Parental Involvement and the Right to Abortion 27
C. The Minnesota Notice Statute Furthers The Important Interest In Parental Involvement . 34
D. The Minnesota Notice Law Does Not Unduly Burden The Abortion Decision Of Minors ... 37
1. Mere Notice Is Not The Equivalent of Consent 37
2. The Direct Burdens Imposed By the Statute Are Not Substantial 39
3. The Indirect "Burdens" Of Notice Are Not Sufficient To Overcome The Legitimate Purposes Of The Statute 41
E. The Two-Parent Aspect Of The Notice Requirement Is Not Unduly Burdensome 43
F. Mandatory Employment Of A Bypass Procedure Impairs The Legitimate Goals Of The Notice Requirement 45
Conclusion 48

TABLE OF AUTHORITIES

Minnesota Statutes: Page
Minn. Stat. § 144.343 (1988) ... 2, 3, 4, 5, 6, 8, 38, 39, 44, 48
Minn. Stat. § 260.133-.161 (1988) 2, 42
Minn. Stat. § 626.556 (1988) 2, 3, 42

Federal Decisions:
Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 6, 22, 23, 24
Bellotti v. Baird, 443 U.S. 622 (1979) ... 6, 7, 22, 27, 28, 29, 30, 31, 35, 41
Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941) 25
H. L. v. Matheson, 450 U.S. 398 (1981) 4, 7, 22, 23, 28, 29, 30, 31, 36, 39
Harris v. McRae, 448 U.S. 297 (1980) 23, 24
Hartigan v. Zbaraz, 484 U.S. 171 (1987) 7, 8
Maher v. Roe, 432 U.S. 464 (1977) 23, 24
Parham v. J.R., 442 U.S. 584 (1979) 27, 42
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 26
Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983) 7, 28
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) ... 6, 22, 23, 28, 29, 30, 31, 33, 37
Prince v. Massachusetts, 321 U.S. 158 (1944) 21, 25
Roe v. Wade, 410 U.S. 113 (1973) ... 20, 22, 23, 24, 26, 28, 31, 32

Page

Stanley v. Illinois,
405 U.S. 645 (1972) 24, 26, 45
Thornburgh v. American College of Obstetricians
and Gynecologists, 476 U.S. 747 (1986) 31
Webster v. Reproductive Health Services,
—— U.S. ——, 109 S.Ct. 3040, 57 U.S.L.W. 5023
(July 3, 1989) 23, 24, 37
Wisconsin v. Yoder,
406 U.S. 205 (1972) 21, 26

Minnesota Decisions:
Clark v. Clark, 346 N.W.2d 383
(Minn. Ct. App. 1984) 44

Decisions of Other Jurisdictions:
In re Marriage of McGee, 613 P.2d 348
(Colo. Ct. App. 1980) 44
Marciano v. Marciano, 56 A.D.2d 735,
392 N.Y.S.2d 747 (App. Div. 1977) 44
Moss v. Rishworth, 222 S.W. 225
(Tex. Comm'n App. 1920) 25
Spotts v. Spotts,
197 N.W.2d 370 (Iowa 1972) 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NO. 88-1309

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CROSS-PETITIONERS

OPINIONS BELOW

The opinions below are set forth at pp. 10a-52a and 74a-109a of the Appendix filed with the *Hodgson, et al.* petition for certiorari in case No. 88-1125, which has been consolidated with this case. Hereinafter that appendix will be called "Hodgson Appendix."

The opinion of the district court is reported at 648 F. Supp. 756 (D. Minn. 1986).

The *en banc* opinion of the United States Court of Appeals for the Eighth Circuit is reported at 853 F.2d 1452 (8th Cir. 1988).

JURISDICTION

Jurisdiction has been asserted in *Hodgson, et al. v. State of Minnesota, et al.*, S. Ct. No. 88-1125, pursuant to 28 U.S.C. § 1254(1). Jurisdiction over this cross-petition is also proper pursuant to that section.

Cross-petitioners received copies of the Petition for Certiorari in *Hodgson v. State* on January 6, 1989. Pursuant to Rule 19.5 of this Court, this cross-petition was timely filed within 30 days after receipt of the petition for certiorari.

STATUTORY PROVISIONS INVOLVED

STATE LAWS

Minnesota Statutes § 144.343 (1988)

Minnesota Statutes §§ 260.133-.161 (1988)

Minnesota Statutes § 626.556 (1988)

(The text of these statutes is reprinted in the Appendix to this brief at A.1-A.38.)

STATEMENT OF THE CASE

I. The Statute.

In 1981 the legislature of the State of Minnesota enacted Act of May 19, 1981, ch. 228, Minn. Laws 1011, the so-called parental notification law, which is codified as subdivisions 2 through 7 of Minn. Stat. § 144.343 (1988) (A.1-A.4). Section 144.343 generally relieves minors of the requirement of parental consent for health services relating to alcohol and other drug abuse, venereal disease, and conditions associated with pregnancy, including abortion operations. With respect to abortions, however, the statute requires that parents receive prior notice of the impending abortion.

The notification requirement is contained in subdivision 2 of the statute which generally provides that physicians or their agents must attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion. Subdivision 4 provides that parental notice is not required when the parents have consented to the abortion, when prompt action is needed to preserve the life of the pregnant minor or when the minor reports that she is a victim of sexual abuse, neglect or physical abuse as defined in Minn. Stat. § 626.556 (1988).[1]

After providing for parental notification as described above, the Minnesota statute goes on to provide for an alternative to the notification requirement in the event that it were ever found to be unenforceable. Specifically, subdivision 6 of the statute provides that if subdivision 2 is ever enjoined by judicial order, then the same parental notice requirement shall

---

[1] While the statute also provides for notice to the guardian or conservator of a woman who has been found incompetent by a court, this aspect of the statute was not challenged by plaintiffs or addressed by the courts below.

be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to her parents upon a showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents would nevertheless be in her best interest. Section 144.343, subd. 6.

While Minn. Stat. § 144.343, subd. 2, does not contain an express statement of its purposes, its primary purposes are apparent from its language. These include the recognition and fostering of parent-child relationships, promoting counsel to a child in a difficult and traumatic choice, and providing for notice to those who are naturally most concerned for the child's welfare.[2]

---

[2] These were among the goals of the author of the bill, Senator Waldorf, who when presenting the bill for the full Senate stated his reasons for the act, endorsing much of what was said by this Court in addressing a similar parental notification statute in *H. L. v. Matheson*, 450 U.S. 398 (1981). Among his reasons were the "longstanding position that the custody, care and nurture of the child reside first in the parents whose . . . guiding role includes counseling them on important decisions. These decisions include physical, emotional and spiritual health of the child. The parent, if he or she knows, can supply medical history, ensure an informed decision on the part of the minor and include the moral implications of the decision." Defendant's Exhibits (hereinafter "D. Exh.") 70-72, reprinted in the consolidated Joint Appendix (J.A.) at 502-07. The district court expressly found that "[t]he primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies." Finding 58, Hodgson Appendix 24a-25a. The court also found that a desire to dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Finding 59, Hodgson Appendix 25a. This finding was based on no more than the testimony before a legislative committee of some supporters of the act who hoped it "would save lives." There is no direct evidence, however, that this was the motive of any legislator.

II. Procedural History.

The parental notification statute was to become effective August 1, 1981. On July 30, 1981 a number of minors desiring to represent a class of minors seeking abortions who claimed to be mature, a parent of such a minor, and four clinics and two physicians who perform abortions commenced an action in the district court seeking a declaratory judgment and an injunction. Named as defendants were the State of Minnesota, its Governor, and its Attorney General.[3]

Plaintiffs raised four claims against Minn. Stat. § 144.343, subds. 2-7. First, plaintiffs alleged that the statute violates due process, both on its face and as applied. Second, plaintiffs challenged the statute on equal protection grounds. Third, plaintiffs asserted that the statute, as applied to estranged families, violates due process and first amendment rights of custodial parents by effectively compelling communications between the custodial parent and the absent, noncustodial parent. Finally, plaintiffs claimed that the statute violates the due process, privacy and equal protection provisions of Article I of the Minnesota Constitution and that the judicial bypass procedure constitutes a delegation of administrative power to Minnesota courts in violation of Article III of the Minnesota Constitution. Amended Complaint, ¶¶ 50-54, J.A. at 47-50.

On July 31, 1981, the district court temporarily restrained enforcement of subdivision 2 of the statute but denied plaintiffs' motion for an order temporarily restraining enforcement of subdivision 6. Thereafter on March 2, 1982, the district court preliminarily enjoined subdivision 2. By virtue

---

[3] The parties will be referred to with reference to their posture at trial. Cross-petitioners will be referred to as "defendants" and the respondents as "plaintiffs."

of these two rulings, the judicial bypass procedure of subdivision 6 went into effect on August 1, 1981.

On January 23, 1985, the district court granted in part and denied in part defendants' motion for summary judgment as to plaintiffs' claims concerning the judicial bypass procedure of subdivision 6. Specifically, the district court granted summary judgment in defendants' favor concerning the judicial bypass procedure with respect to plaintiffs' state constitutional claims, equal protection claims, and facial due process claim and ordered all such claims dismissed. The district court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that the judicial bypass procedure was being unconstitutionally applied in violation of due process guarantees. Hodgson Appendix 146a-157a.

Plaintiffs' remaining claims were tried to the district court between February 10 and March 13, 1986.

The district court issued its findings of fact, conclusions of law and final order on November 6, 1986. The district court declared Minn. Stat. § 144.343, subds. 2-7, unconstitutional and permanently enjoined defendants from enforcing any of its provisions.

In concluding that the parental notification requirement of subdivision 2 was unconstitutional, standing alone, the district court cited three decisions of this Court dealing with parental consent statutes[4] and summarily concluded that "[a] State choosing to encourage parental involvement in their minor child's decision to have an abortion must provide an alternative procedure through which a minor may demonstrate that

[4] *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

she is mature enough to make her own decision or that the abortion is in her best interests" (Hodgson Appendix at 37a), and that "[a] statute that fails to provide such an alternative to a consent or notification requirement imposes an undue burden upon the exercise by minors of the right to seek an abortion." *Id.* at 38a.

With respect to the alternative judicial bypass procedure, the district court concluded that Minnesota's statute complies both on its face and in actual practice with the principles set forth by the Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), *H. L. v. Matheson*, 450 U.S. 398 (1981), and *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) and that plaintiffs' challenge to the statute as a whole must accordingly be rejected. Hodgson Appendix at 45a. The court nevertheless then proceeded to enjoin the statute as a whole upon determining that two features of the notice element of the notice/bypass system (the 48-hour waiting period and the two-parent notice requirement) were unduly burdensome and hence unconstitutional. *Id.* at 45a-49a. The court concluded that the 48-hour waiting period could be severed from the remainder of the statute but that the two-parent notification requirement could not. Based upon this determination of non-severability, the district court then concluded that it must enjoin the statute in its entirety. *Id.* at 50a-51a.

On August 27, 1987, a panel of the Eighth Circuit affirmed the district court's decision. On November 13, 1987, the panel granted defendants' request for rehearing by the panel, vacated and withdrew its prior opinion, held any further decision in abeyance pending a decision by this Court in *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), and denied rehearing *en banc* as moot.

After an equally divided Supreme Court affirmed the decision of the Seventh Circuit without opinion in the *Zbaraz* case, the Eighth Circuit granted defendants' request for *en banc* review. The *en banc* opinion was issued August 8, 1988.

In its *en banc* opinion, the court of appeals held that the prior decisions of this Court required a determination that a judicial bypass procedure is constitutionally required as an alternative to a parental notification law and affirmed the district court to the extent that the district court had declared unconstitutional and enjoined enforcement of the Minnesota parental notification requirements standing alone. The court of appeals, however, reversed the district court in part by holding that Minnesota's parental notification law with the judicial bypass procedure in place is constitutional.

On January 5, 1989, plaintiffs filed a petition for certiorari seeking review of the circuit court decision insofar as it upholds the notice/bypass version of the statute. Case No. 88-1125. Pursuant to Rule 19.5, the defendants thereafter filed a cross-petition for certiorari seeking review of the circuit court decision declaring unconstitutional the notice requirement without a court bypass. Case No. 88-1309. This brief addresses only the issues pertinent to the cross-petition.

III. Facts.

A. The Parental Notification Requirement Generally.

The statutory requirement of parental notification contained in Minn. Stat. § 144.343, subd. 2, was intended to serve the state's substantial and legitimate interest in the family-based child-rearing process and in protecting the well-being of minors in connection with the consequences of a decision to have an abortion by enabling parents to offer support and

guidance in helping their daughter to make an informed decision regarding her unintended pregnancy without imposing a parental veto on that decision. D. Exh. 70-72, J.A. at 502-07.

Plaintiffs at trial brought on numerous lay and expert witnesses in support of their challenge to the parental notification requirement. The testimony critical of the parental notification requirement falls into two broad categories: (1) testimony concerning various burdens allegedly imposed upon pregnant minors by the parental notification requirement, and (2) testimony questioning both the necessity and the effectiveness of the parental notification requirement in actually furthering the statutory purpose of promoting the well-being of minors confronted with an unintended pregnancy and the decision of whether or not to terminate that pregnancy.

B. The Alleged "Burden" of Parental Notification.

Much of plaintiffs' evidence concerning the alleged burdens of the parental notification requirement relates to the incidence and prevalence of "dysfunctional" families and intra-familial violence in the United States generally. According to one of plaintiffs' experts, a "normal" family is one in which there is functioning communication and a reasonable amount of trust. J.A. at 252. By contrast, a "dysfunctional family," as defined by plaintiffs' experts, does not cope effectively with daily stresses and woes of its members and communication is impaired. J.A. at 250, 251. Members of a dysfunctional family may engage in family violence, and studies indicate that violence occurs in two million families in the United States. J.A. at 188-90, 198, 199. There are some minors in Minnesota who fear violence from family members. J.A. at 116-17, 161, 203-04. In addition, it appears that a very small minority of pregnant minors in Minnesota wish to

avoid telling one or both of their parents about their intended abortion because of fear of physical abuse.[5]

The State's witnesses did not dispute that there exist dysfunctional families in which there is violence or abuse or that there are minors in Minnesota who are victims of violence or who fear violence. Nevertheless, although parents of several thousand minors were notified of their daughters' decision to have an abortion pursuant to the statutory requirement from August 1, 1981, to March 1, 1986,[6] the record fails to reveal a single instance in which any such minor has suffered any violence as a consequence of the notification.

A small minority of Minnesota minors have sought to avoid notifying their parents of the abortion on the basis of an apprehension that their parents would somehow prevent the abortion from occurring.[7] Once again, however, of the several

---

[5] Of 258 minors appearing before Ramsey County Judge Peterson in judicial bypass hearings in the period from August 1, 1981, through November 30, 1982, four percent indicated that they did not wish to notify their parents about their abortion because of fear that prior physical abuse would recur. Plaintiffs' Exhibit (P. Exh.) 21, J.A. at 381-82.

[6] During this period 3,573 by-pass petitions were filed in Minnesota courts. D. Exh. 69. J.A. at 493. Both Dr. Hodgson, J.A. at 460, and Paula Wendt, the co-director of Meadowbrook Women's Clinic, J.A. at 123, testified that only about one-half of their minor patients choose the court bypass option. The actual figures offered by Wendt disclose that only 40 percent of Meadowbrook minors have chosen the court option. J.A. at 123. Since very few minors have been excused under the emancipation or abuse/neglect exceptions, it is reasonable to conclude that the number of minors who have notified their parents is at least equal to the number that sought court dispensation. *See also* Opinion of the Circuit Court at Hodgson Appendix 83a n.9.

[7] Of the 258 minors appearing before Juvenile Court Judge Peterson in judicial bypass proceedings for the period August 1, 1981, to November 30, 1982, five percent expressed such a fear. P. Exh. 21, J.A. at 381.

thousand pregnant minors who have notified both parents pursuant to the statutory requirements since August 1, 1981, the record fails to reveal a single instance of parental prevention of an abortion.

Plaintiffs also presented evidence of the claims of various minors made to counselors, health care providers and judges that notification to their parents would result in various other consequences perceived by the minors as unpleasant. The reasons claimed by minors for not wishing to make their parents aware of their pregnancy and abortion decision are numerous and include fear of disapproval and hostility, punishment, interference with her relationship with her boyfriend, upsetting a seriously ill parent and generally damaging the parent-child relationship. *See, e.g.*, J.A. at 114-15, 460. P. Exh. 21, J.A. at 381-82.

It appears, however, that a common, if not the most common, reason for the minor's desire to avoid parental notification is a general fear of damaging her relationship with her parents. P. Exh. 21, J.A. at 381-82. This is so even in good, functional families. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing] to ruin a good relationship." J.A. at 114. Similarly, Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a matter of love for their parents and they don't want to spoil the relationship that they have with their parents." J.A. at 460.

Moreover, as testified by a number of witnesses, including Dr. Hodgson, adolescents often misapprehend their parents' likely actions in response to their decision to obtain an abortion. J.A. at 178, 336, 358-60, 473. Dr. Hodgson likewise agreed with defendants' experts that notwithstanding the ap-

prehensions of pregnant minors, parents are generally supportive in helping a minor deal with an unintended pregnancy. J.A. at 355-60, 473, P. Exh. 92 (Hodgson Depo.) at 187.

C. The Need for and Effectiveness of Parental Notification.

In addition to plaintiffs' evidence concerning the alleged burdens involved in the parental notification requirement, a number of plaintiffs' expert witnesses also presented theories challenging the need for and the effectiveness of the statutory notification requirement in promoting the state's goals of protecting the well-being of minors in connection with the consequences of a decision to have an abortion.

With respect to the necessity of parental notification, plaintiffs' psychological expert Gary Melton testified that in his view the maximum level of intellectual ability is reached by age 14 and that by all available measures of competency, minors are indistinguishable from adults in their capacity to make personal decisions. J.A. at 256-61. More particularly, in his opinion, minors are as competent as adults to make reproductive decisions, including whether or not to terminate a pregnancy and there is no empirical basis for distinguishing between competency to choose to abort and competency to choose to carry to term or to obtain prenatal medical care. J.A. at 262, 263, 268. This same psychological expert, however, also testified that "capacity" to give informed consent to a particular medical procedure is unrelated to maturity, quantity of life experience, overall reasoning ability or even mental health. J.A. at 261-62, T. 1180-81.[8] *See also* T. 959. Moreover, certain of plaintiffs' witnesses also indicated that, in their view a minor's desire to have an abortion, particularly

[8] Page references preceded by "T." are to portions of the trial transcript not contained in the Joint Appendix.

without notifying her parents was, in itself, a demonstration of maturity. *See* finding 65, Hodgson Appendix 27a-28a, and testimony of Jane Hodgson, J.A. at 475.

With respect to the effectiveness of a parental notification requirement, a number of plaintiffs' psychological and health care witnesses questioned the proposition that a parental notification requirement would promote family communication or aid minors in their abortion decision-making. For example, plaintiffs' psychological expert, Dr. Melton, observed that laws mandating parental notice "are not necessarily going to result in [a minor's] more reasoned decisionmaking." J.A. at 267. Another of plaintiffs' experts in the field of communication patterns within violent families similarly testified that there is no clinical or research data which suggests that forced parental notification in abusive, dysfunctional families would have a positive effect on family communication. J.A. at 198. *See also* J.A. at 476.

However, as a number of plaintiffs' experts themselves recognize, an unplanned pregnancy is an extremely traumatic event for a minor and subjects her to extreme psychological stress. J.A. at 141, 304, 472. In this regard, plaintiffs' experts appear to agree in substantial measure with the testimony of defendants' expert Dr. Vincent Rue. Based upon his clinical experience in providing therapy to pregnant minors, Dr. Rue testified that such minors are psychologically vulnerable when dealing with an unintended pregnancy. Dr. Rue further testified that such vulnerability can result in irrational and emotional decisionmaking. J.A. at 360.

For those minors who choose abortion, distinct medical and psychological risks are posed. Although abortion is a relatively safe medical procedure, there is at least a remote risk of death. J.A. at 351-52, P. Exh. 54, p. 40. In addition, the risks of abor-

tion include hemorrhage, infection, perforation of the uterus, cervical damage and possible future infertility. J.A. at 352-53. As Dr. Hodgson has herself recognized, adolescents tend to have higher infection rates after abortion than adults because they tend to delay post-abortion care and ignore complications. J.A. at 446. It has also been the experience of the plaintiff abortion clinics that some minors are unable to take responsibility for their post-abortion care without adult supervision, and many do not return to the clinic for after-care. J.A. at 111-12, 148-49, 211. As further noted by defendants' witness, Dr. Richard Schmidt, minors whose parents have not been notified often tend to minimize and delay treatment of complications appearing after an abortion. J.A. at 353-55. Parental notification can thus in many cases serve the important function of assisting in the prompt recognition of post-abortion complications and in providing adult supervision for proper post-abortion care. In addition, parents may in some cases be aware of aspects of a minor's medical history of which the minor herself is not aware. J.A. at 353.

A minor who chooses to resolve an unwanted pregnancy through abortion is also at psychological risk. As plaintiff Meadowbrook's co-director Paula Wendt testified based upon her substantial experience in counseling abortion patients, it is not uncommon for young women to feel depressed after an abortion, and for some this feeling of depression is not a trivial phenomenon. J.A. at 148, P. Exh. 69, J.A. at 424-25. The adverse psychological consequences of abortion may also include guilt, hostility, sadness, remorse, insomnia, eating disorders, relationship difficulties, anniversary reactions and even suicide attempts. J.A. at 361-63. These adverse consequences, although not common in their more severe form, are well documented in the professional literature. J.A. at 362-63,

D. Exh. 68, J.A. at 486-92.[9] Dr. Steven Butzer, one of plaintiffs' psychiatric experts, testified that he has provided psychiatric therapy to a number of adolescent patients for post-abortion mental health problems. J.A. at 304.

Because of the danger of such adverse psychological sequelae, parental involvement and consultation may serve to support the psychological well-being of the pregnant minor, whether or not she chooses to abort. Indeed, the lack of parental involvement in the minor's abortion decision may itself exacerbate the problem by insulating and isolating the minor and creating considerable guilt, depression, remorse, sadness, both immediately and in the future. T. at 2270-74.

Moreover, adolescents often misapprehend their parents' reaction to their decision to obtain an abortion, and parental guidance in dealing with an unintended pregnancy can be helpful to the minor even though she may not initially seek out such guidance. J.A. at 178-79, 305, 355-56, 359, 472-73.

Although abortion providers generally counsel their patients concerning options in resolving an unintended pregnancy, there is no assurance that such counseling will be performed by trained and experienced persons. For example, two "teen advocates" of the Midwest Health Center for Women have performed abortion counseling when only 17 years old and while relatively untrained and inexperienced. J.A. at 213, 222-23, 227-29.

---

[9] Dr. David, one of the plaintiffs' several expert witnesses, testified that women age 16 and under are very likely to find abortion more stressful than older women and that even 17-year-old women may also encounter greater stress than older women depending on the individual and her family situation. J.A. at 377. Dr. David also pointed out that adolescents in the United States are more at risk for adverse psychological sequelae than adolescents in some other countries, e.g., Denmark, where abortion is less controversial or likely to engender feelings of guilt. J.A. at 376.

In light of the totality of evidence concerning the need for or the utility of a parental notification requirement, the district court specifically found that:

> Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure.

District court finding 58, Hodgson Appendix 24a-25a.

D. The Requirement That Both Parents Be Notified.

Plaintiffs also criticized the parental notification law to the extent that it requires that *both* parents be notified. Plaintiffs' evidence in this regard falls into three categories: (1) evidence concerning the prevalence of divorce in the United States and in Minnesota, J.A. at 125-26, T. at 996-97; (2) opinion testimony that in "dysfunctional" families, involvement of a non-custodial parent can sometimes produce unwanted or disappointing consequences to the custodial parent and the minor, J.A. at 127-29, 131-32, 167-68, 251; and (3) opinion testimony that where a minor has already voluntarily notified a single parent, notification of the second parent serves little purpose. T. at 927. However, plaintiffs' expert Dr. Elissa Benedek testified that in cases not involving abuse, it is important for a child to maintain a relationship with the non-custodial parent. J.A. at 254.

Defendants' expert Dr. Rue also testified as to his clinical experience in providing psychotherapy to minors confronted with problem pregnancies. Dr. Rue has encouraged his pregnant minor patients to involve the non-custodial parent and when such advice has been followed, he has observed a subsequent improvement in the relationship between the child and the non-custodial parent. J.A. at 368-69.

E. The 48-Hour Length of the Parental Notification Requirement.

Minors who elect to have their parents notified by written notice must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mail notice occurs at noon on the regular mail delivery date following mailing. Thus the effective length of the statutory parental notice requirement may in many instances be 72 hours.

It is undisputed that all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age and that a second trimester abortion is statistically somewhat more risky and is in fact more expensive than a first trimester procedure. There is no evidence in the record, however, that a delay of 48 or 72 hours is medically significant. Plaintiff Meadowbrook's co-director Paula Wendt and Dr. Horowitz, an experienced abortion practitioner and co-owner of Meadowbrook, each testified that there is no significant increased risk of medical complication from week to week within the first trimester and that delays of up to one and one-half weeks within the first trimester do not generally increase the risk of medical complication. J.A. at 146-48, 370-73. Presumably based upon such testimony, the district court specifically found that although delay of any length in performing an abortion increases the statistical risk of mortality and morbidity, "[t]he increase in risk becomes statistically significant when the length of delay reaches one week." District court finding 53, Hodgson Appendix 23a.

With respect to the actual operation of the 48-hour waiting period, the district court found that:

> This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of delay may reach a week or more.

District court finding 52, Hodgson Appendix 22a-23a. The court's finding regarding possible delays of a week or more appears to be based upon facts relating to the relative inaccessibility of abortion services in Minnesota. District court findings 22-26, Hodgson Appendix 14a-15a. It is not otherwise apparent from the record, however, how these logistical difficulties would cause the 48-hour notice requirement to result in delays of a week or more. Typically, when a pregnant minor telephones an abortion clinic to arrange an abortion, the operation, in the absence of unusual medical circumstances, is not scheduled to occur sooner than 48 or 72 hours hence. J.A. at 146-48, 370-71. Opinion of the Circuit Court, Hodgson Appendix 97a. Accordingly, in such typical cases it does not appear from the record how the fulfillment of the 48-hour parental notice requirement delays the abortion operation at all.[10]

In any event, the record fails to establish a single instance in which any delay associated with the length of the parental notification requirement has resulted in medical complication.

---

[10] For example, the telephone training manual of Meadowbrook Clinic indicates that if a pregnant minor calls on a Monday and reveals that she wishes to comply with the statute by mailed parent notification, the notification is mailed on that same day and the abortion may be scheduled as soon as Thursday. *See* P. Exh. 70A, at p. 4, J.A. at 433.

Public health data collected, maintained and published by the Minnesota Department of Health likewise fail to reveal any significant increase in medical complications among the population of minors undergoing abortions since August 1, 1981. J.A. at 347-48. Moreover, those data record no increase in the average gestational age of minors obtaining abortions in Minnesota or significant change in the proportions of minors receiving second trimester abortions in Minnesota since August 1, 1981. J.A. at 346-49, P. Exh. 122, J.A. at 477, D. Exh. 35, J.A. at 481.

The district court further acknowledged that "[s]ome period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors" and that "[a] waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved." District court finding 73, Hodgson Appendix 32a. The district court also found, however, that:

> The interest effectuated by the State's 48-hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

District court finding 74, Hodgson Appendix 32a. The district court does not otherwise explain the basis of this finding, and defendants are unaware of any evidence in the record to support it.

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals declared that Minnesota's parental notice requirement could not stand absent availability of a court-bypass alternative. However, no prior holding of this Court and certainly nothing in the Constitution requires that parents be kept ignorant of such a critical juncture of their child's life as pregnancy and abortion.

The right to choose whether to have an abortion first recognized in *Roe v. Wade*, 410 U.S. 113 (1973), is not absolute but must be weighed against other important public interests. In this case the other interests are fundamental ones of far longer standing than is *Roe v. Wade, i.e.*, that the presumptive right and duty to raise children and be involved in their lives and decisions rightfully belongs to parents rather than "experts" or government agents.

The Court has in the past balanced these rights and interests by declaring that the interest in parental child rearing is not sufficiently strong to permit parents an absolute veto over their daughter's abortion decision. However, the Minnesota notice statute affords no one a veto. It merely requires that parents be informed. Clearly the great interest in parental child rearing is sufficient to overcome the markedly lesser burden of timely notice. To hold otherwise is to permit, in the name of the right to abortion, an absolute veto over the rights and interests of parents and society in parental child rearing.

The record in this case presents nothing to justify the reversal of the longstanding presumption in favor of parental involvement. Nor does it identify a single individual minor who was physically abused, suffered medical complications or was prevented from having an abortion as a result of application of Minnesota's notice/bypass law. Thus, it is submitted that the Court should strike a balance among the various rights

and interests by permitting parents the most basic, and least intrusive tool of the parenting function, knowledge.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT MINNESOTA MAY NOT REQUIRE PRE-ABORTION NOTICE TO THE PARENTS OF MINORS WITHOUT PROVIDING AN ALTERNATIVE COURT BYPASS PROCEDURE.

The issue raised by the defendants in this case is one of great importance: whether parents, in whom has always resided the duty of care and nurture, including "the inculcation of moral standards, religious beliefs, and elements of good citizenship,"[11] may be accorded any role whatever in, or even knowledge of, one of the most difficult and potentially far reaching series of events in the life of their young daughter—the discovery of unintended pregnancy, the decision whether to have an abortion, the implementation of that decision and requisite aftercare. Nothing in the Constitution suggests, let alone compels, abandonment, in the singular case of abortion, of the "cardinal [principle] that custody, care and nurture of the child reside first in the parents. . . ." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

A. No Prior Holding Of This Court Precludes A Requirement That A Physician Provide Reasonable Pre-Abortion Notice To The Parents Of An Unemancipated Minor.

The court of appeals gave cursory treatment to the Minnesota statute insofar as it required parental notice without

---

[11] *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

also providing for an *ex parte* summary court bypass alternative upon the observation that the opinions of a number of present and former Justices of this Court contained *dicta* to the effect that a notice requirement without a court-bypass alternative for "mature" minors would be invalid.[12] Plainly, however, this Court has not directly decided this issue. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 651-52 (Rehnquist, J., concurring) 654 n.1 (Stevens, J., concurring), 656-57 (White, J., dissenting); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 469 n.12 (1983) (O'Connor, J., dissenting). Therefore, the Court may uphold the Minnesota parental notice statute without the necessity of either overruling or even retreating from any of its holdings in prior abortion cases.

B. The Minnesota Notice Law Constitutes A Legitimate Balance Among The Several Rights and Interests Of Society, Parents And Minors.

1. The Right to Obtain an Abortion May Be Tempered by Legitimate State Interests, Particularly Those of Constitutional Dimension.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court determined that there exists a constitutional privacy right of a woman, up to a certain point in pregnancy, to determine whether or not to terminate that pregnancy. That right has never been considered absolute or unqualified, but "must be considered against important state interests." *Id.* at 154. *See also Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 60-61 (1976). Therefore, statutory provisions affecting abortion

---

[12] *See* Opinion of the Eighth Circuit Court of Appeals at Hodgson Appendix 81a.

have been permitted where they bear a proper relationship to an appropriate state interest and do not prohibit or "unduly burden" the abortion decision. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (may require written informed consent of women); *H. L. v. Matheson*, 450 U.S. 398 (1981) (may require notice to parents of minors in certain cases). Furthermore, it is clear that a state has no obligation to favor or encourage abortion, but may adopt policies which encourage childbirth over abortion. *Webster v. Reproductive Health Services*, —— U.S. ——, 109 S.Ct. 3040, 57 U.S.L.W. (July 3, 1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977).

The exact strength and description of this abortion "right" have over time been somewhat indistinct and controversial. As applied to adult women, in some circumstances it is said to be a "fundamental" right, immune to all state restrictions save those "narrowly tailored" to serve a "compelling state interest." *See, e.g., Roe v. Wade*, 410 U.S. 113, 155 (1973). In other circumstances, however, the Court has indicated that regulation may be permitted if it is not unduly burdensome and serves an "important" interest of the state. *See, e.g., Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 430-31 (1983).

In its most recent decision, a majority of the members of the Court appear to conclude that, however the right or liberty interest recognized by *Roe* is described, a state regulation pertinent thereto may survive constitutional challenge if it is reasonably designed to further a "legitimate" state interest and does not unduly burden the abortion process. *Webster v. Reproductive Health Services*, 57 U.S.L.W. at 5031 (plurality opinion of Rehnquist, C.J., White, J., and Kennedy, J.); *id.* at 5033 (O'Connor, J., concurring); *id.* at 5034 (Scalia, J., concurring).

These various formulations may be reconciled by a recognition that the appropriate analysis involves a balancing between the degree of direct "burden" upon the abortion decision and the strength of the state interest sought to be effectuated by the regulation. Thus, a compelling state interest in protecting fetal life is sufficient to justify an outright prohibition of abortion, at least after "viability." *Roe*, 410 U.S. at 163-64. On the other hand a mere state preference for childbirth over abortion is sufficient to support a regulation which creates no direct obstacle to abortion, even if some women may consequently find abortions more difficult to obtain. *See Maher v. Roe*; *Harris v. McRae*; *Webster v. Reproductive Health Services.* Where the statute imposes some burden short of virtual prohibition or severe limitation it should be upheld if it rationally furthers legitimate public purposes. *See, e.g., Webster*; *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). The statutory requirement of providing notice to parents satisfies this standard.

2. The State's Interest in Parental Involvement in Their Children's Welfare Is Well-Established and Constitutionally Based.

The Court has long acknowledged the legitimacy of the states' interest in preserving and facilitating parental involvement in the affairs of minors. The strong public and parental interests recognized by the Court are not of recent origin, nor are they derived from fluctuating sociological theories. Rather they are virtually as old as civilization. The existence and necessity for the parental role have, indeed, been strongly asserted by this Court since this nation was founded. As stated in *Stanley v. Illinois*, 405 U.S. 645, 651 (1972):

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

This revered and protected function of parents extends into virtually every area of the child's life. So important is this role of parents and family that any interference therewith by the state or third persons is tolerated only in situations of necessity.

This rule extends as well to the area of medical procedures. Thus, under the common law "generally speaking, the rule has been considered to be that a surgeon has no legal right to operate upon a child without the consent of his parents or guardian." *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). As otherwise stated in *Moss v. Rishworth*, 222 S.W. 225, 226 (Tex. Comm'n App. 1920):

> It is insisted that the paramount interest of the child alone must be considered in determining whether such

> an operation shall be performed, and that if her health demanded an operation, and that, if skillfully performed, no cause of action would arise, even though it resulted disastrously. The law wisely reposes in the parent the care and custody of the minor child, and neither a physician nor those in temporary custody of the child will be permitted, in a case of this character, to determine those matters touching its welfare.

Plainly, these rights are not based upon simple legislative or judicial expressions of policy but are firmly grounded in the Constitution itself. *See, e.g., Roe v. Wade,* 410 U.S. 113, 152-53 (1973); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Thus, natural parental rights may be terminated only where unfitness of the parent is established in accordance with full due process safeguards. *See Stanley v. Illinois,* 405 U.S. 645 (1972).

The right of the parent to shape the child's values and life style has been generally found beyond the control of the state or of well-meaning officials or third persons proposing to have a child's "best interests" at heart. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205 (1972). Thus, it is only where a compelling need to safeguard the safety or welfare of a child has been identified or an important need of society is demonstrated that parents are denied the right to determine and strive for what they believe to be best for their children based upon their natural affection and concern and familiarity due to intimate continuous contact with the unique aspects of their lives and course of development.

Based upon generations of experience, the law plainly recognizes parents as the persons most likely to act out of a genuine concern for the child's interests and to be possessed of

the knowledge of the child necessary to wisely make such judgments. As was recognized by the Court in *Parham v. J.R.,* 442 U.S. 584 (1979):

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests.

Id. at 602-03 (citations omitted).

3. A Parental Notice Requirement Strikes a Permissible Balance Between the Interest in Parental Involvement and the Right to Abortion.

Specifically in situations involving abortions upon children the Court has acknowledged these firmly established interests of society and parents. The Court has recognized these interests as sufficiently compelling to justify requiring, as a general proposition, parental involvement in a minor's abortion decision at least so long as that involvement does not grant parents an "absolute and possibly arbitrary veto." As explained in *Bellotti v. Baird,* 443 U.S. 622 (1979) (*Bellotti II*):

> [P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition,

that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns. As MR. JUSTICE STEWART wrote in concurrence in *Planned Parenthood of Central Missouri v. Danforth,* [428 U.S.,] at 91:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

Id. at 640-41 (footnotes omitted). *See also H. L. v. Matheson,* 450 U.S. 398 at 409-10 (1981). Thus, the Court has acknowledged that a state has a legitimate interest in seeking to assure that parental consent is obtained before the performance of an abortion upon a minor. *See Bellotti II,* 443 U.S. at 640-41 (plurality opinion) and *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 490 n.15 (1983).

Nevertheless, in striking a balance between the state's interest in preserving the legitimate constitutional objective of parental involvement in their children's affairs and the right recognized in *Roe v. Wade,* the Court has limited the state's ability to pursue the former goal. A number of Justices have indicated that, unlike numerous other activities of minors which are either forbidden or permitted only with

express parental approval, an abortion decision is one which cannot be postponed until adulthood. Therefore, a majority of the Court has previously concluded that parents may not be granted an "absolute and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy." *See Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 74 (1976). Accordingly, the Court ruled that a state may not mandate parental consent unless some alternate procedure is available whereby such an arbitrary veto may be avoided. *Bellotti II,* 443 U.S. at 643-44.

The courts below extended that rule to Minnesota's attempt to mandate parental notice without a requirement of consent. Neither the holdings of this Court nor the legal reasoning contained in its opinions justifies that extension.

Admittedly, in *Bellotti II* some Justices would have apparently gone further to conclude that even a general requirement of notice to parents would in some situations be improper. Justice Powell, joined by Justices Burger and Stewart, identified as a deficiency in the Massachusetts statute at issue the requirement that parents would always receive notice of the judicial proceedings wherein the daughter sought to avoid the consent requirement. The objection, like that of the trial court here, to this parental notice requirement apparently was based upon the observation that there are parents who would obstruct and perhaps altogether prevent the minors' right to have an abortion or go to court. *See, e.g., Bellotti II,* 443 U.S. at 647 (opinion of Powell, J.); *H. L. v. Matheson,* 450 U.S. 398, 420 (Powell, J., concurring); 438-39 (Marshall, J., dissenting).[13]

---

[13] These Justices have also derived from the *Danforth* and *Bellotti II* veto formulation, the notion that a "mature" minor must also be permitted to avoid any parental notification in her absolute discretion. *See Matheson,* 450 U.S. at 414 (Powell, J., concurring). It

While a majority of the *Bellotti II* Court concurred in the judgment striking down the Massachusetts statute, it is clear that a majority of the Court did not necessarily endorse, in principle, Justice Powell's objection to parents receiving notice of the bypass proceeding. *See* 443 U.S. at 651-52 (Rehnquist, J., concurring), 654 n.1, 656 n.4 (Stevens, J., concurring). Plainly Justice Powell's observations in the context of a parental consent case did not signal a sweeping determination by a majority of the Court that statutes requiring *notice* to parents prior to minors' abortions are *per se* invalid. Justice Stevens in his concurring opinion in *Bellotti II* pointed out that:

> By affording such a veto, the Massachusetts statute does far more than simply provide for notice to the parents. *See post,* at 657 (WHITE, J., dissenting). ***Neither Danforth nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.***

443 U.S. at 654 n.1 (emphasis added). *See also H. L. v. Matheson,* 450 U.S. 398 (1981) (Utah statute which required parental notice but not parental consent to abortions not unconstitutional on its face despite lack of a formal notice-avoidance procedure).

Some Justices have adhered to the view that minors must be permitted to avoid any parental involvement whatever if they

---

is not clear, however, whether, or in what way, the case of the "mature" minor relates to the spectre of the absolute veto which forms the basis of the *Danforth* and *Bellotti II* holdings. As pointed out by Justice Stevens, concurring in *Matheson,* "Almost by definition, however, a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring any parental disapproval." 450 U.S. at 425 n.2.

deem themselves "mature" or determine that it is in their "best interests" to do so. *See, e.g., Matheson, supra,* 450 U.S. at 413-14 (Powell, J., concurring), 453 (Marshall, J., dissenting). The reasoning supporting that position, apparently based on the fear of obstructive parents articulated by Justice Powell in *Bellotti II* and the notion that a regulation that hypothetically could pose any impediment to obtaining an abortion is faulty, does not however give due recognition to the fact that *Roe v. Wade* did not purport to establish a "right to abortion" as an end in itself. *See Roe,* 410 U.S. at 208 (Burger, C.J., concurring); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 783 (1986) (Burger, C.J., dissenting). Far more persuasive is the point made by Justice White dissenting in *Danforth, supra.*

> [T]he very right created in *Roe v. Wade, supra,* [is] the right of the pregnant woman to decide "whether *or not* to terminate her pregnancy." 410 U.S. at 153 (emphasis added). The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent. This is the traditional way by which States have sought to protect children from their own immature and improvident decisions, and there is absolutely no reason expressed by the majority why the State may not utilize that method here.

428 U.S. at 94-95 (footnote omitted). The validity of this rationale was further underscored by the dissent of Justice Stevens:

Therefore, the holding in *Roe v. Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

The abortion decision is, of course, more important than the decision to attend or to avoid an adult motion picture, or the decision to work long hours in a factory. It is not necessarily any more important than the decision to run away from home or the decision to marry. But even if it is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

> The Court recognizes that the State may insist that the decision not be made without the benefit of medical advice. But since the most significant consequences of the decision are not medical in character, it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent play a part in the decision making process is surely not irrational.

Id. at 102-03.

While the force of these arguments did not command a majority of the Court in *Danforth*, where the requirement of parental *consent* was held to impose the direct burden of an absolute and potentially arbitrary *veto* upon the abortion, their power is substantially more apparent in support of the proposition that parents must be permitted at the very least to know of their daughter's plight.

In distinguishing between this case and *Danforth*, the Court might assume, *arguendo*, that it is prudent to strike a balance between the "rights" of minors ultimately to obtain abortions and the strong interests of the state and parents in the care, nurture and raising of minors, by not providing all parents with a veto of the minor's decision in all circumstances. The Minnesota notice statute, however, gives no one a veto power, either explicitly or implicitly. In fact, Minnesota's statute expressly provides that a minor can, after having given the requisite notice, obtain an abortion without the consent of any other person. All that is required is that those persons to whom our society, legal system and constitution have committed the care, nurture and upbringing of children have a reasonable opportunity to *know* of a critical, stressful and potentially hazardous situation facing their child.

One can conceive of no more narrowly tailored provision for the effective furtherance of the important protective interests of the state and rights of parents than the general providing of notice to parents of unemancipated minors who have not been victims of abuse or neglect. To accord such notice strikes a balance between the rights of minors to abortion and the tremendously strong interests of the state and parents in safeguarding the welfare of children without permitting either set of rights and interests a lawful veto over the other.

To forbid the requiring of notice, however, tips the balance wholly against the interests of the state and parents and

grants to the minor, or the minor and a judge, an "absolute and possibly arbitrary veto" over these legitimate and time honored rights and interests of parents and society.

To hold the Minnesota statute invalid would reverse the longstanding, rebuttable presumption that parents can, should and will act in the best interests of their minor children. In its stead would be erected a virtually irrebuttable presumption that parents, those persons in the best position to bring forth pertinent information, are to be excluded from the decision-making process. Plainly there has been presented in this case neither persuasive argument nor evidence sufficient to compel this extreme reversal of a philosophy inherent in our culture since before the nation was founded.

C. The Minnesota Notice Statute Furthers The Important Interest In Parental Involvement.

As set forth in detail above at pp. 13-15, unwanted pregnancy and abortion are both potentially psychologically and physically traumatic events. This is particularly true for minors who are not, in general, as capable as adults of contending alone with the emotional and psychological stresses involved or recognizing the need for and carrying through proper after-care procedures. Parental involvement with their child at and after this difficult and stressful time can clearly serve numerous useful functions. It can remove the added emotional and logistical stress and isolation brought on by the perceived need to hide the facts from parents. It can permit parents before, during and after the abortion decision to provide emotional, moral and physical support and guidance in connection with whatever course of action is pursued. It can permit parents to make known information potentially relevant to the medical decision on abortion and subsequent medical procedures. It can

also enable parents to assist with ensuring that proper after-care procedures are followed. Indeed, lack of parental knowledge of an abortion can be a factor in minors' delaying treatment of post-abortion complications which do arise. J.A. at 353-55.

Plaintiffs' witnesses further recognize that parents are generally supportive in helping a minor deal with an unintended pregnancy. J.A. at 355-59, P. Exh. 92 (Hodgson Depo.) at p. 187. Moreover, adolescents often misapprehend their parents' reaction to their decision to obtain an abortion, and parental guidance in dealing with an unintended pregnancy can be helpful to the minor even though she may not initially seek out such guidance. J.A. at 178-79, 305, 359-60, 472-73. The fact of teenage pregnancy itself generally bespeaks a need for further parental involvement in the life of the daughter subsequent to the abortion, if it is to occur.

Furthermore, it should not be overlooked that, contrary to the views of some of plaintiffs' witnesses,[14] abortion may not in fact be the best choice for every child. The decision is one fraught with psychological, ethical and moral concerns which neither abortion providers nor judges are well suited to address. *See Bellotti II*, 443 U.S. at 640, 642-43.

The record does not establish that either abortion providers or judges are satisfactory substitutes for parental input, care and involvement. Although abortion providers generally counsel their patients concerning options in resolving an unintended pregnancy, there is no assurance that such counseling will be performed by trained and experienced persons. For example, two teen advocates of the Midwest Health Center for

[14] See P. Exh. 92, J.A. at 473-75. In the opinion of Dr. Hodgson the desire for abortion is the normal, healthy reaction for the average teenager, and any minor who does not seek any abortion is not "looking ahead" and is apt to be in need of psychiatric help.

Women have performed abortion counseling when only 17 years old and while relatively untrained and inexperienced. J.A. at 213, 222, 227-29. One of these, a named plaintiff in the case, professed to be proud of her ability to get pregnant at age 15. She was sexually active from age 13 and did not regularly use birth control, intending to have an abortion if she became pregnant. J.A. at 222, 227-29.

As was found by the trial court, abortion providers rarely withhold abortions from minors they deem "immature." *See* Hodgson Appendix 41a-42a. Even minors who may be considered sufficiently "mature" to make the abortion decision, can benefit from parental notice and potential involvement since they may not be in a position to deal, all alone, with the abortion process itself, its important aftercare requisites or with the issues of teenage sexuality which have led to the pregnancy in the first instance. These are matters in which neither the abortion provider nor the court can ever provide an adequate and ongoing substitute.[15]

While it may be true that notice may not in retrospect prove helpful in every situation, that fact alone does not undercut the legitimacy of the state's overall purposes. As pointed out by Justice Stevens, concurring in *Matheson*:

> Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child consultation will actually occur. Good-faith compliance with the statute's requirements would tend to facilitate communication between daughters and parents regarding the abortion decision. The possibility that some parents will not react with compassion

[15] It appears, for example, that the approach of at least some abortion providers to the myriad personal, psychological and moral issues inherent in teenage sexual activity centers around the fact that they "aren't very good contraceptors, yet." J.A. at 122.

> and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.
>
> The fact that certain members of the class of unmarried "minor women who are suffering unwanted pregnancies and desire to terminate the pregnancies" may actually be emancipated or sufficiently mature to make a well-reasoned abortion decision does not, in my view, undercut the validity of the Utah statute. As I stated in *Danforth*, a state legislature has constitutional power to utilize, for purposes of implementing a parental-notice requirement, a yardstick based upon the chronological age of unmarried pregnant women. That this yardstick will be imprecise or even unjust in particular cases does not render its use by a state legislature impermissible under the Federal Constitution.

450 U.S. at 424-25. *See also Webster v. Reproductive Health Services*, 57 U.S.L.W. at 5031 (requirement of viability tests after 20 weeks of pregnancy upheld even though, in many cases, the fetuses will prove to be not viable).

D. The Minnesota Notice Law Does Not Unduly Burden The Abortion Decision Of Minors.

1. Mere Notice Is Not The Equivalent of Consent.

The result of the Minnesota law is in fact to *remove* from minors' abortions the burden of common law incapacity which

could otherwise render the unemancipated minor incapable of valid consent. Thus, in the case of abortion and a small number of other medical processes, the minor is expressly permitted to obtain an abortion upon her consent alone. Her parents merely have to be informed.

Plainly the Minnesota notice law is not the equivalent of parental consent laws which have, in the past, been upheld only to the extent that a judicial bypass procedure is also available. The Minnesota law provides no one an "absolute and possibly arbitrary veto" over the abortion decision of a minor. It merely requires that parents be informed.

Furthermore, it is simply not true as indicated by plaintiffs[16] that parents are required to acknowledge that they were notified. This claim is apparently based upon policies of some clinics rather than any actual requirements of the statute. Pursuant to the statute, notice may be effected either by personal delivery or by certified mail directed to the parent's usual place of abode. Minn. Stat. § 144.343, subd. 2 (1988). In neither event is the signature of the parent required by the statute. In the case of mailed notice the statute plainly provides that "the time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place subsequent to mailing." *Id.* The statute requires that mailed notice be sent certified mail with restricted delivery and return receipt requested in order to preserve confidentiality and prevent misdelivery. However, there is no requirement that any actual acknowledgement of receipt be received by the clinic.

[16] Petition for Certiorari in Hodgson, Case No. 88-1125 at 18.

2. The Direct Burdens Imposed By The Statute Are Not Substantial.

The only direct burdens imposed by the notice statute on its face are the cost of mailing and a wait for a short time to permit the parents to receive and react, if they so choose, to the notice. Even these requirements are not applicable, however, where the minor declares that she has been abused, or is emancipated; when prompt action is required to save her life, or when the abortion has been authorized in writing by the persons otherwise entitled to notice. Minn. Stat. § 144.343, subd. 4.

The financial "burden" is plainly *de minimis*. The waiting period, as well, is not unduly burdensome in light of the purposes to be accomplished. The district court itself recognized that "[t]he State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur." Hodgson Appendix at 49a.[17] The trial court determined that 48 hours is unreasonable "under conditions presently existing in Minnesota." What particular conditions are referred to or why they render the notice period unreasonable are not clear, however.

There was no showing that any minor suffered any medical complication as a result of the waiting period. As indicated by the trial court's finding number 43, a delay of less than

[17] *See also H. L. v. Matheson*, 450 U.S. 398 (1981):

> Ideally, facilitation of supportive conversation would assist the pregnant minor during an undoubtedly difficult experience. Again, however, when measured against the rationality of the means employed, the Utah statute simply fails to advance this asserted goal. The statute imposes no requirement that the notice be sufficiently timely to permit any discussion between the pregnant minor and the parents.

Id. at 446 (Marshall, J., dissenting).

a week in performing an abortion does not generally increase medical risk to any significant degree. Hodgson Appendix at 20a. Moreover, Minnesota public health data disclose no statistically significant increase in medical complications among pregnant minors during the time the notice/bypass version of this statute was in effect. Plaintiffs, in fact, conceded at trial that no medical complications had resulted from delays allegedly caused by implementing the law. J.A. at 347.

It appears that the trial court's finding was based in part upon the determination that "logistical obstacles" associated with travel make the period too long and that somehow the statute requires a minor from outside a city where abortion clinics exist to make the trip twice or spend additional time in a strange city.

However, the intervention of such a short period or the potential for more than one trip in connection with an abortion have not been found to be unduly burdensome in other cases where the Court has upheld parental consent/judicial bypass statutes. Furthermore, the statute in issue does not itself require that the minor take multiple trips. No reason is apparent why the notice may not be delivered or sent in advance of the minor's abortion appointment. *See, e.g.*, Circuit Court Opinion. Hodgson Appendix at 97a; P. Exh. 70A, p. 4, J.A. at 433.

If indeed the statute is to further its goals of promoting worthwhile parental involvement, 48 hours is certainly not too long to permit parents to assimilate and react to the revelation that they have a pregnant daughter in need of their care. This is particularly true where those parents live in outlying communities if the notice is given after the daughter has left for an abortion in a distant city.

Therefore, the circuit court correctly determined that the 48-hour waiting period was not a significant burden in light of Minnesota's interest in ensuring that notification can potentially result in parental involvement.

3. The Indirect "Burdens" Of Notice Are Not Sufficient To Overcome The Legitimate Purposes Of The Statute.

The trial court based its conclusion that notice could not be required without a court bypass option upon the observation of Justice Powell in *Bellotti II* that "there are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise the right [to submit to abortion]." Hodgson Appendix at 38a. In addition, some plaintiffs assert that some minors fear various other unpleasant consequences from giving notice. These range from fears of physical or sexual abuse, to concerns over parental disappointment. While these general assertions might be accepted as theoretically true, those hypotheses alone cannot be the basis for denying the large majority of all parents vital information which is absolutely necessary to the proper performance of their parental function.

Under the Minnesota law a minor who declares that she is a victim of abuse is exempted from this notice requirement. Furthermore, despite the fact that numerous minors complied with the parental notice requirement of the Minnesota law, there was no showing or finding to demonstrate that even one minor was ever abused or improperly obstructed or prevented from obtaining an abortion as a result of parental notice.

It is unfortunately true that a few parents, unworthy of their trust, abuse their children. In no sense is this unhappy fact unique to the occasion of abortion or to the category of

parents. It could be precipitated by any event or by no event at all. The solution to the problem of child abuse, however, does not lie in wholesale elimination of important parental rights and duties simply because they might in a few cases be abused by some. Were this true, we might also conclude that, because there exist parents who will abuse their children as a result of poor performance in school, no parents may receive school progress or conduct reports.

As recognized by the Court in *Parham v. J. R.*, 442 U.S. 584 (1979):

> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but it's hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests.

Id. at 602-03 (citations omitted).

The best approach to protection of children from abusive parents is not to replace the parental function wholesale. Rather, it is to identify abusive or neglectful parents, act to protect the children involved, and insist on remedy of the problems of the parents. Subdivision 4 of the act recognizes this need.[18] Other legal means exist in Minnesota for the protection of minors against unlawful treatment by parents.[19]

---

[18] This provision forgives the notice requirement in any case where a parent has abused or neglected the child and provides for the reporting of such abuse or neglect to appropriate authorities for investigation.

[19] *See, e.g.*, Minn. Stat. §§ 626.556 (reporting of maltreatment of minors), 260.133-.161 (1988) (procedure, domestic child abuse).

There is simply no necessity to deny parents in general their legal and natural role, without so much as an opportunity to be heard, on the bare allegation that some unknown number of unidentified parents who have not committed prior abuse against the child might commit some legal wrong in the future.

E. The Two-Parent Aspect Of The Notice Requirement Is Not Unduly Burdensome.

The trial court and the dissenting circuit judges concluded that the requirement of notifying *both* parents rendered the statute unduly burdensome in some situations in which a one-parent notification requirement might be upheld. Plainly it is not materially any more burdensome to dispatch two notices rather than one. Thus, if parent notification in general is a valid state requirement, no persuasive reason exists to deny such notice arbitrarily to either parent. For the most part, it appears that this conclusion has no firmer basis than the objection to parent notification generally, *i.e.*, that there may exist some parents who may act in an inappropriate fashion.

For some reason, plaintiffs have singled out non-custodial parents for particular criticism in this regard. Other than evidence to the effect that divorce often involves impaired family communications, no particular explanation is offered for the notion that non-custodial parents should categorically be denied knowledge concerning their children's upbringing and welfare. It cannot be conclusively presumed, however, that a non-custodial parent will automatically take adverse action which could amount to a "veto" of the abortion decision. If anything, a non-custodial parent is in even less of a position to improperly obstruct any abortion decision inas-

much as he or she does not have custody and control of the child.[20]

To the contrary, it is widely recognized that it is beneficial in all but the most extreme cases to support continuing involvement of even non-custodial parents in the lives of their children. *See, e.g., Clark v. Clark*, 346 N.W.2d 383 (Minn. Ct. App. 1984) (abuse of discretion to permit erosion of father's visitation rights); *Spotts v. Spotts*, 197 N.W.2d 370 (Iowa 1972) (best interests of children require continuing association with father absent clear contrary showing); *In re Marriage of McGee*, 613 P.2d 348 (Colo. Ct. App. 1980) (liberal visitation rights favored despite lack of prior contact); *Marciano v. Marciano*, 56 A.D.2d 735, 392 N.Y.S.2d 747 (App. Div. 1977) (visitation should not be denied fathers solely on basis of animosity between parents or stated wishes of child). *See also* testimony of Elissa Benedek, J.A. at 254-55.

Nothing in the record proves that all or even most non-custodial parents are *per se* antagonistic to their daughters' interests or that custodial parents, *per se*, always act in the child's best interests. As noted by the trial judge, a custodial parent's frequent fear is that the daughter's pregnancy may be raised in custody litigation. Finding 70. Hodgson Appendix at 31a. Thus, while eliminating notice to all non-custodial parents might eliminate notice to some who may be "unhelpful," it would also eliminate notice to many who would in fact be concerned and helpful.

Absent adoption or a legal determination that, due to impermissible conduct, parental rights should be terminated, both legal parents of a minor remain her parents with actual

[20] It is important to note that nothing in Minn. Stat. § 144.343, subd. 2, supersedes any restrictions which may exist under any child custody or protective order of court.

and legally recognized concerns in regard to their daughter. To deny either lawful parent important information concerning a child merely at the wish of the child, or an estranged spouse or because the parent is "non-custodial" is to arbitrarily ignore his or her legitimate legal interests in his or her daughter. *Cf. Stanley v. Illinois*, 405 U.S. 645 (1972) (conclusive presumption that unmarried fathers were unsuitable parents unconstitutional).

F. Mandatory Employment Of A Bypass Procedure Impairs The Legitimate Goals Of The Notice Requirement.

As noted above, the objections of plaintiffs and of the district court to requiring parental notice center in general upon the notion that "some parents" reactions may be unhelpful, hostile or even abusive. However, it does not appear that the perceived need to withhold notice from parents is, in all or even most cases, based upon a finding that the parent would in fact take impermissible action or actually prevent the exercise of the abortion decision. In a compilation of 258 cases heard in Ramsey County when the notice/bypass law was in operation, only five percent of the minor petitions even generally asserted a belief that the parents "would force the girl to keep the child." P. Exh. 21, J.A. at 381. Given the confidential, *ex parte* nature of these proceedings and the fact that minors often misapprehend actual parental reaction, it is impossible to know in what portion, if any, of even these cases that assertion was true.

Significantly, the most common single reason asserted for wanting to avoid notice was "fear of damaging parent-child relationship." *Id.* As plaintiff Meadowbrook's co-director Paula Wendt testified, minors seeking to avoid parental notification commonly explain that desire on the basis of "not want[ing]

to ruin a good relationship." J.A. at 114. Similarly, Dr. Hodgson herself testified that minors commonly seek to avoid parental notification as "a matter of love for their parents and they don't want to spoil the relationship that they have with their parents." J.A. at 460.

In other words, in a large proportion of the cases, plaintiffs seek to prevent parental involvement, not because the parents are bad or will fail to perform properly, but for precisely the opposite reason. There is absolutely no support, however, for the proposition that children are or should be entitled to maintain a parent-child relationship based upon deceit or to insist that parents learn only pleasing facts about them or agree with their every action. To the contrary, if parents are to fulfill their role, it is absolutely necessary that they be aware of unpleasant facts concerning their children's behavior and consequent problems. It is precisely in times of crisis, when all is not well with the child, that true parenting is the most important.[21] Abortion clinics, however, seldom, if ever, decline to perform a requested abortion upon a minor without parental notifications due to her immaturity or because they feel that parental involvement would be helpful.

Nor can the courts generally be relied upon to see that parents are entitled to be involved, when they should be, in their daughter's abortion decision, as demonstrated by the fact that all but a very few of the bypass petitions submitted to Minnesota courts were approved. *See* D. Exh. 69, J.A. at 493.

---

[21] To the extent that the initial abortion decision itself has been motivated by the desire of the minor to conceal her sexual activity and subsequent pregnancy from her parents, removal of that motivation via assured parental notice can assist in assuring that the abortion decision will ultimately be made upon other, more legitimate bases.

If the legitimate interests of parents and society in providing the best available counsel and support for young girls in crisis is to be furthered, it is essential that the parents have, at the very least, notice of the facts. The result of requiring a summary court bypass mechanism as an alternative to parental notification is often the prevention of communication among parents and children who otherwise enjoy a good relationship. Minnesota's notice requirement should therefore be permitted to stand alone.

CONCLUSION

For the foregoing reasons the court of appeals erred in striking down the parental notice provision of the Minnesota statute. That decision was not compelled by established Supreme Court precedent; it does not result in a balanced recognition of the strong and proper interests of the state and parents in relation to the ultimate rights of minors to make the abortion decision; and it does not, in most circumstances, serve the best interests of minors generally. Defendants therefore urge this court to reverse the court of appeals and hold Minn. Stat. § 144.343, subd. 2, to be valid.

Respectfully Submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Chief Deputy
Attorney General
CATHARINE F. HAUKEDAHL
Solicitor General
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
525 Park Street, Suite 500
St. Paul, MN 55103
Telephone: (612) 297-2040
Counsel for Cross-Petitioners

APPENDIX

Minnesota Statutes:

144.343 [PREGNANCY, VENEREAL DISEASE, ALCOHOL OR DRUG ABUSE, ABORTION]*

Subdivision 1. [*Minor's consent valid.*] Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. [*Notification concerning abortion.*] Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing.

* Brackets denote Minnesota Revisor of Statutes headnotes.

Subd. 3. [*Parent, abortion; definitions.*] For purposes of this section, "parent" means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one.

For purposes of this section, "abortion" means the use of any means to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus and "fetus" means any individual human organism from fertilization until birth.

Subd. 4. [*Limitations.*] No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. [*Penalty.*] Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman

regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so.

Subd. 6. [*Substitute notification provisions.*] If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise

her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week.

Subd. 7. [*Severability.*] If any provision, word, phrase or clause of this section or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

260.133 [PROCEDURE; DOMESTIC CHILD ABUSE.]

Subdivision 1. [*Petition.*] The local welfare agency may bring an emergency petition on behalf of minor family or

household members seeking relief from acts of domestic child abuse. The petition shall allege the existence of or immediate and present danger of domestic child abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.

Subd. 2. [*Temporary order.*] If it appears from the notarized petition or by sworn affidavit that there are reasonable grounds to believe the child is in immediate and present danger of domestic child abuse, the court may grant an ex parte temporary order for protection, pending a full hearing. The court may grant relief as it deems proper, including an order:

(1) restraining any party from committing acts of domestic child abuse; or

(2) excluding the alleged abusing party from the dwelling which the family or household members share or from the residence of the child.

However, no order excluding the alleged abusing party from the dwelling may be issued unless the court finds that:

(1) the order is in the best interests of the child or children remaining in the dwelling; and

(2) a remaining adult family or household member is able to care adequately for the child or children in the absence of the excluded party.

Before the temporary order is issued, the local welfare agency shall advise the court and the other parties who are present that appropriate social services will be provided to the family or household members during the effective period of the order.

An ex parte temporary order for protection shall be effective for a fixed period not to exceed 14 days. Within five days of the issuance of the temporary order, the petitioner shall file

a petition with the court pursuant to section 260.131, alleging that the child is in need of protection or services and the court shall give docket priority to the petition.

The court may renew the temporary order for protection one time for a fixed period not to exceed 14 days if a petition alleging that the child is in need of protection or services has been filed with the court and if the court determines, upon informal review of the case file, that the renewal is appropriate.

Subd. 3. [*Service and execution of order.*] Any order issued under this section or section 260.191, subdivision 1b, shall be served personally upon the respondent. Where necessary, the court shall order the sheriff or constable to assist in service or execution of the order.

Subd. 4. [*Modification of order.*] Upon application, notice to all parties, and hearing, the court may modify the terms of an existing order for protection issued under this section or section 260.191, subdivision 1b.

Subd. 5. [*Right to apply for relief.*] The local welfare agency's right to apply for relief on behalf of a child shall not be affected by the child's leaving the dwelling or household to avoid abuse.

Subd. 6. [*Real estate.*] Nothing in this section or section 260.191, subdivision 1b, shall affect the title to real estate.

Subd. 7. [*Other remedies available.*] Any relief ordered under this section or section 260.191, subdivision 1b, shall be in addition to other available civil or criminal remedies.

Subd. 8. [*Copy to law enforcement agency.*] An order for protection granted pursuant to this section or section 260.191, subdivision 1b, shall be forwarded by the court administrator within 24 hours to the local law enforcement agency with jurisdiction over the residence of the child.

Each appropriate law enforcement agency shall make available to other law enforcement officers through a system of verification, information as to the existence and status of any order for protection issued pursuant to this section or section 260.191, subdivision 1b.

260.135 [SUMMONS; NOTICE.]

Subdivision 1. After a petition has been filed and unless the parties hereinafter named voluntarily appear, the court shall set a time for a hearing and shall issue a summons requiring the person who has custody or control of the child to appear with the child before the court at a time and place stated. The summons shall have a copy of the petition attached, and shall advise the parties of the right to counsel and of the consequences of failure to obey the summons. The court shall give docket priority to any child in need of protection or services, neglected and in foster care, or delinquency petition that contains allegations of child abuse over any other case except those delinquency matters where a child is being held in a secure detention facility. As used in this subdivision, "child abuse" has the meaning given it in section 630.36, subdivision 2.

Subd. 2. The court shall have notice of the pendency of the case and of the time and place of the hearing served upon a parent, guardian, or spouse of the child, who has not been summoned as provided in subdivision 1.

Subd. 3. If a petition alleging a child's need for protection or services, or a petition to terminate parental rights is initiated by a person other than a representative of the department of human services or county welfare board, the court administrator shall notify the county welfare board of the pendency of the case and of the time and place appointed.

Subd. 4. The court may issue a subpoena requiring the appearance of any other person whose presence, in the opinion of the court, is necessary.

Subd. 5. If it appears from the notarized petition or by sworn affidavit that there are reasonable grounds to believe the child is in surroundings or conditions which endanger the child's health, safety or welfare and require that the child's custody be immediately assumed by the court, the court may order, by endorsement upon the summons, that the officer serving the summons shall take the child into immediate custody.

260.141 [SERVICE OF SUMMONS, NOTICE.]

Subdivision 1. (a) Service of summons or notice required by section 260.135 shall be made upon the following persons in the same manner in which personal service of summons in civil actions is made:

(1) in all delinquency matters, upon the person having custody or control of the child and upon the child; and

(2) in all other matters, upon the person having custody or control of the child, and upon the child if more than 12 years of age.

Personal service shall be effected at least 24 hours before the time of the hearing; however, it shall be sufficient to confer jurisdiction if service is made at any time before the day fixed in the summons or notice for the hearing, except that the court, if so requested, shall not proceed with the hearing earlier than the second day after the service. If personal service cannot well be made within the state, a copy of the summons or notice may be served on the person to whom it is directed by delivering a copy thereof to such person personally outside the state. Such service if made personally outside the state shall be sufficient to confer jurisdiction; providing however it be made at least five days before the date fixed for hearing in such summons or notice.

(b) If the court is satisfied that personal service of the summons or notice cannot well be made, it shall make an order providing for the service of summons or notice by certified mail addressed to the last known addresses of such persons, and by one weeks published notice as provided in section 645.11. A copy of the notice shall be sent by certified mail at least five days before the time of the hearing or 14 days if mailed to addresses outside the state.

(c) Notification to the county welfare board required by section 260.135, subdivision 3, shall be in such manner as the court may direct.

Subd. 2. Service of summons, notice, or subpoena required by sections 260.135 to 260.231 shall be made by any suitable person under the direction of the court, and upon request of the court shall be made by a probation officer or any peace officer. The fees and mileage of witnesses shall be paid by the county if the subpoena is issued by the court on its own motion or at the request of the county attorney. All other fees shall be paid by the party requesting the subpoena unless otherwise ordered by the court.

Subd. 3. Proof of the service required by this section shall be made by the person having knowledge thereof.

260.145 [FAILURE TO OBEY SUMMONS OR SUBPOENA; CONTEMPT, ARREST.]

If any person personally served with summons or subpoena fails, without reasonable cause, to appear or bring the minor, the person may be proceeded against for contempt of court or the court may issue a warrant for the person's arrest, or both. In any case when it appears to the court that the service will be ineffectual, or that the welfare of the minor requires that

the minor be brought forthwith into the custody of the court, the court may issue a warrant for the minor.

260.151 [INVESTIGATION; PHYSICAL AND MENTAL EXAMINATION.]

Subdivision 1. Upon request of the court the county welfare board or probation officer shall investigate the personal and family history and environment of any minor coming within the jurisdiction of the court under section 260.111 and shall report its findings to the court. The court may order any minor coming within its jurisdiction to be examined by a duly qualified physician, psychiatrist, or psychologist appointed by the court. With the consent of the commissioner of corrections and agreement of the county to pay the costs thereof, the court may, by order, place a minor coming within its jurisdiction in an institution maintained by the commissioner for the detention, diagnosis, custody and treatment of persons adjudicated to be delinquent, in order that the condition of the minor be given due consideration in the disposition of the case. Adoption investigations shall be conducted in accordance with the laws relating to adoptions. Any funds received under the provisions of this subdivision shall not cancel until the end of the fiscal year immediately following the fiscal year in which the funds were received. The funds are available for use by the commissioner of corrections during that period and are hereby appropriated annually to the commissioner of corrections as reimbursement of the costs of providing these services to the juvenile courts.

Subd. 2. The court may proceed as described in subdivision 1 only after a petition has been filed and, in delinquency cases, after the child has appeared before the court or a court appointed referee and has been informed of the allegations contained in the petition. However, when the child denies being

delinquent before the court or court appointed referee, the investigation or examination shall not be conducted before a hearing has been held as provided in section 260.155.

260.155 [HEARING.]

Subdivision 1. [*General.*] Except for hearings arising under section 260.261, hearings on any matter shall be without a jury and may be conducted in an informal manner. The rules of evidence promulgated pursuant to section 480.0591 and the law of evidence shall apply in adjudicatory proceedings involving a child alleged to be delinquent, in need of protection or services under section 260.015, subdivision 2a, clause (11) or (12), or a juvenile petty offender, and hearings conducted pursuant to section 260.125 except to the extent that the rules themselves provide that they do not apply. Hearings may be continued or adjourned from time to time and, in the interim, the court may make any orders as it deems in the best interests of the minor in accordance with the provisions of sections 260.011 to 260.301. The court shall exclude the general public from these hearings and shall admit only those persons who, in the discretion of the court, have a direct interest in the case or in the work of the court; except that, the court shall open the hearings to the public in delinquency proceedings where the child is alleged to have committed an offense or has been proven to have committed an offense that would be a felony if committed by an adult and the child was at least 16 years of age at the time of the offense. In all delinquency cases a person named in the charging clause of the petition as a person directly damaged in person or property shall be entitled, upon request, to be notified by the court administrator in writing, at the named person's last known address, of (1) the date of the reference or adjudicatory hearings, and (2) the disposition of the case. Adoption hearings shall be conducted in accordance with the provisions of laws relating to adoptions.

Subd. 1a. [*Right to participate in proceedings.*] A child who is the subject of a petition, and the parents, guardian, or lawful custodian of the child have the right to participate in all proceedings on a petition. Any grandparent of the child has a right to participate in the proceedings to the same extent as a parent, if the child has lived with the grandparent within the two years preceding the filing of the petition. At the first hearing following the filing of a petition, the court shall ask whether the child has lived with a grandparent within the last two years, except that the court need not make this inquiry if the petition states that the child did not live with a grandparent during this time period. Failure to notify a grandparent of the proceedings is not a jurisdictional defect.

Subd. 2. [*Appointment of counsel.*] The minor, parent, guardian or custodian have the right to effective assistance of counsel. If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the minor or the parents or guardian in any other case in which it feels that such an appointment is desirable.

Subd. 3. [*County attorney.*] Except in adoption proceedings, the county attorney shall present the evidence upon request of the court.

Subd. 4. [*Guardian ad litem.*] (a) The court shall appoint a guardian ad litem to protect the interests of the minor when it appears, at any stage of the proceedings, that the minor is without a parent or guardian, or that the minor's parent is a minor or incompetent, or that the parent or guardian is indifferent or hostile to the minor's interests, and in every proceeding alleging a child's need for protection or services under section 260.015, subdivision 2a, clauses (1) to (10). In any other case the court may appoint a guardian ad litem to protect the interests of the minor when the court feels that such ar appointment is desirable. The court shall appoint the guard-

ian ad litem on its own motion or in the manner provided for the appointment of a guardian ad litem in the district court.

(b) The court may waive the appointment of a guardian ad litem pursuant to clause (a), whenever counsel has been appointed pursuant to subdivision 2 or is retained otherwise, and the court is satisfied that the interests of the minor are protected.

(c) In appointing a guardian ad litem pursuant to clause (a), the court shall not appoint the party, or any agent or employee thereof, filing a petition pursuant to section 260.131.

Subd. 4a. [*Examination of child.*] In any child in need of protection or services proceeding, neglected and in foster care, or termination of parental rights proceeding the court may, on its own motion or the motion of any party, take the testimony of a child witness informally when it is in the child's best interests to do so. Informal procedures that may be used by the court include taking the testimony of a child witness outside the courtroom. The court may also require counsel for any party to the proceeding to submit questions to the court before the child's testimony is taken, and to submit additional questions to the court for the witness after questioning has been completed. The court may excuse the presence of the child's parent, guardian, or custodian from the room where the child is questioned in accordance with subdivision 5.

Subd. 5. [*Waiving the presence of child, parent.*] Except in delinquency proceedings, the court may waive the presence of the minor in court at any stage of the proceedings when it is in the best interests of the minor to do so. In a delinquency proceeding, after the child is found to be delinquent, the court may excuse the presence of the child from the hearing when it is in the best interests of the child to do so. In any proceeding the court may temporarily excuse the presence of the parent

or guardian of a minor from the hearing when it is in the best interests of the minor to do so. The attorney or guardian ad litem, if any, has the right to continue to participate in proceedings during the absence of the minor, parent, or guardian.

Subd. 6. [*Rights of the parties at the hearing.*] The minor and the minor's parent, guardian, or custodian are entitled to be heard, to present evidence material to the case, and to cross examine witnesses appearing at the hearing.

Subd. 7. [*Factors in determining neglect.*] In determining whether a child is neglected and in foster care, the court shall consider, among other factors, the following:

(1) the length of time the child has been in foster care;

(2) the effort the parent has made to adjust circumstances, conduct, or condition to make it in the child's best interest to be returned to the parent's home in the foreseeable future, including the use of rehabilitative services offered to the parent;

(3) whether the parent has visited the child within the three months preceding the filing of the petition, unless extreme financial or physical hardship or treatment for mental disability or chemical dependency or other good cause prevented the parent from visiting the child or it was not in the best interests of the child to be visited by the parent;

(4) the maintenance of regular contact or communication with the agency or person temporarily responsible for the child;

(5) the appropriateness and adequacy of services provided or offered to the parent to facilitate a reunion;

(6) whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time; and

(7) the nature of the effort made by the responsible social service agency to rehabilitate and reunite the family.

Subd. 8. [*Waiver.*] (a) Waiver of any right which a child has under this chapter must be an express waiver voluntarily and intelligently made by the child after the child has been fully and effectively informed of the right being waived. If a child is under 12 years of age, the child's parent, guardian or custodian shall give any waiver or offer any objection contemplated by this chapter.

(b) Waiver of a child's right to be represented by counsel provided under the juvenile court rules must be an express waiver voluntarily and intelligently made by the child after the child has been fully and effectively informed of the right being waived. In determining whether a child has voluntarily and intelligently waived the right to counsel, the court shall look to the totality of the circumstances which includes but is not limited to the child's age, maturity, intelligence, education, experience, and ability to comprehend, and the presence and competence of the child's parents, guardian, or guardian ad litem. If the court accepts the child's waiver, it shall state on the record the findings and conclusions that form the basis for its decision to accept the waiver.

260.156 [CERTAIN OUT-OF-COURT STATEMENTS ADMISSIBLE.]

An out-of-court statement made by a child under the age of ten years, or a child ten years of age or older who is mentally impaired, as defined under section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse or neglect of the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any child in need of protection or services, neglected and in foster care, or domestic child abuse proceeding or any proceeding for termination of parental rights if:

(a) the court finds that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the proponent of the statement notifies other parties of an intent to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence, to provide the parties with a fair opportunity to meet the statement.

For purposes of this section, an out-of-court statement includes a video, audio, or other recorded statement.

260.16 [Repealed, 1959 c 685 s 53]

260.161 [RECORDS.]

Subdivision 1. The juvenile court judge shall keep such minutes and in such manner as the court deems necessary and proper. The court shall keep and maintain records pertaining to delinquent adjudications until the person reaches the age of 23 years and shall release the records on an individual to a requesting adult court for purposes of sentencing, or to an adult court or juvenile court as required by the right of confrontation of either the United States Constitution or the Minnesota Constitution. The juvenile court shall provide, upon the request of any other juvenile court, copies of the records concerning adjudications involving the particular child. The court shall also keep an index in which files pertaining to juvenile matters shall be indexed under the name of the child. After the name of each file shall be shown the file number and, if ordered by the court, the book and page of the register in which the documents pertaining to such file are listed. The court shall also keep a register properly indexed in which shall be listed under the name of the child all documents filed pertaining to

the child and in the order filed. The list shall show the name of the document and the date of filing thereof. The juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, findings, orders, decrees, judgments, and motions and such other matters as the court deems necessary and proper. The legal records maintained in this file shall be open at all reasonable times to the inspection of any child to whom the records relate, and to the child's parent and guardian.

Subd. 2. Except as provided in this subdivision and in subdivision 1, and except for legal records arising from proceedings that are public under section 260.155, subdivision 1, none of the records of the juvenile court and none of the records relating to an appeal from a nonpublic juvenile court proceeding, except the written appellate opinion, shall be open to public inspection or their contents disclosed except (a) by order of a court or (b) as required by sections 611A.03, 611A.04, and 611A.06. The records of juvenile probation officers and county home schools are records of the court for the purposes of this subdivision. This subdivision applies to all proceedings under this chapter, including appeals from orders of the juvenile court, except that this subdivision does not apply to proceedings under section 260.255, 260.261, or 260.315 when the proceeding involves an adult defendant. The court shall maintain the confidentiality of adoption files and records in accordance with the provisions of laws relating to adoptions. In juvenile court proceedings any report or social history furnished to the court shall be open to inspection by the attorneys of record and the guardian ad litem a reasonable time before it is used in connection with any proceeding before the court.

When a judge of a juvenile court, or duly authorized agent of the court, determines under a proceeding under this chapter

that a child has violated a state or local law, ordinance, or regulation pertaining to the operation of a motor vehicle on streets and highways, except parking violations, the judge or agent shall immediately report the violation to the commissioner of public safety. The report must be made on a form provided by the department of public safety and must contain the information required under section 169.95.

Subd. 3. (a) Peace officers' records of children shall be kept separate from records of persons 18 years of age or older and shall not be open to public inspection or their contents disclosed to the public except (1) by order of the juvenile court, or (2) as required by section 126.036, or (3) as authorized under chapter 13; except that traffic investigation reports may be open to inspection by a person who has sustained physical harm or economic loss as a result of the traffic accident. No photographs of a child taken into custody may be taken without the consent of the juvenile court unless the child is alleged to have violated section 169.121 or 169.129. Any person violating any of the provisions of this subdivision shall be guilty of a misdemeanor.

(b) Nothing in this subdivision prohibits the exchange of information by law enforcement agencies if the exchanged information is pertinent and necessary to the requesting agency in initiating, furthering, or completing a criminal investigation.

Subd. 4. [*Court record released to prosecutor.*] If a prosecutor has probable cause to believe that a person has committed a gross misdemeanor violation of section 169.121 or has violated section 169.129, and that a prior juvenile court adjudication forms, in part, the basis for the current violation, the prosecutor may file an application with the court having jurisdiction over the criminal matter attesting to this probable cause determination and seeking the relevant juvenile court

records. The court shall transfer the application to the juvenile court where the requested records are maintained, and the juvenile court shall release to the prosecutor any records relating to the person's prior juvenile traffic adjudication, including a transcript, if any, of the court's advisory of the right to counsel and the person's exercise or waiver of that right.

626.556 [REPORTING OF MALTREATMENT OF MINORS.]

Subdivision 1. [*Public policy.*] The legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse; to strengthen the family and make the home, school, and community safe for children by promoting responsible child care in all settings; and to provide, when necessary, a safe temporary or permanent home environment for physically or sexually abused children.

In addition, it is the policy of this state to require the reporting of neglect, physical or sexual abuse of children in the home, school, and community settings; to provide for the voluntary reporting of abuse or neglect of children; to require the assessment and investigation of the reports; and to provide protective and counseling services in appropriate cases.

Subd. 2. [*Definitions.*] As used in this section, the following terms have the meanings given them unless the specific content indicates otherwise:

(a) "Sexual abuse" means the subjection by a person responsible for the child's care, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of section 609.342, 609.343, 609.344, or 609.345. Sexual abuse also includes any act which involves a minor which constitutes a violation of sections 609.321 to 609.324 or 617.246.

(b) "Person responsible for the child's care" means (1) an individual functioning within the family unit and having responsibilities for the care of the child such as a parent, guardian, or other person having similar care responsibilities, or (2) an individual functioning outside the family unit and having responsibilities for the care of the child such as a teacher, school administrator, or other lawful custodian of a child having either full-time or short-term care responsibilities including, but not limited to, day care, babysitting whether paid or unpaid, counseling, teaching, and coaching.

(c) "Neglect" means failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so. Nothing in this section shall be construed to (1) mean that a child is neglected solely because the child's parent, guardian, or other person responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, or (2) impose upon persons, not otherwise legally responsible for providing a child with necessary food, clothing, shelter, or medical care, a duty to provide that care. Neglect also means "medical neglect" as defined in section 260.015, subdivision 10, clause (e).

(d) "Physical abuse" means any physical injury inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical injury that cannot reasonably be explained by the child's history of injuries, or any aversive and deprivation procedures that have not been authorized under section 245.825.

(e) "Report" means any report received by the local welfare agency, police department, or county sheriff pursuant to this section.

(f) "Facility" means a day care facility, residential facility, agency, hospital, sanitarium, or other facility or institution required to be licensed pursuant to sections 144.50 to 144.58, 241.021, or 245.781 to 245.812.

(g) "Operator" means an operator or agency as defined in section 245A.02.

(h) "Commissioner" means the commissioner of human services.

(i) "Assessment" includes authority to interview the child, the person or persons responsible for the child's care, the alleged perpetrator, and any other person with knowledge of the abuse or neglect for the purpose of gathering the facts, assessing the risk to the child, and formulating a plan.

(j) "Practice of social services," for the purposes of subdivision 3, includes but is not limited to employee assistance counseling and the provision of guardian ad litem services.

Subd. 3. [*Persons mandated to report.*] (a) A person who knows or has reason to believe a child is being neglected or physically or sexually abused, or has been neglected or physically or sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, police department, or the county sheriff if the person is:

(1) a professional or professional's delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement; or

(2) employed as a member of the clergy and received the information while engaged in ministerial duties, provided that

a member of the clergy is not required by this subdivision to report information that is otherwise privileged under section 595.02, subdivision 1, paragraph (c).

The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency orally and in writing. The local welfare agency, upon receiving a report, shall immediately notify the local police department or the county sheriff orally and in writing. The county sheriff and the head of every local welfare agency and police department shall each designate a person within their agency, department, or office who is responsible for ensuring that the notification duties of this paragraph and paragraph (b) are carried out. Nothing in this subdivision shall be construed to require more than one report from any institution, facility, school, or agency.

(b) Any person may voluntarily report to the local welfare agency, police department, or the county sheriff if the person knows, has reason to believe, or suspects a child is being or has been neglected or subjected to physical or sexual abuse. The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency orally and in writing. The local welfare agency, upon receiving a report, shall immediately notify the local police department or the county sheriff orally and in writing.

(c) A person mandated to report physical or sexual child abuse or neglect occurring within a licensed facility shall report the information to the agency responsible for licensing the facility. A health or corrections agency receiving a report may request the local welfare agency to provide assistance pursuant to subdivisions 10, 10a, and 10b.

(d) Any person mandated to report shall, upon request to the local welfare agency, receive a summary of the disposition

of any report made by that reporter, unless release would be detrimental to the best interests of the child. Any person who is not mandated to report shall, upon request to the local welfare agency, receive a concise summary of the disposition of any report made by that reporter, unless release would be detrimental to the best interests of the child.

(e) For purposes of this subdivision, "immediately" means as soon as possible but in no event longer than 24 hours.

Subd. 3a. [*Report of deprivation of parental rights.*] A person mandated to report under subdivision 3, who knows or has reason to know of a violation of section 609.26, shall report the information to the local police department or the county sheriff. Receipt by a local welfare agency of a report or notification of a report of a violation of section 609.26 shall not be construed to invoke the duties of subdivision 10, 10a, or 10b.

Subd. 4. [*Immunity from liability.*] (a) The following persons are immune from any civil or criminal liability that otherwise might result from their actions, if they are acting in good faith:

(1) any person making a voluntary or mandated report under subdivision 3 or assisting in an assessment under this section;

(2) any social worker or supervisor employed by a local welfare agency complying with subdivision 10d; and

(3) any public or private school, facility as defined in subdivision 2, or the employee of any public or private school or facility who permits access by a local welfare agency or local law enforcement agency and assists in an investigation or assessment pursuant to subdivision 10.

(b) A person who is a supervisor or social worker employed by a local welfare agency complying with subdivisions

10 and 11 or any related rule or provision of law is immune from any civil or criminal liability that might otherwise result from the person's actions, if the person is acting in good faith and exercising due care.

(c) This subdivision does not provide immunity to any person for failure to make a required report or for committing neglect, physical abuse, or sexual abuse of a child.

Subd. 4a. [*Retaliation prohibited.*] (a) An employer of any person required to make reports under subdivision 3 shall not retaliate against the person for reporting in good faith abuse or neglect pursuant to this section, or against a child with respect to whom a report is made, because of the report.

(b) The employer of any person required to report under subdivision 3 who retaliates against the person because of a report of abuse or neglect is liable to that person for actual damages and, in addition, a penalty up to $1,000.

(c) There shall be a rebuttable presumption that any adverse action within 90 days of a report is retaliatory. For purposes of this paragraph, the term "adverse action" refers to action taken by an employer of a person required to report under subdivision 3 which is involved in a report against the person making the report or the child with respect to whom the report was made because of the report, and includes, but is not limited to:

(1) discharge, suspension, termination, or transfer from the facility, institution, school, or agency;

(2) discharge from or termination of employment;

(3) demotion or reduction in remuneration for services; or

(4) restriction or prohibition of access to the facility, institution, school, agency, or persons affiliated with it.

Subd. 5. [*Malicious and reckless reports.*] Any person who knowingly or recklessly makes a false report under the provi-

sions of this section shall be liable in a civil suit for any actual damages suffered by the person or persons so reported and for any punitive damages set by the court or jury.

Subd. 6. [*Failure to report.*] A person mandated by this section to report who knows or has reason to believe that a child is neglected or physically or sexually abused, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, and fails to report is guilty of a misdemeanor.

Subd. 6a. [*Failure to notify.*] If a local welfare agency receives a report under subdivision 3, paragraph (a) or (b) and fails to notify the local police department or county sheriff as required by subdivision 3, paragraph (a) or (b), the person within the agency who is responsible for ensuring that notification is made shall be subject to disciplinary action in keeping with the agency's existing policy or collective bargaining agreement on discipline of employees. If a local police department or a county sheriff receives a report under subdivision 3, paragraph (a) or (b) and fails to notify the local welfare agency as required by subdivision 3, paragraph (a) or (b), the person within the police department or county sheriff's office who is responsible for ensuring that notification is made shall be subject to disciplinary action in keeping with the agency's existing policy or collective bargaining agreement on discipline of employees.

Subd. 7. [*Report.*] An oral report shall be made immediately by telephone or otherwise. An oral report made by a person required under subdivision 3 to report shall be followed within 72 hours, exclusive of weekends and holidays, by a report in writing to the appropriate police department, the county sheriff or local welfare agency. Any report shall be of sufficient content to identify the child, any person believed to be

responsible for the abuse or neglect of the child if the person is known, the nature and extent of the abuse or neglect and the name and address of the reporter. Written reports received by a police department or the county sheriff shall be forwarded immediately to the local welfare agency. The police department or the county sheriff may keep copies of reports received by them. Copies of written reports received by a local welfare department shall be forwarded immediately to the local police department or the county sheriff.

A written copy of a report maintained by personnel of agencies, other than welfare or law enforcement agencies, which are subject to chapter 13 shall be confidential. An individual subject of the report may obtain access to the original report as provided by subdivision 11.

Subd. 8. [*Evidence not privileged.*] No evidence relating to the neglect or abuse of a child or to any prior incidents of neglect or abuse involving any of the same persons accused of neglect or abuse shall be excluded in any proceeding arising out of the alleged neglect or physical or sexual abuse on the grounds of privilege set forth in section 595.02, subdivision 1, paragraph (a), (d), or (g).

Subd. 9. [*Mandatory reporting to a medical examiner or coroner.*] When a person required to report under the provisions of subdivision 3 knows or has reason to believe a child has died as a result of neglect or physical or sexual abuse, the person shall report that information to the appropriate medical examiner or coroner instead of the local welfare agency, police department, or county sheriff. Medical examiners or coroners shall notify the local welfare agency or police department or county sheriff in instances in which they believe that the child has died as a result of neglect or physical or sexual abuse. The medical examiner or coroner shall complete an investigation as soon as feasible and report the findings to the police department or county sheriff and the local welfare agency. If the child was receiving services or treatment for mental illness, mental retardation or a related condition, chemical dependency, or emotional disturbance from an agency, facility, or program as defined in section 245.91, the medical examiner or coroner shall also notify and report findings to the ombudsman established under sections 245.91 to 245.97.

Subd. 10. [*Duties of local welfare agency and local law enforcement agency upon receipt of a report.*] (a) If the report alleges neglect, physical abuse, or sexual abuse by a parent, guardian, or individual functioning within the family unit as a person responsible for the child's care, the local welfare agency shall immediately conduct an assessment and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible. If the report alleges a violation of a criminal statute involving sexual abuse or physical abuse, the local law enforcement agency and local welfare agency shall coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews. Each agency shall prepare a separate report of the results of its investigation. When necessary the local welfare agency shall seek authority to remove the child from the custody of a parent, guardian, or adult with whom the child is living. In performing any of these duties, the local welfare agency shall maintain appropriate records.

(b) When a local agency receives a report or otherwise has information indicating that a child who is a client, as defined in section 245.91, has been the subject of physical abuse or neglect at an agency, facility, or program as defined in

section 245.91, it shall, in addition to its other duties under this section, immediately inform the ombudsman established under sections 245.91 to 245.97.

(c) Authority of the local welfare agency responsible for assessing the child abuse report and of the local law enforcement agency for investigating the alleged abuse includes, but is not limited to, authority to interview, without parental consent, the alleged victim and any other minors who currently reside with or who have resided with the alleged perpetrator. The interview may take place at school or at any facility or other place where the alleged victim or other minors might be found and may take place outside the presence of the perpetrator or parent, legal custodian, guardian, or school official. Except as provided in this paragraph, the parent, legal custodian, or guardian shall be notified by the responsible local welfare or law enforcement agency no later than the conclusion of the investigation or assessment that this interview has occurred. Notwithstanding rule 49.02 of the Minnesota rules of procedure for juvenile courts, the juvenile court may, after hearing on an ex parte motion by the local welfare agency, order that, where reasonable cause exists, the agency withhold notification of this interview from the parent, legal custodian, or guardian. If the interview took place or is to take place on school property, the order shall specify that school officials may not disclose to the parent, legal custodian, or guardian the contents of the notification of intent to interview the child on school property, as provided under this paragraph, and any other related information regarding the interview that may be a part of the child's school record. A copy of the order shall be sent by the local welfare or law enforcement agency to the appropriate school official.

(d) When the local welfare or local law enforcement agency determines that an interview should take place on school property, written notification of intent to interview the child on school property must be received by school officials prior to the interview. The notification shall include the name of the child to be interviewed, the purpose of the interview, and a reference to the statutory authority to conduct an interview on school property. For interviews conducted by the local welfare agency, the notification shall be signed by the chair of the county welfare board or the chair's designee. The notification shall be private data on individuals subject to the provisions of this paragraph. School officials may not disclose to the parent, legal custodian, or guardian the contents of the notification or any other related information regarding the interview until notified in writing by the local welfare or law enforcement agency that the investigation or assessment has been concluded. Until that time, the local welfare or law enforcement agency shall be solely responsible for any disclosures regarding the nature of the assessment or investigation.

Except where the alleged perpetrator is believed to be a school official or employee, the time and place, and manner of the interview on school premises shall be within the discretion of school officials, but the local welfare or law enforcement agency shall have the exclusive authority to determine who may attend the interview. The conditions as to time, place, and manner of the interview set by the school officials shall be reasonable and the interview shall be conducted not more than 24 hours after the receipt of the notification unless another time is considered necessary by agreement between the school officials and the local welfare or law enforcement agency. Where the school fails to comply with the provisions of this paragraph, the juvenile court may order the school to comply.

Every effort must be made to reduce the disruption of the educational program of the child, other students, or school staff when an interview is conducted on school premises.

(e) Where the perpetrator or a person responsible for the care of the alleged victim or other minor prevents access to the victim or other minor by the local welfare agency, the juvenile court may order the parents, legal custodian, or guardian to produce the alleged victim or other minor for questioning by the local welfare agency or the local law enforcement agency outside the presence of the perpetrator or any person responsible for the child's care at reasonable places and times as specified by court order.

(f) Before making an order under paragraph (d), the court shall issue an order to show cause, either upon its own motion or upon a verified petition, specifying the basis for the requested interviews and fixing the time and place of the hearing. The order to show cause shall be served personally and shall be heard in the same manner as provided in other cases in the juvenile court. The court shall consider the need for appointment of a guardian ad litem to protect the best interests of the child. If appointed, the guardian ad litem shall be present at the hearing on the order to show cause.

(g) The commissioner, the ombudsman for mental health and mental retardation, the local welfare agencies responsible for investigating reports, and the local law enforcement agencies have the right to enter facilities as defined in subdivision 2 and to inspect and copy the facility's records, including medical records, as part of the investigation. Notwithstanding the provisions of chapter 13, they also have the right to inform the facility under investigation that they are conducting an investigation, to disclose to the facility the names of the individuals under investigation for abusing or neglecting a

child, and to provide the facility with a copy of the report and the investigative findings.

Subd. 10a. [*Abuse outside the family unit.*] If the report alleges neglect, physical abuse, or sexual abuse by a person responsible for the child's care functioning outside the family unit in a setting other than a facility as defined in subdivision 2, the local welfare agency shall immediately notify the appropriate law enforcement agency, which shall conduct an investigation of the alleged abuse or neglect. The local welfare agency shall offer appropriate social services for the purpose of safeguarding and enhancing the welfare of the abused or neglected minor.

Subd. 10b. [*Duties of commissioner; neglect or abuse in a facility.*] (a) The commissioner shall immediately investigate if the report alleges that:

(1) a child who is in the care of a facility as defined in subdivision 2 is neglected, physically abused, or sexually abused by an individual in that facility, or has been so neglected or abused by an individual in that facility within the three years preceding the report; or

(2) a child was neglected, physically abused, or sexually abused by an individual in a facility defined in subdivision 2, while in the care of that facility within the three years preceding the report.

The commissioner shall arrange for the transmittal to the commissioner of reports received by local agencies and may delegate to a local welfare agency the duty to investigate reports. In conducting an investigation under this section, the commissioner has the powers and duties specified for local welfare agencies under this section. The commissioner or local welfare agency may interview any children who are or have

been in the care of a facility under investigation and their parents, guardians, or legal custodians.

(b) Prior to any interview, the commissioner or local welfare agency shall notify the parent, guardian, or legal custodian of a child who will be interviewed in the manner provided for in subdivision 10d, paragraph (a). If reasonable efforts to reach the parent, guardian, or legal custodian of a child in an out-of-home placement have failed, the child may be interviewed if there is reason to believe the interview is necessary to protect the child or other children in the facility. The commissioner or local agency must provide the information required in this subdivision to the parent, guardian, or legal custodian of a child interviewed without parental notification as soon as possible after the interview. When the investigation is completed, any parent, guardian, or legal custodian notified under this subdivision shall receive the written memorandum provided for in subdivision 10d, paragraph (c).

Subd. 10c. [*Duties of the local social service agency upon receipt of a report of medical neglect.*] If the report alleges medical neglect as defined in section 260.015, subdivision 10, clause (e), the local welfare agency shall, in addition to its other duties under this section, immediately consult with designated hospital staff and with the parents of the infant to verify that appropriate nutrition, hydration, and medication are being provided; and shall immediately secure an independent medical review of the infant's medical charts and records and, if necessary, seek a court order for an independent medical examination of the infant. If the review or examination leads to a conclusion of medical neglect, the agency shall intervene on behalf of the infant by initiating legal proceedings under section 260.131 and by filing an expedited motion to prevent the withholding of medically indicated treatment.

Subd. 10d. [*Notification of neglect or abuse in a facility.*] (a) When a report is received that alleges neglect, physical abuse, or sexual abuse of a child while in the care of a facility required to be licensed pursuant to sections 245.781 to 245.812, the commissioner or local welfare agency investigating the report shall provide the following information to the parent, guardian, or legal custodian of a child alleged to have been neglected, physically abused, or sexually abused: the name of the facility; the fact that a report alleging neglect, physical abuse, or sexual abuse of a child in the facility has been received; the nature of the alleged neglect, physical abuse, or sexual abuse; that the agency is conducting an investigation; any protective or corrective measures being taken pending the outcome of the investigation; and that a written memorandum will be provided when the investigation is completed.

(b) The commissioner or local welfare agency may also provide the information in paragraph (a) to the parent, guardian, or legal custodian of any other child in the facility if the investigative agency knows or has reason to believe the alleged neglect, physical abuse, or sexual abuse has occurred. In determining whether to exercise this authority, the commissioner or local welfare agency shall consider the seriousness of the alleged neglect, physical abuse, or sexual abuse; the number of children allegedly neglected, physically abused, or sexually abused; the number of alleged perpetrators; and the length of the investigation. The facility shall be notified whenever this discretion is exercised.

(c) When the commissioner or local welfare agency has completed its investigation, every parent, guardian, or legal custodian notified of the investigation by the commissioner or local welfare agency shall be provided with the following information in a written memorandum: the name of the facility

investigated; the nature of the alleged neglect, physical abuse, or sexual abuse; the investigator's name; a summary of the investigation findings; a statement whether maltreatment was found; and the protective or corrective measures that are being or will be taken. The memorandum shall be written in a manner that protects the identity of the reporter and the child and shall not contain the name, or to the extent possible, reveal the identity of the alleged perpetrator or of those interviewed during the investigation. The commissioner or local welfare agency shall also provide the written memorandum to the parent, guardian, or legal custodian of each child in the facility if maltreatment is determined to exist.

Subd. 10e. [*Determinations.*] Upon the conclusion of every assessment or investigation it conducts, the local welfare agency shall make two determinations: first, whether maltreatment has occurred; and second, whether child protective services are needed.

(a) For the purposes of this subdivision, "maltreatment" means any of the following acts or omissions committed by a person responsible for the child's care:

(1) an assault, as defined in section 609.02, subdivision 10, or any physical contact not exempted by section 609.379, where the assault or physical contact is either severe or recurring and causes either injury or significant risk of injury to the child;

(2) neglect as defined in subdivision 2, paragraph (c); or

(3) sexual abuse as defined in subdivision 2, paragraph (a).

(b) For the purposes of this subdivision, a determination that child protective services are needed means that the local welfare agency has documented conditions during the assessment or investigation sufficient to cause a child protection

worker, as defined in section 626.559, subdivision 1, to conclude that a child is at significant risk of maltreatment if protective intervention is not provided and that the individuals responsible for the child's care have not taken or are not likely to take actions to protect the child from maltreatment or risk of maltreatment.

Subd. 10f. [*Notice of determinations.*] Within ten working days of the conclusion of an assessment the local welfare agency shall notify the parent or guardian of the child of the determinations. Within ten working days of completing an investigation of a licensed facility, the local welfare agency shall notify the person alleged to be maltreating the child, the director of the facility, and the parent or guardian of the child of the determinations. In addition to the determinations, the notice shall include the length of time that the records will be kept under subdivision 11c. When there is no determination of either maltreatment or a need for services, the notice shall also include the alleged perpetrator's right to have the records destroyed.

Subd. 11. [*Records.*] Except as provided in subdivisions 10b, 10d, and 11b, all records concerning individuals maintained by a local welfare agency under this section, including any written reports filed under subdivision 7, shall be private data on individuals, except insofar as copies of reports are required by subdivision 7 to be sent to the local police department or the county sheriff. Report records maintained by any police department or the county sheriff shall be private data on individuals except the reports shall be made available to the investigating, petitioning, or prosecuting authority. The welfare board shall make available to the investigating, petitioning, or prosecuting authority any records which contain information relating to a specific incident of neglect or abuse which is

under investigation, petition, or prosecution and information relating to any prior incidents of neglect or abuse involving any of the same persons. The records shall be collected and maintained in accordance with the provisions of chapter 13. In conducting investigations and assessments pursuant to this section, the notice required by section 13.04, subdivision 2, need not be provided to a minor under the age of ten who is the alleged victim of abuse or neglect. An individual subject of a record shall have access to the record in accordance with those sections, except that the name of the reporter shall be confidential while the report is under assessment or investigation except as otherwise permitted by this subdivision. Any person conducting an investigation or assessment under this section who intentionally discloses the identity of a reporter prior to the completion of the investigation or assessment is guilty of a misdemeanor. After the assessment or investigation is completed, the name of the reporter shall be confidential. The subject of the report may compel disclosure of the name of the reporter only with the consent of the reporter or upon a written finding by the court that the report was false and that there is evidence that the report was made in bad faith. This subdivision does not alter disclosure responsibilities or obligations under the rules of criminal procedure.

Subd. 11a. [*Disclosure of information not required in certain cases.*] When interviewing a minor under subdivision 10, an individual does not include the parent or guardian of the minor for purposes of section 13.04, subdivision 2, when the parent or guardian is the alleged perpetrator of the abuse or neglect.

Subd. 11b. [*Data received from law enforcement.*] Active law enforcement investigative data received by a local welfare agency under this section are confidential data on individuals.

When this data become inactive in the law enforcement agency, the data are private data on individuals.

Subd. 11c. [*Records maintained.*] Notwithstanding sections 138.163 and 138.17, records maintained or records derived from reports of abuse by local welfare agencies, county sheriffs or police departments, or schools under this section shall be destroyed as provided in paragraphs (a) to (c) by the responsible authority.

(a) If upon assessment or investigation there is no determination of maltreatment or the need for child protective services, the records may be maintained for a period of four years. After the individual alleged to have maltreated a child is notified under subdivision 10f of the determinations at the conclusion of the assessment or investigation, upon that individual's request, records shall be destroyed within 30 days.

(b) All records relating to reports which, upon assessment or investigation, indicate either maltreatment or a need for child protective services shall be destroyed seven years after the date of the final entry in the case record.

(c) All records regarding a report of maltreatment, including any notification of intent to interview which was received by a school under subdivision 10, paragraph (d), shall be destroyed by the school when ordered to do so by the agency conducting the assessment or investigation. The agency shall order the destruction of the notification when other records relating to the report under investigation or assessment are destroyed under this subdivision.

Subd. 12. [*Duties of facility operators.*] Any operator, employee, or volunteer worker at any facility who intentionally neglects, physically abuses, or sexually abuses any child in the care of that facility may be charged with a violation of section 609.255, 609.377, or 609.378. Any operator of a facility who

knowingly permits conditions to exist which result in neglect, physical abuse, or sexual abuse of a child in the care of that facility may be charged with a violation of section 609.23 or 609.378.

[redacted]

[redacted], M.D., *et al.*,

Petitioners,

—*v.*—

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

—*v.*—

JANE DOE, M.D., *et al.*,

Cross-Respondents.

[redacted] TO THE UNITED STATES
[redacted] FOR THE EIGHTH CIRCUIT

[redacted] CROSS-RESPONDENTS

[redacted]

[redacted]

[redacted]

Robert E. Hicks
Minnesota Civil Liberties Union
1821 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Eighth Circuit was correct in holding unconstitutional a criminal statute requiring that both biological parents of minors be notified at least forty-eight hours prior to any abortion procedure with no opportunity for mature minors (including emancipated or married minors, and minors with children), or minors whose best interests require confidentiality (including sexually abused minors) to avoid such notice?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE EIGHTH CIRCUIT WAS CORRECT IN HOLDING THAT SUBDIVISION 2 OF THE MINNESOTA CRIMINAL NOTIFICATION STATUTE IS UNCONSTITUTIONAL 4

A. Settled Law, Set Forth By This Court And Every Lower Court To Consider The Issue, Requires That Mandatory Parental Notification Laws Provide A Bypass Option 4

B. Minnesota's Two-Parent Notification Statute Is So Burdensome As To Be Unconstitutional Under Any Standard 9

1. Some Minors Will Go To Any Length To Avoid Involving One Or Both Parents In Their Abortion Choice, Whether In The Context Of A Notice Or Consent Statute 10

2. Forced Notice Puts Some Minors And Parents At Risk Of Harm And Creates An Opportunity To Obstruct Access To Abortion 16

PAGE

3. The Statutory Attempt To Exempt Abused Minors From The Mandatory Notice Requirement Does Not Render It Constitutional 23

4. Subdivision 2 Fails To Provide A Way For Emancipated Minors To Avoid Notice To Both Parents 25

II. MINNESOTA'S MANDATORY TWO-PARENT NOTICE REQUIREMENT CANNOT BE JUSTIFIED AS A MEANS OF PROTECTING A PARENTAL RIGHT TO KNOW 27

A. Biological Parents Have No Constitutional "Right To Know" About Their Daughter's Abortion Decision 27

B. The "Right To Know" Upon Which Minnesota Relies Does Not Justify The Lines Drawn In The State's Statutory Scheme ... 32

CONCLUSION 36

APPENDIX:

Exhibit A, Excerpts of Trial Testimony of Dr. Paul Gunderson, March 12, 1986 ..... A-1

Exhibit B, Excerpts from Transcripts of Senate Debate, May 6, 1981 ..... A-7

Exhibit C, Excerpts from Transcripts of Hearings Before Minnesota Senate Committee on Health, Welfare & Corrections, March 24, 1981 ..... A-14

Exhibit D, Excerpts from Child Maltreatment Report 1985-86 ..... A-19

PAGE

Exhibit E, Excerpts of Trial Testimony of Dr. Vincent Rue, March 12, 1986 ..... A-23

Exhibit F, Statutory Definitions of Maturity A-26

Exhibit G, Article from The Idaho Statesman, August 23, 1989, and Murder Indictment of Rocky Allen Adams A-33

TABLE OF AUTHORITIES

Cases: PAGE

Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom. Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989) 7

Anderson v. Bessemer City, 470 U.S. 564 (1985)..... 10

Bellotti v. Baird, 443 U.S. 622 (1979).....*passim*

Boddie v. Connecticut, 401 U.S. 371 (1971)..... 32

Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941)..... 28

Carey v. Population Services International, 431 U.S. 678 (1977).....2, 3, 4

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) .....*passim*

City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989)..... 32

Doe v. Irwin, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980)..... 29

Gillick v. West Norfolk and Wisbeck Area Health Authority, 3 A11 E.R. 402 (H.L. 1985) 29

Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985) 7

H.L. v. Matheson, 450 U.S. 398 (1981).....2, 4, 8, 20

In re Fiihr, 289 Minn. 322, 184 N.W.2d 22 (1971) 26

In re Sonnenberg, 256 Minn. 571, 99 N.W.2d 444 (1959) 26

PAGE

In re T.W., No. 74,143, slip op. (Fla. Oct. 5, 1989) (per curiam) 9, 33

Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983) 7, 8

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 10

Lufkin v. Harvey, 131 Minn. 238, 154 N.W. 1097 (1915) 26, 27

Meyer v. Nebraska, 262 U.S. 390 (1923) 28, 29, 31

Orr v. Knowles, No. CV81-0-301 (D. Neb. Sept. 16, 1983) 7

Parham v. J.R., 442 U.S. 584 (1979) 31

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 28, 29, 31

Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 4

Planned Parenthood Ass'n of Atlanta v. Harris, 691 F. Supp. 1419 (N.D. Ga. 1988) 7

Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) 4, 5

Planned Parenthood of Rhode Island v. Bd. of Medical Review, 598 F. Supp. 625 (D.R.I. 1984) 8, 20

Prince v. Massachusetts, 321 U.S. 158 (1944) 28, 29, 30, 31

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 31, 32

Roe v. Wade, 410 U.S. 113 (1973) 9

Scheinberg v. Smith, 482 F. Supp. 529 (S.D. Fla. 1979), *rev'd on other grounds*, 659 F.2d 476 (5th Cir. 1981) 20

Smith v. City of Fontana, 818 F.2d 1411 (9th Cir.), *cert. denied*, 108 S. Ct. 311 (1987) 29

PAGE

Stanley v. Illinois, 405 U.S. 645 (1972) 28, 31

Streitz v. Streitz, 363 N.W.2d 135 (Minn. 1985) 26

Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908) 26

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 35

United States v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 338 (1949) 10

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 5, 9

Whalen v. Roe, 429 U.S. 589 (1977) 4

Wisconsin v. Yoder, 406 U.S. 205 (1972) 28, 29, 30, 31

Women's Community Health Center v. Cohen, 477 F. Supp. 542 (D. Me. 1977) 7

Zablocki v. Redhail, 434 U.S. 374 (1978) 32

Zbaraz v. Hartigan, 584 F. Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S. Ct. 479 (1987) (per curiam) 4, 7

Statutes:

Minn. R. Civ. P. 12.01 27

Minn. R. Civ. P. 19.01 26

Minn. Stat. § 144.342 ..... 3, 33

Minn. Stat. § 144.343(1)-(7) ..... *passim*

Minn. Stat. § 626.556 ..... 24, 25

Minn. Stat. § 595.02(1) 34

Minnesota Uniform Declaratory Judgments Act, Minn. Stat. ch. 555 (1988) 26

PAGE

Miscellaneous:

Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why are They Still Occurring?*, 14 Fam. Plan. Persp. 163 (1982) 14

Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Amer. J. Pub. Health 397 (1986) 13

Chamie, Eisman, Forrest, Orr & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982) 13

Ensunsa, *Adams charged with murder*, Idaho Statesman, August 23, 1989, at 1C, col. 3 18

Gillow, *Mother Released from Jail: Abandoned Baby on Way to Recovery*, Sullivan County Democrat, July 21, 1989, at 1A 33

Md. Op. Att'y Gen. No. 85-0-35 (Dec. 31, 1985) 7

1 *Risking the Future: Adolescent Sexuality, Pregnancy and Child-Bearing* (Hayes ed. 1987) 10

Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Abuse of Female Children*, in Handbook on Sexual Abuse of Children 19 (L. Walker ed. 1987) 25

Tenn. Op. Att'y Gen. No. 84-239 (August 7, 1984) 7

Torres, *Does Your Mother Know...?*, 10 Fam. Plan. Persp. 280 (1978) 13

Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980)..13, 14

Uniform Marriage and Divorce Act § 408(a) and Comment 28

PAGE

Zabin & Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205 (1981) 13

39 Am. Jur. Parent and Child § 64 26

74 Op. Att'y Gen. No. 89-023 (Md. July 20, 1989)..... 9

1989 Op. Att'y Gen. No. 16 (Wash. Aug. 25, 1989).... 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1125 and 88-1309

JANE HODGSON, M.D., *et al.*,

Petitioners,

—v.—

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

—v.—

JANE HODGSON, M.D., *et al.*,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CROSS-RESPONDENTS

STATEMENT OF THE CASE

Plaintiffs re-affirm the Statement of the Case in B.P. at 2-25.[1]

SUMMARY OF ARGUMENT

It is settled as a matter of law that mandatory parental involvement statutes such as Minn. Stat. § 144.343(2) (hereinafter "subdivision 2") must provide an effective procedure by which mature minors and those minors whose best interests require confidentiality may avoid mandatory parental involvement of any sort. *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (hereinafter *Bellotti II*); *H.L. v. Matheson*, 450 U.S. 398, 420 (1981) (Powell, J., concurring); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439-40 (1983). Subdivision 6 of Minnesota's statute recognizes this principle by providing for a judicial bypass alternative. Subdivision 2, however, in effect requires all minors, including emancipated minors, married minors, minors with children, physically abused minors, minors from broken homes, and minors pregnant through incest, to notify both biological parents forty-eight hours prior to any abortion, no matter what the benefit or result may be. Such a statute is not narrowly drawn to protect significant state interests. *H.L. v. Matheson*, 450 U.S. at 413; *Carey v. Population Services International*, 431 U.S. 678, 707-8 (1977) (Powell, J., concurring).

Employing long-settled standards, the trial court made extensive findings regarding both the severe burdens Minn. Stat.

---

1 Citations to Petitioners' Brief in No. 1125 are in the form "B.P._____." Citations to Cross-Petitioners' Brief in No. 1309 are in the form "B.C-P._____." As in our brief as Petitioners in No. 1125, citations to the Appendix to the Petition for Certiorari are in the form "_____a," citations to the Joint Appendix are in the form "J.A. _____," and citations to other parts of the record are by Exhibit (P. Ex. _____) or Transcript (Tr.) page. Throughout this brief, Cross-Petitioners are referred to as "defendants," and Cross-Respondents are referred to as "plaintiffs."

144.343(6) (hereinafter "subdivision 6") (two-parent notice with bypass) imposed on minors and single parents, and its utter failure to advance any state purpose other than deterring abortion. 25a, 29a, 41a. Faced with the mandate of subdivision 2, many minors will nevertheless avoid notification at any cost; others will encounter emotional or physical abuse in seeking to avoid teenage motherhood. Even abused and emancipated minors face the Hobson's choice between notifying their parents under the statute and effectively notifying them under the "exceptions" to the requirement. The district court found that forced notice to both parents, even with a bypass option, can constitute an absolute veto over a minor's abortion choice. *A fortiori*, the harsher requirements of subdivision 2 are invalid under any standard as a "kind of government-mandated harm" that violates due process. *Carey*, 431 U.S. at 716 (Stevens, J., concurring).

The "right to know" theory advanced by defendants to justify this statute, a right claimed to be more "fundamental" than the right to privacy, constitutes a new and far-reaching theory as yet unrecognized by this Court. What purports to be a reasonable accommodation of this "right" ignores the prevalence of voluntary parental notice and the selectivity with which Minnesota itself invokes this alleged "right to know." Minors in Minnesota are given specific statutory protection of confidentiality for every other aspect of their pregnancy. Minn. Stat. § 144.343(1). Further, married minors and minors who are parents can consent to all medical care for themselves and their children. Minn. Stat. § 144.342. Only in the case of abortion does Minnesota assert that a constitutionally based "right to know" requires notice to both biological parents. Minn. Stat. § 144.343(1).

Since the burdens of notification to both biological parents without a bypass are so severe, and the trial record proves that no legitimate state interests would be served by such a requirement, subdivision 2 is unconstitutional.

ARGUMENT

I. THE EIGHTH CIRCUIT WAS CORRECT IN HOLDING THAT SUBDIVISION 2 OF THE MINNESOTA CRIMINAL NOTIFICATION STATUTE IS UNCONSTITUTIONAL.

A. Settled Law, Set Forth By This Court And Every Lower Court To Consider The Issue, Requires That Mandatory Parental Notification Laws Provide A Bypass Option.

This Court has firmly established that minors, as well as adults, have a constitutionally protected right to privacy which encompasses the right to terminate pregnancy. *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 72-75 (1976); *Bellotti II*, 443 U.S. 622 (1979). Because this right necessarily involves both autonomy and anonymity in decision-making, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and represents an intensely personal decision, this Court has concluded that it is beyond the power of the state to impose a blanket requirement of third-party participation. *Danforth*, 428 U.S. at 74. Thus, state legislation requiring the involvement of a minor's parents in her abortion choice must not only be narrowly drawn to serve some "significant" state interest, *H.L. v. Matheson*, 450 U.S. 398, 413 (1981); *Carey*, 431 U.S. at 693; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987), but must also provide a procedure whereby such involvement can be avoided by mature minors and those whose best interests require complete autonomy and anonymity in the decision. *Akron*, 462 U.S. 416, 427 n.10; *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91 (1983) (affirming that requirement of bypass is "not in dispute"); *Bellotti II*, 443 U.S. at 643-44.[2] Particular legislative sensitivity is required, *Bellotti II*, 443 U.S. at 642, in recogni-

2 Any bypass provision, whether administrative or judicial, must, of course, be effective, expeditious and confidential. As plaintiffs have previously argued, subdivision 6 as applied was not effective, either in providing a means for mature or best interest minors to bypass notice, or in advancing state interests. *See generally*, B.P. 13-16, 23-25, 27-38.

tion of the grave consequences of unwanted motherhood for a teenager. *Id.* To date, a majority of this Court has never strayed from this exacting standard of review. *See e.g., Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring in judgment) (providing the fifth vote to uphold the Missouri statute and declining to re-examine this Court's precedent on grounds that the "requirements [of the law do not] conflict with any of the Court's past decisions concerning state regulation of abortion").

Although defendants agree that parental consent statutes require a judicial bypass, they argue that subdivision 2 survives constitutional scrutiny because it "merely requires that parents be informed," B.C-P. 38,[3] and is therefore distinguishable from the parental consent statutes which this Court has repeatedly held must have a constitutionally adequate bypass procedure. *Akron*, 462 U.S. 416 (1983) (parental consent); *Bellotti II*, 443 U.S. 622 (1979) (parental consent with bypass requiring notification to parents); *Danforth*, 428 U.S. 52 (1976) (parental consent).[4] This argument erroneously construes the prior opinions of this Court and fails to take into account the actual effects of mandatory parental notification on minors.[5]

3 Defendants also argue that notice is less burdensome in fact. This argument is discussed in Point I(B) below.

4 Minnesota's argument that the constitutional standard to be used to evaluate consent requirements differs from that to be used in evaluating notice requirements is inconsistent with defendants' position at trial that the standards are the same. As the district court observed, "[t]he parties agreed in response to a question from the court that the constitutional analysis applicable to notice requirements does not differ from that applicable to consent requirements." 36a. *See also* 81a.

5 Although defendants argue facts about the burden imposed by subdivision 2, the assessment of burdens was treated as a question of law at the trial level. 37a-38a. In Point I(B), *infra*, plaintiffs demonstrate that the burdens imposed by forced notice to both biological parents are effectively the same or greater than the burdens of most consent statutes. Nevertheless, if this Court finds that the difference between notice and consent is of constitutional significance, we argue that the case should be remanded to the district court for specific factual findings regarding the burdens of notification without bypass. *See* n.21, *infra*.

This Court has never considered any abstract distinction between notice and consent to be constitutionally significant. For example, in *Bellotti II*, Justice Powell, writing for the plurality, stated:

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court without first *consulting or notifying* her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental *consultation or consent*.

443 U.S. at 647 (emphasis added).[6] This holding was reaffirmed by a majority of this Court in *Akron*, noting that an Ohio statute:

> makes no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, . . . a requirement that in the case of a mature minor seeking an abortion would be unconstitutional.

462 U.S. at 441 n.31 (citations omitted); *id.* at 427 n.10 (coining the term "parental involvement" to describe notice and consent requirements alike). Further, lower courts, including the district

6 The plurality opinion in *Bellotti II* represented the views of Chief Justice Burger and Justices Stewart, Powell and Rehnquist. Justices Stevens, Brennan, Marshall and Blackmun joined in an opinion which found the parental consent statute in that case unconstitutional because, "In every instance, the minor's decision to secure an abortion is subject to an absolute third-party veto," whether by a parent or a court. *Id.* at 654 (footnote omitted).

court and court of appeals below,[7] have consistently held that a bypass procedure is required whenever notification is required.[8]

7 The district court entered a restraining order enjoining subdivision 2 of Minn. Stat. § 144.343 on July 31, 1981, J.A. 1-2, one day before it was to have gone into effect. The subdivision was preliminarily enjoined on March 22, 1982, J.A. 6. The injunction was made permanent on November 6, 1986, 27a-38a, affirmed by a panel of the Eighth Circuit on August 27, 1987, 58a-62a, and by the Eighth Circuit *en banc* on August 8, 1988. 80a-81a. At each stage, subdivision 2 was held unconstitutional as a matter of settled law. *See* 37a-38a; 81a.

8 *See Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127 (7th Cir. 1983); *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988); *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S. Ct. 479 (1987) (per curiam); *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985); *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom. Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989); *Orr v. Knowles*, No. CV81-0-301 (D. Neb. Sept. 16, 1983). *See also Women's Community Health Center v. Cohen*, 477 F. Supp. 542, 547 (D. Me. 1977) (pre-*Akron* decision that notification laws must have a bypass); Op. Att'y Gen. No. 85-035 (Md. Dec. 31, 1985); Op. Att'y Gen. No. 84-239 (Tenn. August 7, 1984).

The Seventh Circuit's discussion of this point in *Pearson* is particularly helpful:

> In requiring that states provide bypass procedures in connection with both consent and notification statutes, the Court has made no suggestion that procedures insufficient for consent statutes would be sufficient for notification statutes. Rather than differentiating between consent and notification statutes, the Court in *City of Akron* stated that it is "parental involvement" that an emancipated or mature minor must have an opportunity to avoid. The apparent reason for the similar treatment of notification and consent requirements is that, as a practical matter, a notification requirement will have the same deterrent effect on a minor seeking an abortion as a consent statute has.
>
> . . . .
>
> Because parental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion, we will apply the Supreme Court's analysis with respect to consent bypass procedures in our consideration of the

This Court's rejection of gossamer distinctions between "consent" and "notice" constitutes recognition that parental authority which can be used to benefit teenagers may also be used to obstruct their exercise of constitutional rights, simply by virtue of the economic, emotional and other coercive powers most parents inherently have over their children. As this Court noted in *Bellotti II*:

> [M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct . . . an abortion . . . .

443 U.S. at 647. *See also H.L. v. Matheson*, 450 U.S. 398, 420 & n.9 (1981) (Powell, J., concurring); *id.* at 428 n.3 (Marshall, J., dissenting); opinion of Eighth Circuit *en banc* at 81a. *Cf. Planned Parenthood of Rhode Island v. Bd. of Medical Review*, 598 F. Supp. 625, 635 (D.R.I. 1984) ("spousal notification requirement . . . opens the door to total frustration of a woman's personal and unilateral decision to have an abortion" because husbands "will exert physical or emotional pressure to coerce their wives to forego the abortion entirely").[9] The trial record in this case bears witness to these facts. *See* discussion Point I(B), *infra*.

---

constitutional sufficiency of Indiana's notification bypass procedures.

716 F.2d at 1132 (citations omitted).

9 The Seventh Circuit has characterized the effects of parental notification as follows:

> Unemancipated minors are fundamentally different from adults because they are financially dependent upon their parents and have numerous legal incapacities. In addition, parents have considerable leeway to impose punishment upon their children for disobedience. Because of this, minors often have no choice but to comply with parental directives.
>
> Although notification requirements do not give parents the legal power to veto their daughter's abortion decision, as a practical matter they may . . . . It was a recognition of this vulnerability that led the plurality in *Bellotti II* to state that confidentiality was necessary in a waiver-of-consent proceeding.

Pearson, 716 F.2d at 1132 (citations omitted).

B. Minnesota's Two-Parent Notification Statute Is So Burdensome As To Be Unconstitutional Under Any Standard.

Employing a standard never before adopted in a privacy case, defendants contend that Minnesota's statute passes constitutional muster under a new form of rational basis test.[10] In so arguing, defendants rely on post-trial assertions and fail to cite any evidence to support their argument that Minn. Stat. § 144.343(2) would in fact result in increased notice, benefit minors or families, or actually impose "markedly less[ ]" of a burden[11] on minors than some hypothetical consent statute. Defendants' assertions cannot sustain the statute, however, because the overwhelming evidence in the record establishes that precisely the opposite is true.[12] As outlined below, the rec-

---

10 Defendants contend that following this Court's decision in *Webster*, 109 S. Ct. 3040 (1989), "a state regulation pertinent [to the constitutional right to choose abortion] may survive constitutional challenge if it is reasonably designed to further a 'legitimate' state interest and does not unduly burden the abortion process." B.C-P. 23. But as Justice Blackmun stated, this Court in *Webster* made not "a single, even incremental, change in the law of abortion." *Webster*, 109 S. Ct. at 3067 (Blackmun, J., concurring in part and dissenting in part); *id.* at 3064 (Scalia, J., concurring in judgment) (Court "avoid[ed] almost any decision of national import"). *See also* Chief Justice Rehnquist speaking for the plurality in *Webster*, explicitly declining to "revisit" this Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973), stating instead that "we leave it undisturbed." *Webster* at 3058; *id.* at 3060 (O'Connor, J., concurring in judgment) ("there is no necessity to accept the state's invitation to re-examine the constitutional validity of *Roe v. Wade*"). Since *Webster*, courts and Attorneys General have read the case as providing no majority of this Court for a change in *Roe* or its standard of review. *E.g.*, *In re T.W.*, No. 74,143, slip op. at 6 (Fla. Oct. 5, 1989) (per curiam); 1989 Op. Att'y Gen. No 16 (Wash. Aug. 25, 1989); 74 Op. Att'y Gen. No. 89-023 (Md. July 20, 1989).

11 The "balancing" approach to constitutional analysis which defendants hereby advance has been consistently rejected by members of this Court. *See Webster*, 109 S. Ct. at 3066, n.* (Scalia J., concurring in judgment); *Akron*, 462 U.S. 416, 420 n.1 (1983).

12 Even in their post-trial Proposed Findings of Fact, defendants failed to cite a single piece of evidence in support of their proposed finding

ord shows that minors will be driven to dangerous alternatives in seeking to avoid involving parents and that, if notice were successfully compelled, their lives, and those of their single parents, would be imperiled. Without a judicial or other bypass mechanism, many mature and best interest minors, including emancipated minors and victims of abuse, will thus have their privacy rights violated.

1. Some Minors Will Go To Any Length To Avoid Involving One Or Both Parents In Their Abortion Choice, Whether In The Context Of A Notice Or Consent Statute.

Most minors notify at least one parent about their pregnancy.[13] 31a; 41a. Many others discuss their pregnancy with another adult.[14] J.A. 380-81. Kathy M. Tr. 1234, P. Ex. 96 at 7. Martin Tr. 412. Those members of plaintiff class who cannot involve one or both biological parents, however, have compelling reasons. *See* B.P. 16-23. These reasons include: fear of

---

that notice is less burdensome than consent. *See* Defendants' Proposed Findings Of Fact And Conclusions Of Law, p.36 No. 13. Defendants get around the record in this case by simply disagreeing with, or ignoring, the trial court's extensive findings. Unless defendants prove clear error by the district court, they are foreclosed from writing their own, alternative assessment of the factual record. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 857-58 (1982); *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 494-95 (1949).

13 Younger minors are more likely then older ones to notify their parents. 1 *Risking the Future: Adolescent Sexuality, Pregnancy and Child-Bearing* 192 (C. Hayes ed. 1987).

14 Out of the 258 minors involved in the court bypass hearings at which Minnesota State Court Judge Petersen had presided, 35 had discussed their abortion with one parent, 48 had discussed it with an adult relative, and "[i]n many of the remaining cases, the girl had sought out the advice and counsel of other adults before going to professional counselors. Those adults include teachers, employers, parents of friends, parents of the potential father, ministers, priests and neighbors." J.A. 380-81.

recurring abuse;[15] fear that one or both parents would obstruct the abortion;[16] serious illness or disability in the family;[17] fear of notifying an estranged parent with whom the minor has no emotional relationship or trust;[18] fear that notice would evoke

---

15 Judge Gerald Martin testified that one minor who appeared before him was "frequently abused" by her father, and that her father had broken her mother's wrist a week or two before the hearing. J.A. 204. *See also* § B(2), *infra*.

16 In his order finding C.U. to be mature and capable of giving informed consent, Judge Martin wrote, "[p]etitioner stated that her father is dramatically opposed to abortion and she is concerned that he would force her to leave home if he knew of her condition." P. Ex. 55L. *See also* § B(2), *infra*.

17 Plaintiff Rose C., who told her mother, stated that her family doctor advised her not to tell her father about the pregnancy because he was recovering from a massive stroke and the stress would be harmful to him. P. Ex. 98 at 12-13. Mary J., whose mother was a recovering alcoholic, testified that she was afraid, based on her knowledge of her mother's addictive behavior, that notification of her pregnancy would cause her mother to resume drinking. Mary J. Tr. 634-35. Amy W. testified that her mother had suffered a nervous breakdown the previous winter and that she was afraid that notice of her pregnancy would have deleterious effects on her mother's health. P. Ex. 111 at 6-7. Susan B., 17 years old, testified she did not wish to notify her parents because there had recently been illnesses and deaths in her immediate family. P. Ex. 99 at 4-5. Judge Peter Hemstad found that W.C., who was one month short of 18, should be allowed to obtain her abortion without notifying her parents because, in part, her parents were divorcing and her father was paraplegic. P. Ex. 55S.

18 Emma G., who had discussed her pregnancy with her father, testified that her parents had divorced when she was one year old, and that her mother lived in Maryland. She also testified that she first met her mother when she was 14 years old. P. Ex. 104 at 10-11. Harriet T. testified that her parents had divorced when she was five years old and that her father lived in the East. P. Ex. at 8. She also testified that she had only seen her father twice in the previous four or five years. *Id.* at 10. Sally H. testified that her parents had been divorced for seven years and that her father lived in Colorado. She also stated, "I don't—I see him, but not enough for him to have anything to do with what I have to do with my future . . . . " P. Ex. 96 at 9. In his order declaring B.L. a mature minor, Judge Martin stated, "Petitioner related to the Court that her mother and father separated when she was about [10]

violence towards one parent by the other;[19] or fears based on the fact that the pregnancy was the result of incest.[20]

Although defendants assume that a blanket notice requirement without a bypass option would operate to force notice to both biological parents without cost to the minor, this assumption must fail in light of the trial record.[21] Social workers, clinic personnel, experts, all made clear that many minors would forego critical medical care, rather than involving their parents, if there were no bypass option. Ring Tr. 1661, Melton Tr. 1154, Welsh Tr. 122-23. This is because teenagers are so concerned with confidentiality, Melton Tr. 1147-48, David Tr. 2544-45, Peterson Tr. 1289, that the decisive factor in whether to seek

years old and that since that time she sees her father possibly once a year." P. Ex. 55F. In another court proceeding, Judge Martin found L.Q. mature and stated that "her father is currently a fugitive from the law and his whereabouts are unknown." P. Ex. 55I.

19 In his order declaring C.U. to be mature, Judge Martin stated, "Petitioner informed the Court that her father is a practicing alcoholic and has been very abusive towards her and her mother in the past . . . . She is concerned that if her father knew he would be physically abusive towards her and perhaps her mother." P. Ex. 55K. Judge Oleisky testified, "[W]e have heard . . . where the parent will say I am afraid of assault from my husband or if he were to know about this." J.A. 166.

20 P.C., a member of plaintiff class, was living with her father and stepmother when she was reportedly impregnated by her stepbrother. Welsh Tr. 230-31. It would not have been reasonable to expect P.C. to notify her natural mother, who lived away from her and had abused P.C. in the past. Welsh Tr. 231.

21 The district court made no specific findings on the effect of mandatory notice without a bypass option; because it, like the court of appeals, held that the unconstitutionality of subdivision 2 was settled as a question of law. 38a; 81a. However, many of the court's findings concerning subdivision 6 apply with even greater force to a system that eliminates a bypass. Should this Court find that the necessity of a bypass procedure for this notification statute rests on a factual evaluation of either the degree of burden or the statute's effectiveness, not already satisfied by the present record or trial court findings, this Court should remand to the district court for further findings of fact.

health care in connection with a pregnancy is often whether they will be assured privacy. Melton Tr. 1154.[22] Minors' desperation for privacy is illustrated as well by the fact that nearly one-half of all minors receiving abortions went through the arduous and traumatic bypass procedure, often accompanied by their mothers, in order to avoid notice to one or both parents. J.A. 123. *See generally* B.P. at 9 n.16, 23-24.

Some minors, who choose to neither notify nor carry to term, will run away,[23] commit suicide,[24] obtain illegal or self-induced

22 Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288 (1980) (twenty-three percent of teenagers would not seek an abortion at a clinic which required parental notification); Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Amer. J. Pub. Health 397, 399 (1986) (one in three minor abortion patients living in Massachusetts had abortions in states that did not require parental consent); Chamie, Eisman, Forrest, Orr & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126, 133 (1982) (twenty-six percent of adolescents prefer clinics to doctors because they fear doctors will notify parents). Torres, *Does Your Mother Know...?*, 10 Fam. Plan. Persp. 280, 281 (1978) (thirty-six percent of teenagers would not attend family planning clinic if parents were notified); Zabin & Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205, 213 (1981) (three out of ten adolescents state that they delay attending family planning clinics because they are afraid their parents will be notified).

23 Elizabeth S., a member of the plaintiff class, testified that she would have left home rather than tell her parents of her pregnancy. When asked why she opposed telling her parents, she stated, "[My father] totally disagrees with abortion . . . . He thinks that if a person is old enough to have sex he is old enough. [sic] If she gets pregnant they're old enough to take care of the baby." P. Ex. 105 at 5.

24 One minor plaintiff testified that she considered committing suicide or running away rather than notifying her father, a prominent anti-abortion politician. She was convinced by clinic counselors to consider options other than suicide, and she chose to appear before a judge instead. J.A. 65.

abortions,[25] or travel long distances out of state[26] rather than inform their parents of their pregnancy. Thomas Webber, the executive director of Planned Parenthood of Minnesota, testified that one quarter of the minors who came to Planned Parenthood clinics stated that they could not notify their parents of the abortion. When asked how minors would cope with a notice requirement, he stated:

> Some [minors] said they would seek illegal abortion care, some said they would lie about their age, some said that they would leave home, some said I don't know what I would do but I can't talk to my parents . . . .

Webber Tr. 611.[27]

Required notification without a bypass option would, at a minimum, lead minors to delay obtaining critical care, subjecting them to the increased risks of childbirth and all the attend-

25 Dr. Hodgson testified that one of her 14-year-old patients had attempted to self-abort and had severely damaged her cervix in the attempt. J.A. 462. *See* Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Fam. Plan. Persp. 163, 165 (1982) (desire for secrecy was primary reason why teen self-aborted and consequently died).

26 Legal abortion in another state with no restrictive laws is an option available only to those few minors who have both the necessary economic resources and the geographic proximity to an out of state provider. Plaintiff Kathy M. was taken to Iowa for an abortion by her mother when their local judge, who was religiously opposed to abortion, denied their bypass petition. Kathy M. Tr. 1239-41. It is unclear whether she could have done this without her mother's help.

27 This trial testimony is substantiated by such studies as one which found that forced parental notification would cause nine percent of pregnant minors to self-abort or seek an illegal abortion. Torres, Forrest & Eisman, 12 Fam. Plan. Persp. at 288. This testimony is further substantiated by the history of young women's actions before they could obtain legal abortions. *See* J.A. 457 (a number of attempted suicide patients seen in a psychiatric ward were, or feared they were, pregnant); B.P. 11 n.21 (before abortions were legal and accessible to minors under conditions of confidentiality, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant).

ant problems of teenage motherhood. B.P. 11-13.[28] Delay results from denial, from minors' hopes of avoiding notification of their parents, or from the time required to contemplate their limited options for obtaining an abortion in confidence, such as traveling out of state. Even minors with serious health problems which necessitate an immediate abortion, but which are less than imminently life-threatening, would be compelled to delay or forego medical treatment when notification of both parents is not in the minor's best interests.[29]

28 Evidence offered at trial demonstrates that the percentage of minors getting second trimester abortions in Minnesota increased 26.6% (from 18.4% to 23.3% from 1978 to 1983. In contrast, these percentages increased only 12.2% for 18 to 19 year olds and only 14% for 20 to 24 year olds. 135a. Defendants erroneously claim that subdivision 6 caused no increase in the average gestational age of Minnesota minors seeking abortions, B.C-P. 19, but their argument proves nothing. Dr. Paul Gunderson, Director of the Minnesota Center for Health Statistics, testified that the "average" gestational age noted in defendants' Exhibit 35 is the "mean" gestational age, calculated by adding the gestational age for each minor who obtained an abortion and dividing it by the number of abortions. Exhibit A, *infra* at A-1. If, therefore, a number of minors obtained early abortions, they would mask the trend toward later abortions in other minors. Thus, in response to a hypothetical question, Dr. Gunderson conceded that, if Minnesota minors were otherwise generally participating in the national trend towards earlier abortions, an unchanged mean gestational age could be explained by the presence of minors who delayed their abortions until a later stage in their pregnancy. Exhibit A, *infra* at A-1-3.

29 Subdivision 4(e) of the statute provides an exception for minors whose health is so endangered that her doctor can certify she will die within three days. Specifically, subdivision 4(a) states that no notice is required if the attending physician certifies the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice. By the terms of the statute, the procedure may be performed 72 hours after notice is mailed. But, unless the doctor can state the minor will die within those three days, it is presumed that there is sufficient time to notify the parents. This exception does not help minors whose health problems warrant immediate abortions but whose lives cannot be certified to be so imminently endangered.

For example, when plaintiff H.L. began to abort spontaneously at the Women's Health Center of Duluth she could not be treated by an abortion procedure without notice to both her parents, because spontaneous abortions are usually not life-endangering. She was therefore

Despite the lengths to which minors will go to avoid notice, defendants contend that Minnesota's law falls short of an absolute veto, and somehow reasonably accommodates the interests and rights of minors. B.C-P. 37-38. But the illusory distinction they draw between statutes requiring notice, as in Minnesota, and those requiring consent is of little consequence to minors.[30] It is parental involvement which minors in Minnesota sought to avoid at all cost, and the record makes clear that notice alone, without a bypass, would deprive minors of critical choices and drive them to acts of desperation. The simple fact is that privacy, violated as much by "notice" as by "consent," is what they seek.

2. Forced Notice Puts Some Minors And Parents At Risk Of Harm And Creates An Opportunity To Obstruct Access to Abortion.

No one disagrees that the ideal situation for a pregnant minor is one in which both her parents, living together and with her, discuss the situation with the minor, offer advice, and support the decisions which need to be made about the pregnancy. However, this ideal is unattainable and unavailable to many teenagers. In fact, only fifty percent of the members of plaintiff class of minors live with both biological parents. 29a. Moreover, blanket requirement of notice for *all* minors would present significant numbers of them with a choice between unwanted motherhood and physical or psychological abuse. Requiring two-parent notice will subject many parents to these evils as well.

---

taken to the court, accompanied by her mother and a nurse, in order to obtain a court order. Welsh Tr. 165-66. If no bypass had been in place, she would have had to wait for treatment until both parents were located or until 72 hours had elapsed from the time notice was mailed. This assumes she and her mother would have agreed to notify the father.

30 For example, Massachusetts state court judge Paul Garrity testified that he had adjudicated over 200 bypass cases under the Massachusetts parental consent statute. Not one of these minors had initially told her parents and then been refused consent. J.A. 290-93.

The district court found and defendants do not dispute that intrafamilial violence is a widespread phenomenon in Minnesota and in the nation as a whole. 30a. Violence and the threat of violence are too frequently a part of the lives of many of the plaintiff class.[31] Some minors had experience with violence inflicted on older sisters who had become pregnant.[32] These minors are only too aware that parental knowledge of their pregnancy could precipitate further abuse.[33] J.A. 204; J.A. 226;

---

31 Natalie C., a plaintiff minor, testified, "my step-dad, he's got a bad temper and I'm scared of him and I was just afraid he'd knock me around." J.A. 66. Sarah L., a minor's mother, testified that her ex-husband had held one of their daughters locked up in her bedroom during a visit and that she had to send money to her daughter's friend so that the friend could help her daughter escape. J.A. 276-77. *See also* B.P. 16-19.

32 Ida B., an older sister of a plaintiff minor, testified that she had become pregnant when she was a teenager. She testified that when her father learned of her pregnancy "he was outraged, he was physically violent . . . [t]o me and my mother . . . [t]o the point of being slapped and kicked [sic] and abusive to my mother in the same way." Ida B. Tr. 1440-41. Paula Wendt testified:

> [O]ne [minor] chose to tell neither parent and she said that three years ago her father found her older sister in a somewhat compromising situation with her boyfriend. She said her father became so enraged over this he took her sister to a bar on Hennepin Avenue in downtown Minneapolis and forced her to sit and watch the prostitutes the way they were picked up by men. She said that he told her sister that if she were going to act like a whore she should see the way they live.

J.A. 116. This minor was adamant in refusing to notify her parents. *Id.*

33 Indeed, defendants' own proffered "expert," Dr. Rue, testified that, in some cases, forced notification could "exacerbate the problem." Exhibit E, *infra* at A-25. When asked how this could happen, he stated:

> In cases where there is very severe dysfunctional communication, threats of violence, very poor family life, it is possible that notification could be harmful to both the adolescent—well, primarily to the adolescent.

Id. He also admitted under cross-examination that mandatory notice could conceivably result in a parental reaction ending up in the death of the minor. J.A. 367. Recently, an Idaho father was indicted for the

J.A. 269-70; *see also* J.A. 193-94; J.A. 161; J.A. 245; J.A. 324; J.A. 464. It is not surprising, therefore, that many of the minors who used the bypass procedure stated that they did so because they feared parental abuse. J.A. 161; J.A. 203-204; J.A. 226; J.A. 237; J.A. 245; J.A. 269-270; J.A. 460.[34]

The two-parent notice requirement will also jeopardize the physical safety of some parents and will interfere with the integrity of those families who choose not to include both biological parents in the minor's abortion choice. For example, mothers of minors testified they will be abused if their estranged husbands learn of their daughters' pregnancies. D.P., a minor's mother, testified that during their marriage, her ex-husband "would just hit [her] all over and throw [her] down or [do] the same thing to the children." J.A. 180. When asked what she feared if she were forced to notify her ex-husband, she replied, "His violence. His last marriage ended where she ended up in the hospital a couple of time and he also did physically abuse

---

first degree murder of his 13-year-old daughter. The young woman, who had allegedly been impregnated by her father, was to have obtained an abortion the following morning. Ensunsa, *Adams charged with murder*, The Idaho Statesman, August 23, 1989, at 1C, col. 3. *See* Exhibit G, *infra* at A-33-34. Dr. Rue endorsed notification to rapists and incestuous abusers. J.A. 366.

34 Defendants attempt to minimize the number of minors who fear parental retaliation by mischaracterizing the statistics compiled by state court Judge Petersen, B.C-P. 9-10. First, they state that only four percent of minors who went to court fear physical abuse. B.C-P. 10 n.5. This number refers, however, to those minors who are categorized as fearing *recurring* abuse. A closer look at Judge Petersen's tables reveals that several of his categories fall under any definition of abuse. For example, at least twice that number state explicitly that they fear physical abuse, whether recurring or initial (i.e., 11 stated that they feared a reoccurrence of prior abuse and 10 stated they were fearful based on prior expressed threats). J.A. 382. Others discussed family problems that are often associated with incidents of abuse (i.e., alcoholism, marital problems, etc.). *Id.* Second, and perhaps more importantly, defendants do not take into account the extensive evidence demonstrating that abused minors frequently do not reveal abuse. Those who reveal this family secret are but the tip of the iceberg. *See* § B(3) *infra*; 30a (abuse underreported).

their three children and that just—it just frightens me." J.A. 181.[35]

Physical abuse is not the only consequence minors fear. Trial testimony demonstrated that some parents attempt to obstruct their daughters' access to abortion services,[36] or make an abortion as difficult to obtain as they possibly can.[37] Based on their knowledge of their parents, some minors used the judicial bypass because they feared that similar tactics could be used against them.[38] J.A. 64, 114-115, 232, 460; *see also* J.A. 280,

---

35 Another plaintiff, Sarah L., the mother of a pregnant teenager, Kathy M., testified that her ex-husband had repeatedly subjected her to emotional abuse during their marriage. J.A. 277. She also stated, "[t]wice during the last six years of our marriage when he was in a drunken stupor he put a .45 Magnum [sic] to my head and was going to blow my head off." J.A. 279. When asked why she had not even considered notifying her ex-husband, she said, "[h]e would go totally insane . . . Kathy was terrified of him, horribly terrified of him." Sarah L. Tr. 1261-62. "We would not have notified him. She would have had the child. We would not have notified him, there would have been no way, no way." J.A. 280.

36 For example, Dr. Hodgson testified concerning an incident in which a mother removed her 15-year-old daughter from school and kept her locked in the house to prevent her from obtaining an abortion. J.A. 462.

37 The administrative assistant in the Guardian Ad Litem Office of Hennepin County testified that some parents refused to sign the acknowledgement of notice in order to make the procedure as difficult as possible for their daughters. J.A. 332. *See also* J.A. 64; J.A. 114-15; J.A. 161; B.P. 42 n.80.

38 Agnes I. testified that her mother, who was politically active in the anti-abortion movement, had told her that, if she ever became pregnant, she would either have to carry to term and put the child up for adoption or lose her parents' support. P. Ex. 112 at 9-10. Sally H. testified that her mother had told her she would be forced to leave home if she ever became pregnant. P. Ex. 96 at 9-10. Natalie C. testified, "my mom once said I would be kicked out if I got pregnant[,] if she ever found out I'd be kicked out." J.A. 66-67. Rose E. testified that she and her mother traveled to Duluth rather than notify her father. When asked why she did not tell her father about her pregnancy, she stated:

(*Footnote continued*)

318. Further, although parental obstruction may be most successful with younger minors, *see* B.P. 42 n.80, many older minors will be unable to withstand parental efforts at obstruction and will be forced into childbirth against their will.[39] Contrary to Justice Stevens' assumption, not all mature minors can simply ignore any parental disapproval by virtue of their intellectual and emotional capability to make important decisions. *See Matheson*, 450 U.S. at 425 n.2 (Stevens, J., concurring).[40]

> I was—would be intimidated by his reaction. I know that he's conservative and I know his views on issues like abortion. I think it would really disrupt the family unit, ourselves, and it probably would be carried to extremes. I might have even had to leave home.

P. Ex. 97 at 5. Beth F. testified that, although she discussed her pregnancy with her boyfriend's mother, she would not talk to her own mother because she was afraid of being forced to leave home. P. Ex. 108 at 9-10. Her mother had once locked her out of her home when she saw Beth kissing her boyfriend. *Id.* at 11. In his order declaring B.L. a mature minor, Judge Martin stated, "[p]etitioner informed the Court that her mother has forced her to leave the home in the past and feels that this may happen again if she is told." P. Ex. 55F.

39 In downplaying this type of testimony, defendants miscount the number of minors who told Judge Petersen that they feared obstruction by their parents. B.C-P. 10 n.7. While five percent explicitly stated that their parents would force them to keep the child, 21% stated that their parents would force them to leave home. J.A. 381. Such a threat would obviously have a chilling effect on a minor's exercise of her privacy rights.

40 Similarly, a district court in Rhode Island, in striking down a spousal notification requirement, observed:

> [W]hen a woman has chosen not to communicate with her husband concerning her abortion decision, it is often due to the fragile or strained nature of the marital relationship. The wife in such a marriage may fear or avoid consultation with her husband for a number of reasons including an imbalance of decision-making power within the marital relationship; fear of physical abuse; extreme dissention regarding religious or moral values; and a variety of other communication barriers. In this type of dysfunctional marriage, the parties agree that forced notification may result in the husband physically abusing his wife, or exerting psychological or economic coercion to prevent the abortion altogether.

Planned Parenthood of Rhode Island v. Bd. of Medical Review, 598 F. Supp. 625, 635-36 (D.R.I. 1984) (citations omitted). *See also Scheinberg v. Smith*, 482 F. Supp. 529, 537-38 (S.D. Fla. 1979), *rev'd on other grounds*, 659 F.2d 476 (5th Cir. 1981).

Maturity is, unfortunately, no shield against a clenched fist or a closed door.

Defendants seek to sidestep the weight of this evidence by arguing that some minors, on occasion, overestimate the severity of parental reaction to their pregnancies. B.C-P. 11.[41] Defendants ignore the fact that single parents and others often corroborated minors' testimony about family violence. *See* n.44. State court judges, court-appointed guardians, social workers,[42] doctors, and other medical and court personnel uniformly testified that they believed the minors and single parents with whom they had contact had accurately described their family situations.[43]

---

41 Even if it were true that a small number of minors misapprehend the degree of violence they would face, fear itself is enough to convince these minors to go through the bypass procedure. If an effective bypass were not available, that same fear would cause them to take more drastic steps. *See* § B(1) *supra*.

42 Defendants' own witness, Mary Ring, was an Olmstead County social worker who worked in the child protection division and had done pregnancy counseling for 12 years. She testified, regarding her counseling of pregnant teenagers, it would "be a violation of [my] professional ethics to advise her parents." Ring Tr. 1661. She also testified that if teenagers even thought she would tell, it would be a "great barrier" preventing many minors from seeking her help. *Id.* She believed, based on her experience and knowledge of the families involved, that threats of violence are real. Ring Tr. 1663.

43 Judge Neil Riley testified, "Quite universally the [reason why mothers accompanied their daughters to court] was that the father would beat up the child and raise unshirted hell if he were to know about [the pregnancy]." Riley Tr. 2009. He also testified that he believed these mothers because "[they were] in the best position to know." *Id.* Judge Gerald Martin was asked whether he too believed petitioners who stated that they were afraid of abuse from their parents. He replied, "Oh, yes. For sixteen years I have seen a great deal of that and there is no reason for me not to believe that." J.A. 204. Two other state court judges testified that, based on their years of experience on the bench, they believed the minors and parents who told them of intrafamilial abuse. J.A. 161-62; J.A. 166; J.A. 292. When Dr. Lenore Walker was asked whether a minor's judgment that she cannot notify one or both parents was correct, she answered:

(*Footnote continued*)

Defendants argue, without having offered proof at trial, that if and when parents are ultimately notified pursuant to subdivision 2, parents will provide emotional support, provide medical information to the physician, and assist them in obtaining proper post-abortion care. B.C-P. 34-35. But the trial record belies these assumptions as well. The evidence demonstrates that parental knowledge does not always benefit minors.[44] Many parents are abusive or otherwise unsupportive, while others inhibit minors from providing accurate medical

---

> In my professional opinion, yes, it is likely to be an accurate perception. In abusive, dysfunctional families particularly a hyper-reluctance to discuss any potential violence develop and that sensitivity is a very accurate and real sensitivity and I think her judgement, a minor child's judgment that this might—telling her parents might create a dangerous situation is very accurate.

J.A. 197. Dr. Walker also testified that the perception of potential violence made by a mother in a dysfunctional family is also accurate. J.A. 198. Susanne Smith, the supervisor of the guardian ad litem program in Hennepin County, testified that based on her 10 years of experience in juvenile court, she believed the minors who described physical abuse and parental opposition to abortion. J.A. 232. Heather Sweetland, assistant public defender in St. Louis County, was asked whether she believed minors who told her of physical abuse in the home. She replied:

> Yes, I do, in part because they are so reticent about telling me; they are embarrassed to tell me, but they feel they need to tell me so that they can get the judicial bypass or the order allowing them to have the procedure.
>
> The other reason I believe them is that I handle kids, you know, minors every day of the week in juvenile delinquency court and I like to think I can tell the difference between someone who is lying through their teeth and someone who is not . . . . I think these women are telling me the truth.

J.A. 245-46.

44 Some parents, upon notification, will actually harm them instead. *See* n.33, *supra*. Defendants attempt to refute this evidence by arguing that not all parents are abusive. Plaintiffs do not dispute that fact; plaintiffs argue, however, that the state should allow some minors and their single parents the opportunity to decide what is in their own individual best interests.

histories,[45] or fail to promote greater post-abortion care.[46] These facts depict an unfortunate tragedy of dysfunctional family life. Minnesota's statute fails to address this tragedy and undermines the state's asserted interest in protecting minors who are already victims.

3. The Statutory Attempt To Exempt Abused Minors From The Mandatory Notice Requirement Does Not Render It Constitutional.

Defendants argue that subdivision 2 is narrowly tailored to accommodate the rights of minors because subdivision 4(c) contains an exception for minors who are reported victims of abuse or neglect. B.C-P. at 33. The record makes clear that Minnesota's effort to exempt such minors from its statutory mandate has been wholly unsuccessful.

As the district court found, "members of dysfunctional families are characteristically secretive about such matters and

---

45 Paula Wendt, the co-administrator of Meadowbrook Women's Clinic, testified that clinic staff members take medical histories from minors outside the presence of their parents because "[w]e feel we get more accurate medical history if there is nobody else there, particularly with minors because they will have some aspects of their medical history that their parents do not know about . . . ." J.A. 129. Dr. Jane Hodgson also testified to this effect, stating that she always insisted on seeing the minors alone "because [she] found that the histories were much more accurate, particularly in regards to confidential matters." J.A. 439.

46 Defendants' reliance on the fact that many minors do not return to the clinics for a post-procedure check-up ignores evidence that puts this fact into context. For instance, it is undisputed that many minors must travel long distances to reach a clinic. 15a. It is therefore very likely that they decided to obtain post-procedure care closer to home. Furthermore, many of these minors presumably notified their parents, since more than half of all minors do so. It is therefore logical to presume that at least some parents agreed not to have their daughters return to the clinic in which they obtained abortions. Finally, the same percentage of adults as minors do not return for post-abortion check ups. Wendt Tr. 175. No one, however, suggests that these adult women be forced to notify their husbands, or parents, to ensure that they return to a clinic for a check-up.

minors are particularly reluctant to reveal violence or abuse in their families." 30a. Dr. Lenore Walker, a renowned expert in the field of family violence, testified:

> [I]t is very rare for children who are either physically or sexually abused to tell anybody about the abuse in any event. With the addition of pregnancy it would make it even less likely; there may be some who would, but it would be a very small percentage who would tell . . . . I think it would be almost impossible for most of them to take advantage of [the exception] psychologically.

J.A. 196. Because it is so difficult for an abused minor to break this code of silence and because her circumstances often preclude notice to both parents, elimination of the bypass will obviate her abortion option altogether.

Even if a minor is emotionally able to report the abuse, reporting itself, under Minnesota law, initiates the following chain of events inevitably leading to parental notice: (1) the notified physician or physician's delegate must report the abuse to the local welfare or law enforcement agency within twenty-four hours, Minn. Stat. § 626.556(3)(a),(3)(e); (2) if the minor declares that she is or was being abused by a parent, the welfare agency must conduct an immediate assessment of the situation, Minn. Stat. § 626.556(10)(a); (3) unless the agency obtains a court order it *must* notify the parent "no later than the conclusion of the assessment or investigation" that the interview took place, Minn. Stat. § 626.556(10)(c);[47] and (4) once the parent learns that he is the subject of a child abuse investigation, he may obtain access to the agency's records, Minn. Stat. § 626.556(11).

The records prepared when a report of abuse is filed may contain a reference to the minor's pregnancy,[48] particularly if

47 Minn. Stat. § 626.556(10)(c) gives the *latest* date the agency must notify the parent. The agency has the discretion to inform the parent of the interview, or otherwise initiate contact with the parent, as soon as it wishes.

48 Susanne Smith, director of the guardian ad litem program in Hennepin County, who acted as guardian for 200 minors who went through the bypass, J.A. 231, testified:

(*Footnote continued*)

she was impregnated by her father.[49] In such situations, the young woman's parents learn of her pregnancy and her abortion decision, despite invocation of the abuse exception.[50] As the district court found, "notification to government authorities [as required by Minn. Stat. § 626.556] creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost." 21a.

4. Subdivision 2 Fails To Provide A Way For Emancipated Minors To Avoid Notice To Both Parents.

Subdivision 2 provides that "no abortion operation shall be performed upon an unemancipated minor" in the absence of written notice to both of her parents. 1a. There is no definition of emancipation in the statute, however, and no other statute in Minnesota contains one. For this reason, throughout the five years in which the notice and bypass scheme operated, emanci-

> What I have heard from teenagers that I have specifically asked, as well as the clinics, when the [abuse] situations have occurred, is that the teens do not want this reported . . . . I think some teenagers are so fearful of their parents' reaction that they don't want this reported and would rather go to court than have it reported which would mean that their parents would find out that they were pregnant and planning to have an abortion.

J.A. 233.

49 Intrafamilial sexual abuse is, unfortunately, an all too common occurrence. According to a report by the Minnesota Department of Human Services, in 1986 there were 1665 reported cases of sexual abuse of young women between the ages of nine and 17. Exhibit D, *infra* at A-19-22. The corresponding numbers for the years 1985 and 1984 were, respectively, 1777 and 2099. *Id.* According to one study with a sample of 930 women, 16% reported at least one experience of intrafamilial abuse before the age of 18, and 12% had been sexually abused by a relative before the age of 14. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Abuse of Female Children*, in Handbook on Sexual Abuse of Children 19, 25 (L. Walker ed. 1987). *See also* n.33, *supra*.

50 Although the statute mandates that the identity of the reporter be confidential, Minn. Stat. § 626.556(11), parents do, in fact, learn who reported the abuse. For instance, Paula Wendt testified, "I have gotten angry phone calls from parents who are furious because they find out I reported a problem in their family . . . ." J.A. 117-18.

pation became a factual issue to be resolved during the judicial bypass proceeding. B.P. 34. J.A. 230-31. In the absence of the judicial bypass option, minors who believe they are emancipated would have no defined or expeditious method for insuring their exemption from mandatory two-parent notice.

First, the standards for emancipation are themselves unclear. Minnesota courts have "had but few occasions to discuss and legally define an emancipated minor," *In re Fiihr*, 289 Minn. 322, 325, 184 N.W.2d 22, 25 (1971), and have noted "the inexactitude with which the term is used." *In re Sonnenberg*, 256 Minn. 571, 576, 99 N.W. 2d 444, 446 (1959). Moreover, emancipation "is to be determined largely on the peculiar facts and circumstances of each case," *Streitz v. Streitz*, 363 N.W.2d 135, 137 (Minn. Ct. App. 1985), and is "ordinarily a question for the jury." *In re Fiihr*, 184 N.W.2d at 25, quoting 39 Am. Jur. Parent and Child § 64. "[E]mancipation may be complete, partial, conditional, absolute or limited as to time or purpose." *In re Sonnenberg*, 256 Minn. at 576, 99 N.W.2d at 447-48 (footnote omitted).[51]

Second, there is no expeditious procedure in Minnesota for obtaining a judicial declaration of emancipation. Indeed, absent Minn. Stat. § 144.343(6), it appears that a minor would have to initiate an action under the Minnesota Uniform Declaratory Judgment Act, Minn. Stat. ch. 555 (1988), presumably against the minor's parents, *see Taubert v. Taubert*, 103 Minn. at 247, 114 N.W. at 764 (1908) (emancipation involves surrender of control by parent),[52] in order to obtain a court order of emancipation. Such an action would have to proceed

51 The effect of complete emancipation is to give the minor "his time and earnings and gives up the parents' custody and control, and in fact works in absolute destruction of the filial relation." *Lufkin v. Harvey*, 131 Minn. 238, 241, 154 N.W. 1097, 1098 (1915) (citation omitted). In order for complete emancipation to occur, a parent must surrender "the right to the services of his minor child, and also the right to the custody and control of his person." *Taubert v. Taubert*, 103 Minn. 247, 249, 114 N.W. 763, 764 (1908) (citations omitted).

52 *See also* Minn. R. Civ. P. 19.01 (all persons must be joined in whose absence complete relief cannot be accorded).

in accordance with the Minnesota Rules of Civil Procedure.[53] The time consumed by such a process would delay many minors until far beyond the time when it would be permissible to perform an abortion.

Finally, a minor would have no choice but to seek such a court order because, if she asserted she was emancipated, but was unable to produce a written instrument of emancipation,[54] any person who performed the abortion would risk prosecution. This is because Minn. Stat. § 144.343(5) requires written evidence of compliance to avoid liability. 2a-3a. No prudent physician or clinic providing abortions would go forward with an abortion simply based upon a minor's representation that she was emancipated.

In sum, a minor who believes she is emancipated would be forced either to notify her parents or, alternatively, to engage in a lengthy judicial proceeding against her parents, without counsel, and without a guarantee of expedition or confidentiality in order to obtain a declaration of emancipation. Elimination of the judicial bypass would thus destroy the purported exception for emancipated minors contained in subdivision 2.

II. MINNESOTA'S MANDATORY TWO-PARENT NOTICE REQUIREMENT CANNOT BE JUSTIFIED AS A MEANS OF PROTECTING A PARENTAL RIGHT TO KNOW.

A. Biological Parents Have No Constitutional "Right To Know" About Their Daughter's Abortion Decision.

Defendants, recognizing that the decisions of this Court have never endorsed a blanket requirement of two-parent notification, nevertheless seek to sustain subdivision 2 on the ground

53 The Rules allow 20 days after service of the Summons for service of an answer; the time to answer is automatically extended if a dismissal motion is made. Minn. R. Civ. P. 12.01.

54 "A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties." *Lufkin v. Harvey*, 154 N.W. at 1098 (citation omitted).

that Minnesota is protecting the "constitutionally based" right of Minnesota parents to be informed of their daughters' abortion choice.[55] *See, e.g.*, B.C-P. 24, 33. The right proffered by the state as a justification for the challenged law is, ironically, asserted in opposition to the arguments of parent-plaintiffs herein, the only parents who are party to this case.

Defendants do not cite a single decision of this or any other court recognizing such a right. They rely instead for support on *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). These cases, however, fail to

55 Rather than being "constitutionally based," defendants' "right to know" theory appears to be derived from the antiquated common law rule requiring parental consent to medical procedures performed on minors. Of course, such a common law doctrine is insufficient to justify infringement of a constitutional right and has, in any event, been modified by many states—including Minnesota—to reflect the modern view that many minors are mature enough to consent on their own, and that the health interests of the minor may outweigh the parental authority interests. Minn. Stat. § 144.343(1). For example, many states give mature minors the right to consent to medical treatment. Statutory "maturity" has been accorded minors who are married, active in the armed services, living independently, etc. These statutes are listed in Exhibit F to this Brief, *infra* at A-26.

The common law rule requiring parental consent was never itself based on a "right" of parents but on the now archaic judgment that adolescent minors are incompetent to consent on their own behalf. *See* Brief *amicus curiae* of American Psychological Association, *et al.*, in No. 88-1125. But even under common law, parental consent requirements, the consent of one parent was sufficient. *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). Indeed, a custodial parent, as a consequence of sole custody, has sufficient authority to consent to medical treatment for her children. *See, e.g.*, Uniform Marriage and Divorce Act, § 408(a) and Comment (1974) (general rule that custodial parent "may determine the child's . . . health care" is "designed to promote family privacy and to prevent intrusions upon the prerogatives of the custodial parent at the request of the non-custodial parent").

establish that which defendants advocate.[56] Indeed, the right which lies at the core of these cases is a right against interference with "the private realm of family life which the state cannot enter." *Prince*, 321 U.S. at 166.[57] It is a right of the family as against the state, not a right of parents as against the rights of their children.[58]

56 Cases more on point than those cited by defendant make clear that there is no such "right to know." *Doe v. Irwin*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980) *accord Gillick v. West Norfolk and Wisbeck Area Health Authority*, 3 All E.R. 402 (H.L. 1985). In rejecting a constitutional right of parents to know their children have received contraceptives based on *Meyer*, *Pierce*, *Yoder*, and *Prince*, the Sixth Circuit explained why these cases are not controlling. "There is one fundamental difference between all the cited cases and the present one. In each of the Supreme Court cases the state was either requiring or prohibiting some activity [of parents]." 615 F.2d at 1168. Furthermore, the absence of parental involvement legislation does not, as defendants claim, constitute a veto over parental rights because:

> [t]here is no requirement that the children . . . avail themselves of the services offered by the Center and no prohibition against the [parents] participating in decisions of their minor children on issues of sexual activity and birth control. The [parents] remain free to exercise their traditional care, custody and control over their unemancipated children.

Id.

57 Characterizing this right, at least one court of appeals stated: "[w]e now hold that this constitutional interest in familial companionship and society logically *extends to protect children from unwarranted state interference with their relationships with their parents.*" *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir.) (emphasis added), *cert. denied*, 108 S. Ct. 311 (1987).

58 These cases did not involve a conflict between the authority of parents and the rights of children; rather, they were attempts by the state to interfere with inter-familial decisionmaking. The Court in *Yoder*, for example, specifically disavowed any balancing of parents' and children's interests:

> Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State

Moreover, in *Yoder*[59] the Court stated in no uncertain terms that even the traditional interest of parents in guiding their child is limited by the child's interest in health and safety:

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.*

406 U.S. at 233-34 (emphasis added). The Court upheld parental power only because it found that the accommodation of the Amish religious beliefs "will not impair the physical or mental health of the child,[60] or result in an inability to be self-

---

is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary.

406 U.S. at 231; *see also id.* at 237 (Stewart, J., concurring) ("This case in no way involves any questions regarding the right of the children of Amish parents to attend public high schools, or any other institutions of learning, if they wish to do so."). Not one of these cases suggests that a state is obliged to legislate to protect parental "rights" or that a state would be constrained by due process from depriving parents of their alleged rights by, for example, passing laws to safeguard confidentiality in health care such as Minn. Stat. § 144.343(1) and others listed in B.P. Exhibits C and D. Rather, these cases indicate that in instances where there is no demonstrated harm to the child the state may not interfere with parental authority. Yet, when there is a demonstrated harm to the child, even parental authority may be blocked by the state. *Prince*, 321 U.S. at 168-69.

59 In *Yoder*, the Court was faced with a conflict between the state's strong interest in educating minors through age 16 and the Free Exercise rights of the Amish community. The presence of the Free Exercise claim strengthened any independent parental interests in the upbringing of children and led to a decision in favor of parental authority and against the government. As the Court noted, "where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 . . . ." 406 U.S. at 233.

60 The Court was quite clear in *Yoder* that there was no demonstrated harm to the child in the record: "This case, of course, is not one in

supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society." *Id.* at 234.[61]

Far from establishing a constitutional "right to know" in favor of estranged or non-custodial parents, these cases shed constitutional doubt on a statute which, like subdivision 2, invades "the private realm of family life," *see Prince*, 321 U.S. at 166, in a manner which seriously threatens the health and safety of minors. *See* discussion regarding harm to minors in Point I(B), *supra*. The statute interferes with the freedom of parents to structure sharing, responsibility and privacy with their adolescent daughters, *see, e.g.*, 117a-118a, and with the ability of single parents to control communication, association, and the flow of personal information to the minor's other parent regardless of whether divorce, separation, remarriage or previous abuse has occurred.[62] This sort of interference in the ability of a parent to control family relationships in accordance with the child's best interests is precisely what is prohibited under *Meyer*, *Pierce*, *Prince*, *Stanley* and *Yoder*. "Protecting [such intimate family] relationships from unwarranted state interference . . . safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (citations omitted). Contrary to defendant's arguments, a statute like

---

which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* at 230 (footnote omitted).

61 This Court's decision in *Parham v. J.R.*, 442 U.S. 584 (1979), is in accord. While the statute upheld in that case permits parents to exercise control and authority over their children, the Court established stringent procedural safeguards to ensure that the parent acts in the minor's best interests. *Id.* at 606-07. The parent has the burden of persuading an impartial medical fact-finder of the need for the commitment and the decision of that fact-finder is subject to mandatory periodic review. *Id.* at 607.

62 The single parent plaintiffs in this case are mostly divorced and several cited fear of abuse as the reason for not wanting to re-involve an absent parent. *E.g.*, J.A. 181, 277-79.

Minnesota's which compels minors and their single parents to communicate private information to an estranged second parent may in fact violate, rather than protect, parents' constitutional rights.[63]

B. The "Right To Know" Upon Which Minnesota Relies Does Not Justify The Lines Drawn In The State's Statutory Scheme.

Minnesota not only asks this Court to create a constitutional right and to sustain subdivision 2 as a means of protecting that right, but it also asks this Court to ignore the conspicuous selectivity with which it invokes the right.

For example, minors in Minnesota are given specific statutory protection for confidential pregnancy tests, pregnancy counseling, and prenatal care, including tests and treatment that may be risky for the fetus, as well as for childbirth surgery, where necessary. Minn. Stat. § 144.343(1). Married minors and

63 For example, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Jaycees*, 468 U.S. at 623. Infringements on the right not to associate must be justified by a compelling state interest that cannot be effectuated by less restrictive means. *Id.* Recently, this Court quoted *Jaycees* approvingly:

> . . . the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.

City of Dallas v. Stanglin, 109 S. Ct. 1591, 1594 (1989) (quoting *Jaycees*, 468 U.S. at 617-18). Of course, the association embodied in marriage, and the corresponding decision not to associate embodied in divorce, are accorded special constitutional protection as well. *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978) ("reaffirming the fundamental character of the right to marry"); *Boddie v. Connecticut*, 401 U.S. 371, 376-77, 382 (1971) (indigent women must "be afforded an opportunity to go into court to obtain a divorce"). Subdivision 2 effectively compels minors and single parents to associate with divorced or estranged spouses with whom, as the facts of this case show, they have chosen to break off all relations. *See* 31a (large percentage of minors using bypass were accompanied by or had voluntarily notified one parent and went to court to avoid having to notify the other biological parent).

those with children can consent to all medical care for themselves and their children. Minn. Stat. § 144.342 (1988). Minnesota guarantees minors the right to make these important medical decisions without notification of parents despite the fact that for teenagers, pregnancy, childbirth and motherhood pose far greater risks, both physical and psychological, than abortion. *See* B.P. 11-13.[64] Under this statutory scheme, for example, a minor could in fact refuse to consent to medical treatment even if she were informed that the treatment was vital to the continued survival of her fetus. "At the heart of that situation, as with abortion, is a decision-involving the life or death of the fetus. Yet under this statutory scheme, the minor girl is considered competent to make one decision but not the other." *In re T.W.*, No. 74,143, slip op. at 23 (Fla. Oct. 5, 1989) (Ehrlich, C.J., concurring specially).

The irrationality of Minnesota's asserted justification of its statute is further illustrated by the fact that the "right to know" theory would vitiate other valuable, though unrelated, legislative initiatives regarding confidentiality. *See generally* statutes listed in B.P. Exhibits C and D. Minnesota teenagers are currently guaranteed confidentiality in a wide variety of

64 Defendants imply that forced parental notification of a minor's pregnancy is not necessary because the parents will eventually learn of the impending birth. This assumption, however, is not necessarily true. For example, in Liberty, N.Y., a 17-year-old who left her baby in the woods after giving birth managed to keep her pregnancy hidden from her parents. According to the *Sullivan County Democrat*, a local newspaper:

> Apparently, the girl had hidden her pregnancy from everyone except her boyfriend, and had given birth to the child at about 6 a.m. on Thursday, July 13. Her mother and stepfather were reportedly home with their daughter at the time of birth, but were unaware of what was going on.
>
> According to reports, the girl waited until 2 p.m. when her parents had left the apartment, and then she wrapped the child in a sheet, put him in a box, and took the child, who she thought was stillborn, out into the woods and left him there.

Gillow, *Mother Released from Jail: Abandoned Baby on Way to Recovery*, Sullivan County Democrat, July 21, 1989 at 1A, 16A.

areas: communications with psychologists[65] or psychiatrists,[66] confessions to members of the clergy,[67] and communications with attorneys[68] are all instances in which minors have been given by statute the right to be free from unauthorized disclosure of their private deliberations and decisions. It is a weak interest indeed which defendants assert so selectively.

The only inference which can be drawn from this legislative picture is that the state had in mind a purpose other than protecting some alleged parental "right to know" when it enacted the statute. In fact, the district court found that one of the legislature's motives for enacting Minn. Stat. § 144.343(2)-(7) was the "desire to deter and dissuade minors from choosing to terminate their pregnancies." 25a. Contrary to defendants' assertion, *see* B.C-P. 4 n.2, substantial support for this finding can be found not only in the statements of witnesses testifying

65 Minn. Stat. § 595.02(1)(g) (1988) ("A registered nurse, psychologist or consulting psychologist shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity . . .").

66 Communications with psychiatrists are protected by the provision concerning licensed physicians, Minn. Stat. § 595.02(1)(d) (1988) ("A licensed physician . . . shall not, without the consent of the patient, be allowed to disclose any information or any opinion based thereon which the professional acquired in attending the patient in a professional capacity . . .").

67 Minn. Stat. § 595.02(1)(c) (1988) ("A member of the clergy or other minister of any religion shall not, without the consent of the party making the confession, be allowed to disclose a confession made to the member of the clergy or other minister in a professional character . . . ; nor shall a member of the clergy or other minister of any religion be examined as to any communication made to the member of the clergy or other minister by any person seeking religious or spiritual advice. . . ."). The statute makes no distinction based on the age of the person seeking advice.

68 Minn. Stat. § 595.02(1)(b) (1988) ("An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty . . .").

before the legislative committee,[69] but also in the statements of legislators who debated passage of this law.[70] This desire to deter abortions is, however, a patently improper legislative purpose. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986).

To sustain Minnesota's law based on a theory which represents, in truth, a thinly-veiled hostility to abortion rights for minors, would be to open the door to a host of disingenuous legislative enactments mandating parental involvement in minors' decision-making. The cost of keeping parents informed

69 Statements made to the Minnesota Senate Committee on Health, Welfare and Corrections by both proponents and opponents of the proposed legislation highlight that the measure was designed to deter abortions. A lobbyist for Minnesota Citizens Concerned for Life stated that her group supported the bill because "we are convinced that it will save at least some lives . . . . We believe, many parents, if given the opportunity, will help their daughters continue her [sic] pregnancy . . ." (statement of Maurice [sic] Rosenberg). *See* Exhibit C, *infra* at A-14, A-15. Another witness, who opposed the legislation, echoed the belief that the intended purpose of the act was "accomplish[ing] the desire of cutting down on the number of abortions that are preformed [sic] in this state." (statement of Robert McCory, Administrator of the Midwest Health Center for Women). *See* Exhibit C, *infra* at A-16.

70 One of the Act's most outspoken proponents in the Minnesota Senate, Senator Menning, stated on the Senate floor that it could "save lives," or deter abortions. *See* Exhibit B, *infra* at A-8. A sponsor of the Human Life Amendment, Senator Menning repeatedly referred to abortion as the "taking of life" and attempted to sway other state senators with graphic descriptions of the abortion procedure ("Those suction devices pull those babies limb from limb and they don't even kill them before time."). *See* Exhibit B, *infra* at A-12. In a discussion regarding the number of judicial bypass procedures the proposed statute would necessitate, Senator Menning asked, ". . . how many lives do you think it [the bypass procedure] could possibly save?" Senator Stern agreed that the purpose of this statute was to discourage abortions:

> [W]hat we're talking about here is a strong desire to prevent abortions. So I don't think we should continue to fool ourselves and the general public or the courts that that isn't our intent. I think a quick review of the tapes today makes legislative intent very obvious . . . .

See Exhibit B, *infra* at A-12-13.

would be unacceptably high and would swallow entirely the independent rights of minors. That cost—both the physical harm to minors from unwanted pregnancies and the loss of constitutional rights—must not be condoned by this Court.

CONCLUSION

Cross-Respondents respectfully request this Court to affirm the judgment of the Eighth Circuit Court of Appeals that Minn. Stat. § 144.343(2) is unconstitutional.

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, MN 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, MN 55404
(612) 871-9004

JANET BENSHOOF
(counsel of record)
RACHAEL N. PINE
LYNN M. PALTROW
KATHRYN KOLBERT
JOHN A. POWELL
ELLEN K. GOETZ
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

SIMON HELLER
On the Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, MN 55411
(612) 522-2423

APPENDIX

Exhibit A

Excerpts of Trial Testimony of Dr. Paul Gunderson
March 12, 1986

CROSS-EXAMINATION

[2464] * * *

BY MS. BENSHOOF:

Q: Looking at Exhibit 35, you drew this up or your staff did?
A: That is right, uh-huh.
Q: Looking at the average gestational age which is on Exhibit 35, do you have any opinion today about the average gestational age reported there and its correlation, if any, to the parental notification law?
A: Do I have an opinion?
Q: Yes.
A: Yes.
Q: What is that opinion?
A: The opinion is that there appears not to be a correlation.
Q: Is that because in 1980, 1981, 1982, and 1983 the average gestational weeks are about the same?
A: Correct.
Q: Okay. Now average means taking all minors of gestational ages 8 weeks to 20 weeks, adding it together and dividing it by the number, isn't that correct?
A: Yes, or whatever the gestational age was that was reported by their physician, if it was less than 8 weeks.
Q: So when there is an average there are people at either [2465] end and it all averages out, is that correct?
A: Yes, yes.

The distribution spans a continuum as you have mentioned.

Q: So distribution changes do not always relate to average, is that correct? Let me rephrase the question, there can be a change in distribution with the averages staying the same, isn't that correct?

For example, people could go from 12 to 18 and other people could go from 14 to 18 and the average would be the same?

A: Yes, so long as both movements occurred simultaneously.
Q: Right.
A: Yes.
Q: You have testified that you are familiar with a national trend to earlier gestational ages, is that correct?
A: That is right.
Q: And you also testified that you are familiar with the national studies showing that when new facilities open, or when people have to travel less, there is less delays [sic], isn't that correct?
A: That is correct.
Q: Now are you familiar with the fact that in March 1981 an abortion clinic opened in Duluth, Minnesota, and in October 1981 an abortion clinic opened in Fargo, North Dakota?
[2466] A: Yes, we do know about those, uh-huh.
Q: Well, let me give you a hypothetical as an expert, okay?

Since you are testifying about this law, you know how this law operates, isn't that correct?
A: That is correct.
Q: Now let's presume for a hypothetical, and I think this is accurate, that not all minors are affected by this law.

Let's say that out of 100 minors 35 would tell both parents before the law and 35 would tell them after the law so there would be no effect of the law on some minors.

Let's also assume that there is a trend to lower gestational ages for those minors because of the national trend of increased knowledge and because of the opening of two facilities in 1981.

Let's also assume, and I think that in 1982 less than 50 percent of the minors were using the court system, more are now.

Let's assume in 1982 because of the two new facilities and because of the national trends, 35 minors out of 100 got their abortions one week earlier and these are the ones unaffected by the law because they would tell their parents anyway.

35 minors who had to go to court and who were anxious about making the decision got their abortions one week later than they would have without the law.

Now assuming that those two phenomena happened the [2467] average gestational weeks would still be the same, isn't that correct, one week of 35 cancels out one week of 35?
A: That is correct.

MR. GALUS: Excuse me, counsel, I would object to the factual premises of these hypotheticals unless those facts are in the record.

Plaintiffs have rested.

THE COURT: I think for the purposes of postulating means from averages, is what, as I understand, you are getting at?

MR. GALUS: If the question is limited to an explanation of what the possible difference between a mean and distribution are I withdraw my objection.

But if it is positive on any premise that those facts are part of the record—

THE COURT: There are no facts such as that in the record.

MS. BENSHOOF: Well, Your Honor—

THE COURT: Well, there is a fact that there is a new clinic in Fargo and a new clinic in Duluth.

MR. GALUS: My reference was to the assumption in the hypothetical, a certain group would have gotten it earlier and a certain group would have gotten it later.

MS. BENSHOOF: Assuming those two assumptions an average would cancel out then, wouldn't it?
[2468] THE WITNESS: That is right.

BY MS. BENSHOOF:

Q: But looking—
A: The average would remain the same.
Q: I am sorry, I am sorry. The answer would remain the same?
A: That is right.
Q: But that would not mean that for 35 of those 100 minors there was not a burden of delay, isn't that correct?
A: That is right.

Q: Now you also testified that you had two other bases for your opinion that there was no effect of the statute and one was comparing married minors with unmarried minors, is that correct?

A: The testimony that I believed in that regard was focused on substantiating the fact that the average gestation, the average gestational age of minors was fixed as was entered in Exhibit 35 and what I was trying to suggest was that I, in an effort to be sure that there weren't some unwanted or some unexplained major differences, used two tests in essence to test for the stability of the average gestational week as specified there on the first line for 1983, 1982, et cetera.

Q: But why would one compare married with unmarried minors?

A: The reason for doing that is sort of rooted in the premise that the married minor may have different patterns of **[2469]** behavior with respect to seeking an abortion as opposed to an unmarried minor.

Q: And do you have an opinion on that premise?

A: No, no, just simply aware of the fact that that has appeared here and there in terms of conversations among the reproductive epidemiologists at the CDC and in my conversations with them.

THE COURT: Were you comparing—was it minors you were comparing, married versus the emancipated?

THE WITNESS: Yes.

THE COURT: Or unemancipated?

THE WITNESS: That is right, minors only.

BY MS. BENSHOOF:

* * *

[2470] * * *

Q: Are you aware of the studies, sociologic-demographic that show the different kinds of minors who are married versus unmarried and that married minors are most passive, delay reproductive seeking behavior and that sort of thing?

A: I am only aware of, frankly, of one study in that area and I am not sure how directly that one addressed the issue, and that is the Bloom (ph) study, et al, here at the University of Minnesota.

Q: Now this is a study by Bloom and Resnick?

A: That is right.

Q: Isn't the result of that study that minors who are married and have children are more passive, less future-oriented, and delay in seeking medical help?

A: If my memory serves me right, I think you are right. I don't have it in front of me, I confess, and I am working from memory on that one.

Q: So if I am right, as you think I am, then what we are comparing here are apples and oranges because if Minnesota married minors have these characteristics that would already lead them to delay their gestational ages at the time of **[2471]** abortion they might very well come out the same as other minors seeking abortion who are delayed because of the law, isn't that correct? Do you follow me?

A: Yes. I believe I am following you. That is one possible, yes, explanation, uh-huh.

Q: So if that is a possible explanation, that would be an explanation for your results, that is a different explanation than saying the parental notification law has no effect, is not that true?

A: Yes. Again that could be one logical extension of the explanation, yes.

Q: Okay. So let's go onto [sic] your third basis for your opinion and that was—I am not quite sure what it was, if you could explain it again; I think you were comparing resident minors to all other minors, is that correct?

A: That is correct.

THE COURT: Minnesota 17 and under versus all women, the result is the same is [sic] what I have.

Maybe you had better tell us, Dr. Gunderson, what your third one was.

THE WITNESS: I believe at this point we may be confusing the testimony relative to gestation with complications

because what you have just mentioned, Your Honor, was testimony with respect to complications, at least that is what I recall.

* * * *

[2472] * * *

Q: Okay. Could you explain what you mean by a comparison of resident women and all others?

A: Yeah, the all [sic] others in essence are those women who are not residents of Minnesota; who came into the state for purposes of securing an abortion and based on the analyses I have done from '80 through 1983, it certainly appeared as though the average weeks of gestation for both of those populations were relatively similar.

Q: Well, what does that mean?

A: Well, as I think I indicated at the outset of my testimony, the reason for doing this additional work in essence was to test the stability of the calculation for average gestation in weeks by expanding in theory the test.

[2473] Q: Well, is it your understanding that the law also applies to minors coming in from other states?

A: That is my understanding.

Q: What does your comparison have to do with the parental notification law, forgive me if I am not getting it.

A: The reason for doing that comparison was—was principally an interest in determining the stability of the calculation for average gestational weeks and what I was interested in doing was trying to determine whether as a scientist I could detect levels of instability which would be helpful in explaining in any way the nature of the phenomenon here. I could deduct none.

Q: So that you used the resident versus nonresident comparison only to check your other figures?

A: Uh-huh.

Q: That is not an independent basis for your opinion that the law had no effect.

A: No. The two reasons I gave were reasons because I wanted to check.

Exhibit B*

Excerpts from Transcripts of Senate Debate

May 6, 1981

[14] * * * *

CHAIR: Sen. B [sic]

BERGLAND [sic]: Mr. Chairman and Sen W [sic]. I was sitting last night looking in my crystal ball and I just had a hunch you might offer this amendment today and so we called out to Massachusetts, which has had this particular provision which you are introducing in this part of your amendment, in operation for about two weeks. Now two weeks isn't very long to find out what the kind of history is, but they are having 15-20 cases being referred to the courts per week at the present time. Of course, only two weeks for this new system to operate. None of the cases that have gone before the court under this provision have been denied. So I calculated that out and I figure, at least in their state, they will have somewhere over 1,000 cases per year going to their courts, unless that number increases as people become more aware of how the whole thing works. And I'm just wondering, your amendment calls for a guardian ad lidem [sic] to be appointed for these minors who are in court asking for the court to review their situation. Do you have any idea what the cost of appointing a guardian ad lidem [sic] for an individual is?

CHAIR: Sen. W [sic]

WALDORF: No, Mr. Chairman, I don't.

---

* A copy of relevant portions of transcripts of tapes of Minnesota Senate Committee hearings, including the contents of this Exhibit, has been lodged with this Court by counsel for Cross-Respondents.

BERGLAND [sic]: I don't either. But, I am a little bit concerned that if this amendment should pass, which I expect it probably will, and if this should go into effect, which it might, that essentially what is going to happen is that Hennepin and Ramsey County Juvenile Courts are to [sic] ones that are going to end up hearing most of these cases since that is where most of the requests for abortions take place. In spite of the fact that the people who may be coming to Hennepin and Ramsey Counties for those services may not reside in Hennepin or Ramsey County. I'm not sure whether between our two counties, Sen. W [sic], we're going to be able to handle 1,000 or perhaps more than that cases, more cases in the juvenile court per year without increasing the cost to our court. And, I wonder if you've given that any consideration in the drafting of this amendment?

[15] CHAIR: Sen. Menning, is it relevant to the same point here?

MENNING: Yes, Mr. Chairman, will Sen. B [sic] yield?

BERGLAND [sic]: Yes.

MENNING: Sen. B, I think you said your calculations showed maybe possibly 1,000 cases?

BERGLAND [sic]: 1,040, based on two weeks.

MENNING: Sen. B [sic], out of that 1,040 that goes to court, how many lives do you think it could possibly save?

BERGLAND [sic]: Well, based on what's happening in Massachusetts, everyone [sic] of the cases so far has been referred to a doctor for an abortion.

MENNING: So what you're saying, Sen. B [sic], is there are no lives saved?

BERGLAND [sic]: Perhaps the lives of some of the minors who might seek an illegal abortion if they didn't have

that option available to them, but what I'm saying is I think . . .

MENNING: I'm sorry I didn't think I understand that statement. Could you repeat that?

BERGLAND [sic]: I said only the lives of the minors who are using this option rather than seeking an illegal abortion.

CHAIR: Chair recognizes,

(Confusion)

Senator Menning, is this a continuation to your comments before?

MENNING: Mr. Chairman, I guess I'm a little surprised at Sen. B's [sic] comments that—insinuating that possibly this provision goes there's going to be some lives of some teenagers taken? Is that what you're saying?

BERGLAND [sic]: No. I'm not saying that. What I'm trying to say is that through this process, it does not seem apparent, at least at this time, that anyone is going to be denied an abortion, and yet we are going to make people go through this somewhat cumbersome and costly process. And I am a little bit concerned that the cost of that, at least, is not going to be shared by residents across the state, since it will be residents throughout the state that will be using this service.

MENNING: Sen. B [sic], you really—what you're really saying is that the issue is not serious enough with merit to a trial or going to court. Is that what you're saying?

[16] BERGLAND [sic]: Mr. Chairman, Sen. Marion [sic].

* * * *

This provision does not warrant a trial. What it does is it says that the juvenile courts shall review

the situation if the minor requests it. And based on what's been happening under this very same provision, which is in force in Massachusetts, there've been no cases denied by the court.

MARION [sic]: I think we have a serious enough matter here where it perhaps should go to the courts. Sen. B [sic], how is an abortion performed? I'm serious, folks. I think we're dealing with a very serious matter, I hear some groans and I guess I'm wondering . . .

CHAIR: Sen. B [sic]

BERGLAND [sic]: Sen Marion [sic], I have never performed an abortion. I wouldn't have the vaguest idea how you perform an abortion. I have never had an abortion so I'm not an expert on how you perform abortion.

MARION [sic]: Mr. Chairman, members . . .

STERN: Mr. Chairman, point of order.

CHAIR: Sen. [sic] Stern, state your point.

STERN: Mr. Chairman, just to state my point, I'm a little confused by this debate. I thought that we were talking about counseling, love, care and all those good things, and parental notification and all of a sudden I find myself in the middle of a debate revolving [sic] death, and all those other awful things and how do you perform abortions. And I really would like to get back to the debate, Mr. Chairman, and I would call upon you to keep us germaine [sic] while we're going through these amendments.

CHAIR: Your point is well taken, Sen. [sic] Stern.

MARION [sic]: I agree with Sen. [sic] Stern. He clarified exactly what I was thinking. He said, "Now we're

dealing with death." And that's exactly what we're dealing with.

* * *

[30] * * * *

MENNING: Thank you, Senator Stern. Senator Stern, what we're talking about here is the actual killing of life. Now that's what we're talking about. Senator Stern, I asked Senator Bergland [sic] a question. Do you know how an abortion is performed? And I'm giving that the amendment, Mr. Chairman.

STERN: Mr. Chairman, Senator Menning, I can imagine, but I really don't know.

DAVIES: Senator Menning, proceed with your comments.

STERN: Mr. Chairman, Senator Menning, No.

MENNING: All right, Mr. Chairman, Members, I hear a lot of people say, "let's keep to the point." That is exactly what I'm talking about. I'm talking about a 14, 15, 16, 17 year old young girl who's pregnant who, if that person has an abortion, a couple years later will say as a young lady said on radio the other night when I was debating the abortion issue, while she was crying, she said: "I killed my baby." That's what she said, she said, "I killed my baby." And now what you're saying Senator Stern is, don't pass this amendment; just let them make this decision without really thinking about it. Senator Stern, I think you know as well as I do, that most of these abortions now are performed through a suction device. Do you agree, Senator?

STERN: Mr. Chairman, Senator Menning—

DAVIES: Senator from Hennepin, Senator Stern.

STERN: Again, I'm confused. We're talking about this amendment that Senator Waldorf proposed that asks a girl to go to the courts, and you're asking me about abortion, suction devices and all those things?

MENNING: That's right.

STERN: I do not come prepared to argue on this particular amendment.

[31] DAVIES: Senator Stern, if you don't want to yield to the questions, you don't have to if you don't think they're relevant. Senator from Pipestone, Senator Menning.

MENNING: Members of the body, what I'm saying is this, we are dealing with a situation where a minor has to make a decision on whether or not to take the life of her baby. Mr. Chairman, members of the body, this body came in here Monday morning. You know they were all concerned about those dog fights down there. And what I'm saying is this. Those suction devices pull those babies limb from limb and they don't even kill them before time. And this young girl who has to make that decision is going to face that situation someday, and I would support the Waldorf Amendment.

* * *

[43] DAVIES: The Secretary will report the amendment.

SECRETARY: Mr. Stern moves to amend Senate File 287 as follows: Amend the title. Page 1, line 4, after the word "persons" insert "comma, with the intent to prevent abortions."

STERN: Mr. Chairman, members of the committee, what I'm really trying to do here is just a simply [sic] title change because after the debate, I think you'll agree, that what we're talking about here is a strong desire to prevent abortions. So I don't

think we should continue to fool ourselves and the general public or the courts that that isn't our intent. I think a quick review of the tapes today makes legislative intent very obvious, and I would appreciate your affirmative vote for this amendment.

Exhibit C*

Excerpts from Transcripts of Hearings Before Minnesota Senate Committee on Health, Welfare & Corrections

March 24, 1981

[3] * * * *

ROSENBERG: Madam Chairman, members of the committee, my name is Maurice [sic] Rosenberg. I am a chief volunteer lobbyist of Minnesota Citizens Concernced [sic] for Life. In 1973 the Supreme Court struck down the abortion laws in all 50 states and ruled that abortion was to legal [sic] for the entire term of pregnancy. In subsequent ruling [sic], the court has reaffirmed and expanded the right to destroy the unborn. But yesterday the court issued a ruling that at least would allow a restriction on the right of abortionists to perform his or her specialty on minor girls when their parents do not know they are seeking abortion. Today we are asking to approve a law similar to the one upheld yesterday. Why does MCCL support such legislation? First and foremost, we are convinced that it will save at least some lives. When young teens become pregnant they, understandably, are frightened and may make a panic decision to have an abortion because this looks like an easy solution to their problems. In many case, the parents of these teenagers would have been willing and able to offer help and support their daughters in a time of crisis but they do not have the opportunity when abortion clinics are allowed to end the lives of their daughter's child, their grandchild, before they even know that life exists. Under the proposed law, teenagers could still get abortions without their [4] parents consent or even over their objections, but at least their parents would have

* A copy of relevant portions of transcripts of tapes of Minnesota Senate Committee hearings, including the contents of this Exhibit, has been lodged with this Court by counsel for Cross-Respondents.

the important knowledge about their daughter's [sic] plight. We believe, many parents, if given the opportunity, will help their daughters continue her [sic] pregnancy and will make suitable arrangements for the welfare of the baby. Secondly, we are concerned for the health and welfare for [sic] the pregnant teen herself. A frightened girl is in no position to give an accurate medical history to an abortionist, but if her parents at least knew she was planning to undergo an abortion they could provide pertinent information that might be vital in preserving their daughters [sic] own health. Abortion can cause severe health problems in young. Even when they have no preexisting medical condition. For instance, a study conducted by a Florida obstetrician, Dr. Mathew [sic] Bolson, has shown that teens undergoing abortion can suffer both long and short term complications that can effect [sic] their health and reproductive capabilities for the rest of their lives. Many symptoms of such problems may be regarded by the young girl as just part of the abortion aftermath or she may hide these symptoms from her parents so they don't find out about the abortion. In the short term their health and very lives can be put in jeopardy and in the long run they can find that abortion complication [sic] can effect [sic] their ability to have children in the future when they truely [sic] want to have them and are prepared to raise them. Informing parents of their daughter's decision will not eliminate these dangerous aspects of abortion, but at least they will be in a position to help their child if such problems do develop. Opponents of this legislation stress the right of a woman of age to choose abortion and they deny that parents have any right sufficient to interfere with their daughters [sic] decision. What they are saying is that a teenage girl afraid and confused has the sole right to choose the destruction of her own child. We reject this logic and insist that we cannot, must not, attempt to solve the problem of pregnant teenagers by destroying the babier [sic] they carry. We urge you to approve this vital legis-

lation which will have benefits for three generations of Minnesotoans [sic]. Parents, their teenage daughters and their unborn children. Thank you for this opportunity to speak before you. Are there any questions?

* * * *

[15] * * *

MCCORY: My name is Robert McCory. I'm the administrator of the Midwest Health Center for Wômen in Minneapolis. Next week we are opening a clinic in Duluth. I've assisted since 19___ the provision of abortion care for some 30 thousand women in this state and I've learned some things from my experience in doing this, but I do not think that this piece of legislation you have before you will accomplish the desire of cutting down on the number of abortions that are preformed [sic] in this state. Doctor Sumerdorf has suggested that it will delay some procedures too far and cause problems when some parents discover their children are pregnant and try to force them to have abortions. Those of us in the provision of health care for our patients who seek abortion *encourage* parental involvement. We see the importance that parents do become involved in these decisions. At Midwest we're committed to giving parents information about what their children are doing. We conduct courses and programs on such topics as parents as sex education [sic]. We think its [sic] important to do this and we think its [sic] important for the patient to bring her parents to the clinic to be with her at the time she has the abortion which to us is more important than to send the parents a notice that your youngster is having an abortion. We ask our patients to bring somebody with them to the clinic. Often it is a parent, but it could be an older brother or sister. From 40-50% of our patients do call their parents but they generally tell only one parent and its [sic] generally the mother. While we do believe we should involve parents in these decisions we do know that there are a small number of cases, which Doctor

Sumerdorf just pointed out, in which the patients [sic] cannot advise her parents what she is preparing to do. In some instances they will tell them later. In many instances they know it would be damaging to their already shaky relationship to expose them to the fact that they've been sexually active. I can recall in years past of [sic] young women telling me how, their [sic] parents in one case, locked her in the attic of her house with blankets on the windows so the rest of the neighbors wouldn't see their shame. Or another young woman who was locked in the basement as a prisoner because her parents thought that the rest of the neighborhood found out she's pregnant and bring shame on the family [sic]. Both of these youngsters escaped and they did seek abortion care and this was at a time [16] that it was illegal and went out of the county. At our clinic we require young people to have parental consent or family consent of some kind if they're 15 or younger. There are very few patients 13, 12 or younger than that. 22 last year. If the woman is 15 or younger we ask her and we will not do the procedure unless she brings someone else from her family. It may be a parent and it usually is, but it also may be even a grandparent or an aunt or uncle. Providers of this kind of care are not willy nilly trying to capture patients to do abortions. We at our clinic have never done an abortion on a patient against her will. We should really call this the, if you are being cynical, the abortion business aid bill because at present we subsidize, that is we provide a time payment for 40% of the patients we see. We let them pay for their procedures on time. I know many of the patients I talk to I've told them "why don't you tell your parents?" In almost every instance when they tell their parents their parents come back with them to the clinic and see that they have proper medical care. We are finding that large numbers of young women often helping with their sisters and brothers who provide abortion care [sic]. We provide a fair number of free procedures, but 40% of them pay for their procedure on time. I think the cate-

gory that this is really aimed at is the 16 and 17 year old young women because that is the big people [sic] who are sort of on their own. Its [sic] this group we think its [sic] detrimental to notify both of their parents that an abortion is pending. We urge you to defeat this kind of legislation because we think it will produce really serious disaster [sic] among many of the families in this state. Thank you.

Exhibit D*

Excerpts from Child Maltreatment Report
1985-86

Published by the Minnesota Department of Human Services

[22] *Reported Sexual Abuse*

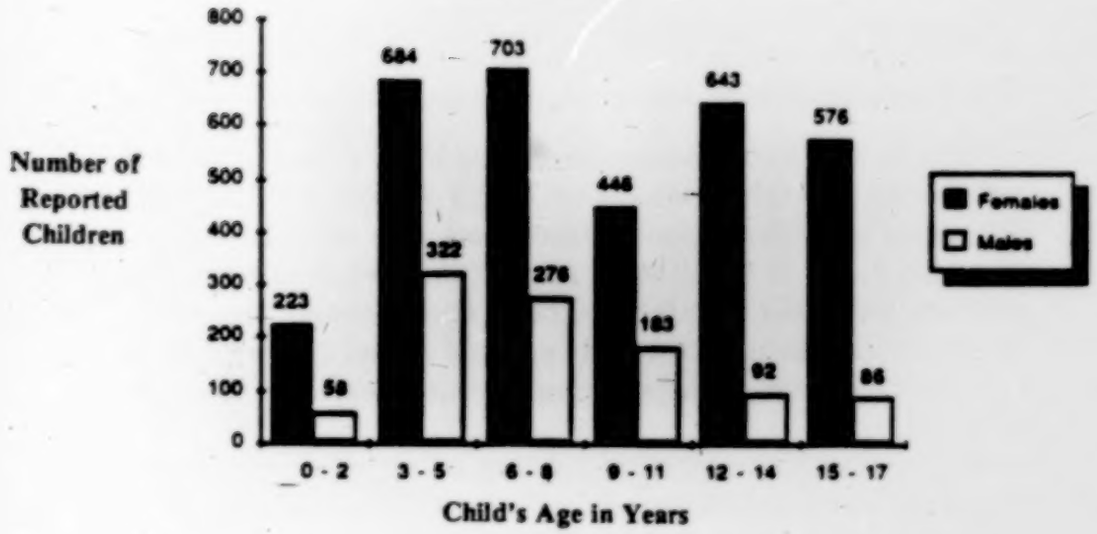
Females were two to seven times more likely to be reported as sexually abused than males. One of the reasons for this large difference is the department collects data only on those reports of sexual abuse in which child protection is required by law to respond, primarily intrafamilial child sexual abuse. The statistics below do not reflect reports of child sexual abuse made to law enforcement agencies where social services was not involved.

The substantiation rate for children on sexual abuse reports decreased from approximately 46% in 1984 to 44% in 1985, and increased back to 46% in 1986. In 1985 the substantiation rate for reports of sexual abuse was the same as physical abuse, while in 1986 it was again higher.

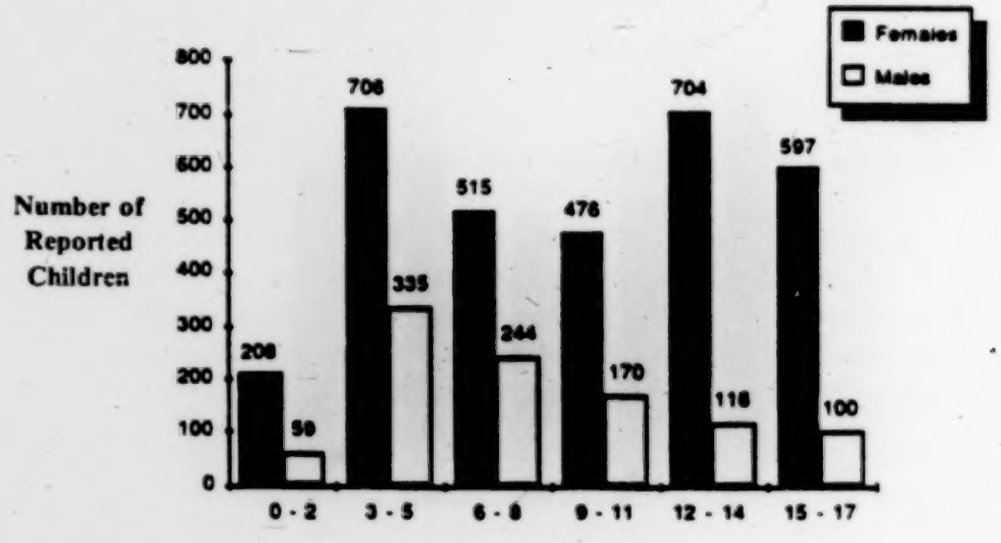
---

* A copy of this report has been filed with this Court by counsel for Cross-Respondents.

Reported Sexual Abuse in 1986: Number of Children by Age and Gender



Reported Sexual Abuse in 1985: Number of Children by Age and Gender



Reported Sexual Abuse in 1984: Number of Children by Age and Gender

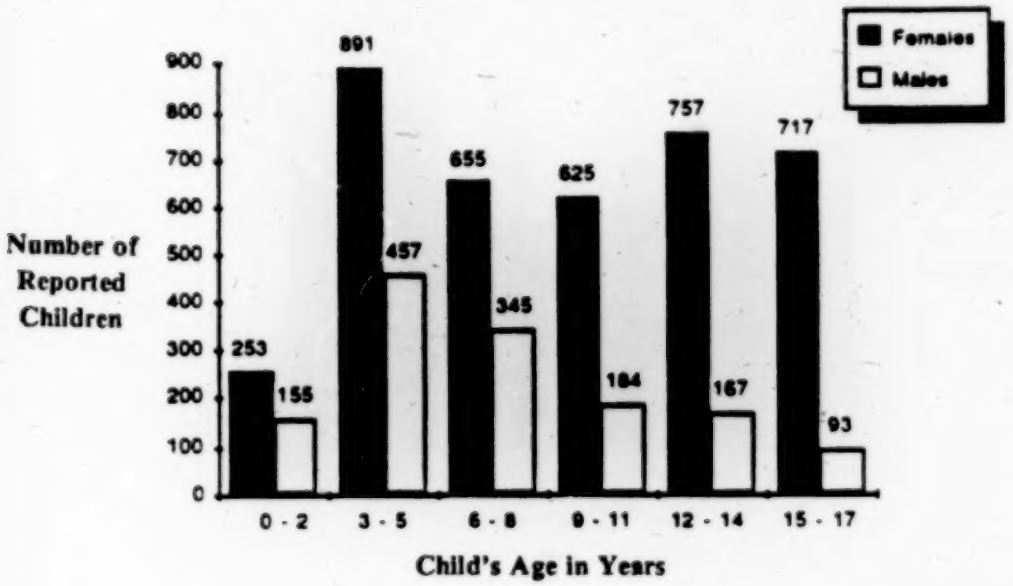


Exhibit E

Excerpts of Trial Testimony of Dr. Vincent Rue
March 12, 1986

CROSS-EXAMINATION

[2333] * * *

MS. BENSHOOF: If there were a criminal statute in California—
A: Uh-huh.
Q: —that required therapists such as yourself, when young women, and you see quite a few, come before you, are pregnant and their parents do not know about it, wouldn't you support a criminal law that would require you not to treat, see or counsel that minor until her parents are notified?

MR. GALUS: Object to that as asked and answered.
THE COURT: Objection overruled, you may answer.
THE WITNESS: I would not agree with such a statute that would impose criminal penalties on a counselor for not notifying parents of an intention for an abortion simply because the counselor is not providing the abortion.

Q: But you testified yesterday that the reason you are in favor [2334] of the statute is that it will lead to parental notice, parental knowledge of the pregnancy, that will lead to involvement, is that correct?
A: Yes.
Q: And if you as a counselor notified a parent, that would lead to knowledge, would it not?
A: Correct.
Q: So the beneficial result you would want from the Minnesota law would also occur from a California law, is that not correct?
A: No, I don't believe so because I will bet you in Minnesota most pregnant teenagers don't seek out a psychotherapist in decisionmaking [sic] process regarding abortion and I know that certainly is the case in California.
Q: So what you are suggesting here is if we—if the goal is to encourage parental notification, then what we should have

are sanctions against psychotherapists who don't involve parents?

A: Well, that would be true, I suppose, and workable to the extent of the goal, if the majority of teenagers went to counselors around the state, but I don't think that is the case.

Q: It would help a little bit, wouldn't it?

A: Well, no, I don't believe so, because—

Q: About how many patients do you see a year who don't involve parents?

[2335] MR. GALUS: Object to the answer being cut off.

THE COURT: Well, I think he should be permitted to answer.

Had you completed your answer or do you want to say more, or have we lost track?

THE WITNESS: I have lost track, but that is okay, proceed.

BY MS. BENSHOOF:

Q: About how many minors do you see a year who end up having abortions who don't tell their parents and you can't convince to tell them?

A: The minority.

Q: About how many?

A: I don't know, but it is a minority.

Q: Twenty-five?

A: I don't know.

Q: You said you saw 50 to 100, a minority, 25, 10?

A: If I saw 50, and 25 didn't, that would be 50 percent, that is not a minority.

Q: Let's say 15-10?

A: A minority.

Q: A minority. If there were a criminal statute it would certainly help that minority because their parents would be told by you and then their families would have the opportunity to get involved, isn't that correct?

[2336] A: For those minority of patients who are pregnant, who through the course of counseling insist that their parents not be involved, their parents would be notified subject to criminal prosecution of the psychotherapist.

Q: And the parents then would have the opportunity to be involved, isn't that correct?

A: They would.

Q: So for that portion of your patients they would be helped by such a law even though you would oppose such a law, isn't that correct?

A: I don't know that they would be helped. I don't know what that word means.

Parents would be notified. It is very possible in those exceptional situations that we could exacerbate the problem.

Q: You mean notification, forced notification would exacerbate the problem?

A: In some exceptional cases, yes.

Q: Well, tell me about this: How would such forced notification exacerbate the problem?

A: In cases where there is very severe dysfunctional communication, threats of violence, very poor family life, it is possible that notification could be harmful both to the adolescent—well, primarily to the adolescent.

Exhibit F

Statutory Definitions of Maturity

I. MARRIED MINORS (27 states):

ALA. CODE § 22-8-4 (1984) (minor who is or has been married may consent to any legally authorized medical, dental, health or mental health services), ALA. CODE § 22-8-5 (1984); ARIZ. REV. STAT. ANN. § 44-132 (1987) (minor who is or has been married may consent to hospital, medical and surgical care); ARK. CODE ADD. § 20-9-602(3) (1987) (married minor may consent to surgical or medical treatment or procedures not prohibited by law); CAL. CIV. CODE § 25.6 (West 1982) (minor who is or has been married may consent to hospital, medical and surgical care); COLO. REV. STAT. § 13-22-103 (1987) (married minor may give consent to hospital, medical, dental, emergency health and surgical care); DEL. CODE ANN. tit. 13, § 707(a)(2) (married minor may consent to any lawful diagnostic, therapeutic or post-mortem procedure, and to the furnishing of hospitalization and other reasonably necessary care in connection therewith); GA. CODE ANN. § 31-9-2(a)(3) (1985) (married minor may consent to any surgical or medical treatment or procedures not prohibited by law); ILL. REV. STAT. ch. 111, para. 4501 (1987) (married minor may consent to performance of medical or surgical procedures by a physician); IND. CODE § 16-8-12-2(2)(c) (Supp. 1987) (minor who is or has been married may consent to his or her own health care); KY. REV. STAT. ANN. § 214185(3) (Baldwin Supp. 1988) (minor who is or has been married may consent to hospital, medical, dental or surgical care for himself or herself); LA. REV. STAT. ANN. § 40: 1299.53(c) (West 1977) (married minor may consent to any medical or surgical treatment or procedures, including autopsy, not prohibited by law); MD. HEALTH-GEN. CODE ANN. § 20-102(a)(1) (1987) (married minor has same capacity as adult to consent to medical treatment); MASS. GEN. L. ch. 112, § 12F (1986) (minor who is married, widowed or divorced can consent to his or her own medical or dental care); MINN. STAT. § 144.342 (1988) (married minor may consent to medical, mental, dental and other

health services); MISS. CODE ANN. § 41-41-3(c) (Supp. 1988) (married minor may consent to medical or surgical procedures or treatments not prohibited by law); MO. REV. STAT. § 431.061 (1986) (married minor may consent to any medical or surgical treatment or procedures not prohibited by law); MONT. CODE ANN. § 41-1-402(1)(a) (1987) (minor who is or has been married may consent to medical or surgical care or services by hospital, clinic or physician); NEV. REV. STAT. ANN. § 129.030(1)(b) (Michie 1986) (minor who is or has been married may consent to examination and treatment, other than sterilization, provided by physician, hospital, board of health, or health officer, as long as he or she understands the nature and purpose of treatment, its probable outcome and voluntarily requests it); N.J. STAT. ANN. § 9:17A-1 (West 1976) (married minor may consent to medical or surgical care); N.M. STAT. ANN. § 24-10-1 (1986) (minor who is or has been married may consent to hospital, medical and surgical care); N.Y. PUB. HEALTH LAW § 2504(2) (McKinney 1985) (any person who is or has been married may consent to medical, dental, health and hospital services); OKLA. STAT. ANN. tit. 63, § § 2601(c) and 2602(A)(1) (West 1984) (1981) (married minor may consent to health services, except abortion or sterilization); PA. STAT. ANN. tit. 35, § 10101 (Purdon 1977) (minor who is or has been married may give consent to medical, dental, and health services); R.I. GEN. LAWS § 23-4.6-1 (1985) (any married person may consent to routine emergency medical or surgical care); S.C. CODE ANN. § 20-7-270 (Law. Co-op. 1985) (married minor may consent to any lawful diagnostic, therapeutic surgical or postmortem procedures); VA. CODE ANN. § 54.1-2969(E) (1988) (minor who is or has been married may consent to any surgical and medical treatment, except sterilization); WYO. STAT. ANN. § 14-1-101 (Michie 1989) (minor who is or has been married may consent to health care treatment to the same extent as an adult).

II. MINORS WHO ARE PARENTS (27 states):

ALA. CODE § 22-8-5 (1984) (any minor who has borne a child may consent to any legally authorized medical, dental, health or

mental health services for self and child); ALASKA STAT. § 09.65.100(3) (1983) (minor who is the parent of a child may consent to medical and dental services for self and child); ARK. CODE ANN. § 20-9-602(2) (1987) (any minor parent may consent for any medical or surgical treatment or procedure not prohibited by law for his child, but illegitimate father cannot consent for children solely on the basis of parenthood); COLO. REV. STAT. § 13-22-103(3) (1987) (minor parent may consent to hospital, medical, dental, emergency health and surgical care for his or her child); CONN. GEN. STAT. § 19a-285 (1987) (minor who has borne a child may consent to medical, dental, health and hospital services for his or her child); DEL. CODE ANN. tit. 13, § 707(a)(4) (1981) (minor parent may give consent for his or her child for any licensed medical, surgical, dental or osteopathic practitioner or hospital or clinic to perform diagnostic, therapeutic, or postmortem procedures and any hospitalization or other necessary care in connection therewith); FLA. STAT. § 743.065(2) (1987) (unwed minor mother may consent to medical or surgical care or services for her child by hospital, clinic or physician); GA. CODE ANN. § 31-9-2(a)(2) (1985) (minor parent may give consent to any surgical or medical treatment or procedure not prohibited by law for his or her minor child); IDAHO CODE § 39-4303 (1985) (consent for furnishing of hospital, medical, dental or surgical care, treatment or procedure to any person who is not then capable of giving such consent as provided in this act or who is a minor or incompetent person, may be given or refused by any competent parent, spouse or guardian); ILL. ANN. STAT. ch. 111, para. 4502 (Smith-Hurd 1987) (a parent who is a minor may consent to performance of medical, surgical or dental procedure upon his or her child); KAN. STAT. ANN. § 38-122 (1986) (minor parent may consent to the performance upon his or her child of medical, surgical or post mortem procedure by a physician); KY. REV. STAT. ANN. § 214.185(3) (Baldwin Supp. 1988) (minor who has been married or borne a child may consent to hospital, medical, dental or surgical care for the child or for himself or herself); LA. REV. STAT. ANN. § 40:1299.53(b) (West 1977) (minor parent may give consent for his or her child to any medical or surgical treatment or procedure, including

autopsy, not prohibited by law); MD. HEALTH-GEN. CODE ANN. § 20-102(a)(2) (1987) (minor parent has the same capacity as an adult to consent to medical treatment); MASS. GEN. L. ch. 112, § 12F (1986) (minor parent may give consent to medical or dental care for herself or himself and his or her child); MINN. STAT. § 144.342 (1988) (minor who has borne a child may consent to medical, dental, mental and other health services for self and child); MISS. CODE ANN. § 41-41-3(b) (Supp. 1988) (minor parent may consent for his or her child to any medical or surgical procedures or treatments not prohibited by law; however, father of illegitimate child cannot consent for child solely on basis of parenthood); MO. REV. STAT. § 431.061(1)(3) (1986) (minor parent may consent to any medical or surgical procedures or treatment not prohibited by law for himself or herself and for his or her child); MONT. CODE ANN. § 41-1-402(a) (1987) (minor who has had a child may consent to medical or surgical care or treatment by a hospital, clinic or physician); NEV. REV. STAT. ANN. § 129.030 (Michie 1986) (minor who has borne a child may consent for herself and for child to any examination and treatment, except sterilization, by a hospital, clinic, or physician, provided she understands the nature and purpose of the treatment and its probable outcome, and voluntarily requests it); N.J. STAT. ANN. § 9:17A-1 (West 1976) (married or pregnant minor may consent for self and children for medical and surgical care or procedures); N.Y. PUB. HEALTH LAW § 2504 (McKinney 1985) (any person who has borne a child may consent to medical, dental, health and hospital services for herself and for child); OKLA. STAT. ANN. tit. 63, § 2602(1) (West 1984) (a minor who has a dependent child may give consent for self and child to health services); PA. STAT. ANN. tit. 35, § 10102 (Purdon 1977) (minor who has been pregnant, borne a child or married may consent to medical, dental, and health services for self and child); R.I. GEN. LAWS § 23-4.6-1 (1985) (minor parent may consent to routine emergency medical or surgical care for his or her child); S.C. CODE ANN. § 20-7-300 (Law. Co-op. 1985) (minor who has been married or borne a child may consent to health services for the child); UTAH CODE ANN.

§ 78-14-5(4)(a) (1987) (minor parent may consent to any health care not prohibited by law for his or her minor child).

III. INDEPENDENT MINORS (11 states):

ALASKA STAT. § 09.65.100(1) (1988) (minor who is living apart from parents and managing own financial affairs may consent to medical and dental services); CAL. CIV. CODE § 34.6 (West 1982) (minor 15 years of age or older and living apart from parents or guardian and managing own financial affairs, regardless of income source, may consent to hospital care or any X-ray examination, anesthetic, or medical, dental or surgical diagnosis or treatment); COLO. REV. STAT. § 13-22-103(1) (1987) (minor 15 years of age or older who is married or living apart from his or her parents and managing own financial affairs, regardless of source of income, may consent to hospital, medical, dental, emergency health and surgical care); IND. CODE § 16-8-12-2(2)(B) (Supp. 1987) (minor at least 14 years of age who is not dependent on a parent for support, is living apart from parents and is managing own affairs may give consent to health care); MASS. GEN. L. ch. 112, § 12F (1986) (minor who is living apart from parents and managing own financial affairs may consent to medical or dental care); MINN. STAT. § 144.341 (1988) (minor who is living apart from parents and managing personal financial affairs, regardless of source or extent of income, may consent to medical, dental, mental or other health services); MONT. CODE ANN. § 41-1-402(b) (1987) (minor who has been separated from his or her parents and is supporting himself or herself may consent to medical or surgical care or services by a hospital, clinic or physician); NEV. REV. STAT. ANN. § 129.030 (Michie 1986) (minor who has been living apart from his or her parents for at least 4 months may consent to any examination or treatment, except sterilization, provided by physician, hospital, board of health, or health officer, as long as he or she understands the nature and purpose of the treatment and voluntarily requests it); OKLA. STAT. ANN. tit. 63, § 2602(A)(2) (West 1981) (minor who is separated from his or her parents and is not supported by them may consent to health services); TEX. FAM.

CODE ANN. § 35.03(a)(2) (Vernon Supp. 1989) (minor who is 16, is living apart from his or her parents with or without their consent, and managing personal financial affairs, regardless of source of income, may consent to hospital, medical, surgical and dental care); WYO. STAT. § 14-1-101 (1989) (minor who is living apart from parents and managing own affairs, regardless of income source, may consent to health care treatment).

IV. MINORS IN ARMED FORCES (five states):

CAL. CIV. CODE § 25.7 (West 1982) (any minor on active duty with any of the armed services may consent to hospital, medical or surgical care); IND. CODE § 16-8-12-2(2)(D) (Supp. 1987) (a minor who is in the military service may consent to his or her own health care); MASS. GEN. L. ch. 112, § 12F (1986) (minor who is a member of the armed forces may consent to medical or dental care); TEX. FAM. CODE ANN. § 35.03 (Vernon Supp. 1989) (a minor on active duty in armed forces may consent to hospital, medical, surgical or dental care); WYO. STAT. § 14-1-101(b)(ii) (1989) (minor in active military service may consent to health care treatment to the same extent as an adult).

V. MINORS WHO HAVE GRADUATED FROM HIGH SCHOOL (three states):

ALA. CODE § 22-8-4 (1984) (minor who has graduated from high school may consent to any legally authorized medical, dental, health or mental health services); MONT. CODE ANN. § 41-1-402(a) (1987) (minor who has graduated from high school may consent to medical or surgical treatment or care); PA. STAT. ANN. tit. 35, § 10101 (Purdon 1977) (minor who has graduated from high school may consent to medical, dental and health services).

VI. MATURE MINORS (three states):

ARK. STAT. ANN. § 20-9-602(7) (1987) (unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment

or procedures may consent); MISS. CODE ANN. § 41-41-3(h) (Supp. 1988) (any unemancipated minor of sufficient intelligence to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures may consent for himself or herself); N.H. REV. STAT. ANN. § 318-B:12a (1984) ("nothing contained herein shall be construed to mean that any minor of sound mind is legally incapable of consenting to medical treatment provided that such minor is of sufficient maturity to understand the nature of such treatment and the consequences thereof").

Exhibit G

Article from The Idaho Statesman, August 23, 1989, and Murder Indictment of Rocky Allen Adams

ADAMS CHARGED WITH MURDER

By David Ensunsa
The Idaho Statesman

PAYETTE—A charge of first-degree murder has been filed against a Fruitland man accused of impregnating and killing his teenage daughter.

Payette County Prosecutor Bruce Birch said his office filed the charge Monday against Rocky Adams, 37, who remained hospitalized in Boise Tuesday night from an apparent suicide attempt.

Adams will appear in court for arraignment when he is able to, Birch said Tuesday.

Adams is accused of with [sic] firing a slug from a .30-caliber rifle into the head of his 13-year-old daughter, Spring, on Aug. 14, at their Fruitland home. He then apparently turned the gun on himself and suffered a bullet wound to the head.

Adams, who was comatose for several days, has been steadily improving at St. Alphonsus Regional Medical Center. Tuesday night, he was listed in fair condition.

Birch said his office is continuing to investigate the shooting. Sheriff Bob Barowsky said his investigation is essentially complete.

"We had to make sure we had all our statements before the charge was filed," Barowsky said. "Once the charges have been filed, we are pretty well finished."

The sheriff declined to comment further on the case, saying he did not want to "try the case in the newspaper."

Officials were still refusing Tuesday to release some findings from Spring Adams' autopsy. After the shooting, family members told The Statesman that Rocky Adams had been consumed with guilt because he had sexually abused and impregnated his daughter.

But officials have declined to say whether the girl was pregnant, adding that such a revelation, if true, could hinder the prosecution.

On Tuesday, Payette County Coroner Robert Bigelow said he did not know whether Adams was pregnant. He said he has had the autopsy report read to him but he hadn't actually seen the report.

"Personally, I don't have knowledge if she was pregnant. I'm not interested in that, because that's not the cause of death," Bigelow said.

A clerk at the Payette County court office said she had no written report of an autopsy on the girl.

The girl, who would have been a sixth-grader this year, had been scheduled to receive an abortion Aug. 15 in Portland, relatives said.

(EXHIBIT CONTINUED ON FOLLOWING PAGE.)

IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF PAYETTE

Case No. CRM: 839

STATE OF IDAHO,

Plaintiff,

vs.

ROCKY ALLEN ADAMS,

Defendant.

CRIMINAL INFORMATION

Pursuant to Idaho Criminal Rule 7, the Prosecuting Attorney of Payette County, Idaho, alleges by this information that:

ROCKY ALLEN ADAMS

has perpetrated a crime against the State of Idaho, to-wit:

MURDER IN THE FIRST DEGREE,
I.C. 18-4001, 18-4002, 18-4003, (FELONY)

committed as follows:

That the Defendant, ROCKY ALLEN ADAMS, on or about the 14th day of August, 1989, in the County of Payette, State of Idaho, did wilfully, unlawfully, deliberately and with premeditation, and with malice aforethought, kill and murder Spring Adams, a human being, by shooting her in the head with a firearm from which she died, which is in violation of I. C. 18-4001, 18-4002, 18-4003, MURDER IN THE FIRST DEGREE, (FELONY).

CRIMINAL INFORMATION—1

DATED this 14 day of September, 1989.

Bruce H. Birch
Prosecuting Attorney

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF CROSS-PETITIONERS

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Chief Deputy
Attorney General
CATHARINE F. HAUKEDAHL
Solicitor General

KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
525 Park Street, Suite 500
St. Paul, Minnesota 55103
Telephone: (612) 297-2040
Counsel for
Cross-Petitioners

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	Page
Argument	2
I. There Exists No Constitutional Right Of Minors To Conceal Important Information From Their Parents	2
II. There Is No Scientific Consensus That This Court's Recognition Of The Vulnerability Of Pregnant Children Rests Upon "Archaic Judgments" Concerning The Nature Of Adolescents	7
III. A Constitutional Mandate For Parental Notice Is Not A Prerequisite To Legislation Providing For Such Notice	11
IV. A Notice Requirement Is Not, As A Matter Of Law Or Fact, The Equivalent Of A Consent Requirement	12
V. The Exceptions To The Notice Requirement Permit Avoidance Of Notice In Appropriate Circumstances	14
A. Emancipation	14
B. Abuse	15
C. Medical Emergency	17
D. Other Compelling Reasons To Avoid Notice	18
Conclusion	20

TABLE OF AUTHORITIES

Cases: Page

Bellotti v. Baird, 443 U.S. 622 (1979) 6, 7, 9, 11, 13, 19

H. L. v. Matheson, 450 U.S. 398 (1981) 6, 7, 11, 12, 13, 16

Harris v. McRae, 448 U.S. 297 (1980) 4

Hartigan v. Zbaraz, 108 S. Ct. 479 (1987) 8

Parham v. J. R., 442 U.S. 584 (1979) 6, 11, 12

Planned Parenthood Ass'n v. Danforth, 428 U.S. 52 (1976) 5, 6, 7, 11, 19

Planned Parenthood League v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) 5

Quilloin v. Walcott, 434 U.S 246 (1978) 12

Stanford v. Kentucky, 109 S. Ct. 2969 (1989) 6, 10

Stanley v. Illinois, 405 U.S. 645 (1972) 12

State v. Staat, 192 N.W.2d 192 (1971) 3

Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) 5

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 8

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 4, 19

Minnesota Statutes: Page

Minn. Stat. § 126.264 5

Minn. Stat. § 127.30-.31 5

Minn. Stat. § 144.335 3

Minn. Stat. § 144.341 ..... 4, 14, 15

Minn. Stat. § 144.342 ..... 4, 14, 15

Minn. Stat. §§ 144.341-144.347 3

Minn. Stat. § 144.343 14

Minn. Stat. § 144.4175 3

Minn. Stat. § 171.04 5

Minn. Stat. § 259.10 5

Minn. Stat. § 260.155 5

Minn. Stat. § 260.171 5

Minn. Stat. § 260.51 5

Minn. Stat. § 517.02 5

Minn. Stat. § 595.02 ..... 2, 3

Minn. Stat. § 609.255 19

Minn. Stat. § 626.52 3

Minn. Stat. § 626.556 ..... 3, 17

Other Authorities:

Adolescent Abortion, Psychological and Legal Issues, 42 Amer. Psych. 73 (1987) 8

Brunstetter & Silver, Normal Adolescent Development, in 2 Comprehensive Textbook of Psychiatry 1608 (H. Kaplan & B. Sadock 4th ed. 1985) 9

Gardner, Scherer & Tester, Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights, American Psychologist, 895-902 (June, 1989) 8

Page

Graham & Rutter, Adolescent Disorders, in Child Psychiatry: Modern Approaches 407 (M. Rutter & L. Hersov eds. 1977) 9

Hamburg & Wortman, Adolescent Development and Psychopathology, in 2 Psychiatry ch. 4 (J. Cavenar ed. 1985) 9

Handbook of Clinical Child Psychology (C. Walker & M. Roberts eds. 1983) 9

Lewis, Minors' Competence to Consent to Abortion, 42 Amer. Psych. 87 (1987) 8

M. Lewis, Clinical Aspects of Child Development (2d ed. 1982) 9

M. Rutter, Changing Youth in a Changing Society (1979) 9

Melton and Russo, Adolescent Abortion, Psychological Perspectives on Public Policy, 42 Amer. Psych. 71 (1987) 8

National Research Council, Risking the Future 9 (1987) 8

P. Mussen, J. Conger & J. Kagan, Child Development and Personality (5th ed. 1979) 9

S. Ambron, Child Development (3d ed. 1981) 9

Miscellaneous:

Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as *amici curiae* in *Thompson v. Oklahoma* 8, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NO. 88-1309

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Cross-Petitioners,

v.

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF CROSS-PETITIONERS

ARGUMENT

I. THERE EXISTS NO CONSTITUTIONAL RIGHT OF MINORS TO CONCEAL IMPORTANT INFORMATION FROM THEIR PARENTS.

Plaintiffs appear to assert that parental notification offends some purported constitutional right of children to keep information from their parents. Although this Court has previously recognized that mature and best interest minors are entitled to an abortion without parental veto, there is no precedent or constitutional support for the notion that minors have any right to informational privacy from their parents either generally or with specific reference to abortion. Indeed, in any context other than that of the derived "right" to abortion, the proposition would be rejected out of hand.

Lacking any support in either the Constitution itself or the holdings of this Court for such an expansive right, plaintiffs recite a number of statutory provisions which supposedly demonstrate a recognition of a pervasive right of "confidentiality" for minors. *See, e.g.*, Brief of Cross-Respondents at 32-34. Thus, they claim, upholding the Minnesota parental notification law will improperly "open the door to a host of disingenuous legislative enactments mandating parental involvement in minors' decision-making." *Id.* at 35.

In truth, however, parental involvement in minors' decision-making is presently the rule in the vast majority of circumstances. The series of statutes cited by plaintiffs in notes 65-68 at 34 of their brief, clearly do not provide "guaranteed confidentiality in a wide variety of communications." These provisions, which are contained in Minn. Stat. § 595.02, deal narrowly with testimonial privileges as applied to certain

witnesses in judicial proceedings. They do not in any sense guarantee "confidentiality" in any particular context outside the formal testimony of witnesses. Certainly they do not establish any independent right of minors to conceal information from their parents.

Privileges such as the doctor-patient privilege are purely statutory. They are subject to narrow constructions[1] and a number of exceptions.[2]

Even in the medical area, it is clear that in the majority of situations there is no guarantee of confidentiality for a minor *vis a vis* parents. For example, Minn. Stat. § 144.335 which deals with patient access to health records, defines "patient" as follows:

> "Patient" means a natural person who has received health care services from a provider for treatment of a medical, psychiatric, or mental condition, or a person the patient designates in writing as a representative. Except for minors who have received health care services pursuant to sections 144.341 to 144.347, in the case of a minor, "patient" includes a parent or guardian, or a person acting as a parent or guardian in the absence of a parent or guardian.

The fact that the State has enacted specific legislation in Minn. Stat. §§ 144.341-144.347 which authorizes treatment of minors without parental consent in a very narrow set of de-

---

[1] *See, e.g., State v. Staat*, 192 N.W.2d 192 (1971).

[2] *See, e.g.*, Minn. Stat. §§ 144.4175 (carriers of certain communicable diseases); 595.02, subd. 1(J) (sexual assault counselors to disclose certain information); 595.02, subd. 2 (testimony relating to abuse or neglect of minors); 626.52 (report of suspicious wounds); 626.556-626.557 (reporting abuse of minors and vulnerable adults).

fined circumstances, stands as further acknowledgment that in the vast majority of situations not only parental knowledge, but also consent is required for the treatment of minors.

With the exception of the emancipation-related provisions of sections 144.341 and 144.342, these narrow exceptions do not represent any acknowledgment of "maturity" on the part of minors. Rather, they represent a permissible, but not mandated, legislative judgment that certain types of treatment, such as prenatal care and treatment for venereal disease, alcoholism and drug abuse, ought to be actively promoted even at a potential cost to the normal parental role, because of the clear medical need that such treatment be given and the undesirable societal and public health consequences which would follow the lack of such treatment. Even in these limited situations, however, the wisdom and usefulness of the exclusion of parents could well be debated.

That the legislature has tipped the policy balance in favor of promoting treatment for venereal disease, alcoholism, drug abuse, and prenatal care, to the detriment of parental involvement, does not compel a similar policy choice with respect to abortions. Unlike the clear medical necessity for treatment of venereal disease, for example, an abortion normally represents an important life choice unrelated to questions of medical need. The legislature is not required to promote abortion as a socially desirable end in itself. *See, e.g., Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3042 (1989).

Furthermore, this Court has expressly recognized that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). In contrast, for example, the decision to seek

prenatal care or other treatment of pregnancy related conditions does not, in itself, constitute an irrevocable commitment to bear a child. This inherent difference is a matter of such consequence that it is constitutionally permissible to set apart abortion by imposing regulations which are not imposed upon other medical procedures which may be superficially similar. *Id.*; *Planned Parenthood Ass'n v. Danforth*, 428 U.S. 52, 66-67, 80-81 (1976) (written consent and record keeping and reporting requirements imposed upon abortions but not other surgery). Accordingly, the statutory distinctions between minors who seek an abortion and minors who seek to give birth, are rationally related to a legitimate state interest and thus do not offend constitutional equal protection guarantees. *See Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1012-13 (1st Cir. 1981).

In addition to the medical area, there are numerous situations in which parents are properly involved by explicit statutory directives in making important decisions concerning their minor children. *See, e.g.*, Minn. Stat. §§ 126.264 (rights of parents of students in limited English proficient programs); 127.30-.31 (rights of parents to notice and hearing prior to suspension or expulsion of student); 171.04 (parental approval required for driver's license applications); 259.10 (both parents notified of application for minor's name change); 260.171, subd. 1 (parents notified whenever child taken into custody); 260.155, subd. 1a (parents have right to participate in all juvenile court proceedings); 260.51, art. IV (a parent may petition return of run-away juvenile); 517.02 (parental consent or court order required for minor's marriage); *see also Thompson v. Oklahoma*, 108 S. Ct. 2687, 2702-06 (1988) (appendices C, D and F). Furthermore, as noted by Justice Bren-

nan in *Stanford v. Kentucky*, 109 S.Ct. 2969 (1989), "[t]hirty-seven States have specific enactments requiring that a patient have attained 18 before she may validly consent to medical treatment." *Id.* at 2988 (dissenting opinion).

Thus it is not the State which would "open the door" to radical change in the law concerning parental involvement in minors' decision-making. Rather it is plaintiffs, who by their argument, ask this Court to establish rights in children *vis a vis* their parents far beyond any which have been hitherto recognized.

There is nothing in the prior holdings of this Court or in the record of this case which either requires or supports such a radical departure from the cardinal principle that parents should be accorded at least the opportunity to know about and be involved in all critical life decisions made by their children.

Indeed the decisions of this Court have consistently recognized the proper role of parents in overseeing important decisions in the lives of their children, even when children may object to such involvement. *See, e.g., Parham v. J. R.*, 442 U.S. 584, 602-03 (1979). The "right" of children as against their parents which has been recognized by this Court in the abortion area plainly is not a sweeping right of informational privacy, but a right to avoid obstruction of the abortion by parental veto. *See Danforth*, 428 U.S. at 72-75; *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (*Bellotti II*); *H. L. v. Matheson*, 450 U.S. 398, 409 (1981). All of these cases, in fact, continue to recognize the general need for parental involvement and communication. None has recognized any general right of minors to keep an abortion secret from their parents.

II. THERE IS NO SCIENTIFIC CONSENSUS THAT THIS COURT'S RECOGNITION OF THE VULNERABILITY OF PREGNANT CHILDREN RESTS UPON "ARCHAIC JUDGMENTS" CONCERNING THE NATURE OF ADOLESCENTS.

Explaining this Court's conclusion that a state "furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child," the *Bellotti II* plurality reasoned that "[t]hat is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support." 443 U.S. at 641, quoting *Danforth*, 428 U.S. at 91 (Stewart, J., concurring). The *Bellotti II* plurality further noted that this conclusion was in accord with other rulings of the Court grounded upon "the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635 (footnote omitted). *Accord, Matheson*, 450 U.S. at 409-10. Citing the *amicus curiae* brief of the American Psychological Association (APA) in No. 88-1125, plaintiffs appear to suggest that this Court's recognition of the relative vulnerability of children is a "now archaic judgment." Brief of Cross-Respondents at 28 n.55.

Although the APA brief asserts that psychological theory and research "strongly support" the conclusion that most adolescents are competent to make informed decisions about important life choices, including decisions about abortion (APA *amicus* brief at 18-26), its arguments are unpersuasive, and there does not exist any substantial body of empirical

evidence to support the APA's claim. As the APA Interdivisional Committee on Adolescent Abortion has itself most recently reported, "[t]here are few studies directly focused on abortion decision making by adolescents." *Adolescent Abortion, Psychological and Legal Issues*, 42 Amer. Psych. 73 (1987).[3] The Panel on Adolescent Pregnancy and Child Bearing of the National Academy of Sciences has likewise recently concluded that "[t]here is no evidence concerning either the cognitive capacity of adolescents to make decisions about pregnancy termination or the psychological consequences of abortion that would support *or refute* the imposition of age restrictions governing access to abortion services." National Research Council, *Risking the Future* 9 (1987) (emphasis added).[4]

Furthermore, the discipline of adolescent psychiatry appears to be squarely at odds with the contention of the APA that most adolescents are as competent as adults to make informed choices about important life decisions. In *Thompson v. Oklahoma, supra*, the American Society for Adolescent Psychiatry (ASAP) and the American Orthopsychiatric Association filed an *amicus* brief in support of the claim that the

[3] "[R]esearch is still sparse on abortion decision making per se." Melton and Russo, *Adolescent Abortion, Psychological Perspectives on Public Policy*, 42 Amer. Psych. 71 (1987), and "[d]efinitive statements about minors' competence must await large, representative samples of pregnancy decision making by minors and adults." Lewis, *Minors' Competence to Consent to Abortion*, 42 Amer. Psych. 87 (1987).

[4] The APA's similar *amicus* briefs in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) and *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987) have been criticized as overstating the available scientific knowledge. *See* Gardner, Scherer & Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, American Psychologist 895-902 (June, 1989).

imposition of the death penalty upon minors constituted cruel and unusual punishment.[5] In discussing that issue, these two learned associations surveyed the current scientific research, experience and literature demonstrating that adolescence is a transitional period between childhood and adulthood in which young people are still developing cognitive ability, judgment and fully formed identity or character of adults. In their *Thompson amicus* brief ASAP quoted with approval the pronouncement in *Bellotti II* that "during the formative years of childhood and adolescence, minors often lack the experience, perspective and judgment" expected of adults, 443 U.S. at 635, and declared without reservation that "[t]his view is confirmed by a vast body of clinical research and literature." ASAP *amicus* brief at 3-4.[6] The ASAP reviewed the available

[5] ASAP has approximately 1,400 members, one-half of which are child psychiatrists, while the remaining number are general psychriatrists and psychoanalysts who maintain an active interest in adolescents. The American Orthopsychiatric Association is an organization comprised of more than 10,000 members representing a variety of mental health-related professions—psychiatry, psychology, psychiatric nursing, social work, education and the law—including experts in adolescent development. *See* Brief of the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association as *amici curiae* in *Thompson v. Oklahoma* at 1.

[6] As examples of such clinical research and literature, the ASAP cited the following: Brunstetter & Silver, *Normal Adolescent Development*, in 2 *Comprehensive Textbook of Psychiatry* 1608 (H. Kaplan & B. Sadock 4th ed. 1985); Hamburg & Wortman, *Adolescent Development and Psychopathology*, in 2 *Psychiatry* ch. 4 (J. Cavenar ed. 1985); *Handbook of Clinical Child Psychology* (C. Walker & M. Roberts eds. 1983); M. Lewis, *Clinical Aspects of Child Development* (2d ed. 1982); S. Ambron, *Child Development* (3d ed. 1981); P. Mussen, J. Conger & J. Kagan, *Child Development and Personality* (5th ed. 1979); M. Rutter, *Changing Youth in a Changing Society* (1979); Graham & Rutter, *Adolescent Disorders*, in *Child Psychiatry: Modern Approaches* 407 (M. Rutter & L. Hersov eds. 1977).

research and literature demonstrating that adolescents "lack cognitive ability, judgment and fully-formed identity or character of adults," and "the judgment necessary to choose carefully among various possibilities and to appreciate the future consequences of their actions"; that they "are less capable of independent, self-directed action than adults"; that they "lack the capacity for mature, principled moral judgment which is characteristic of normal adult thought"; that they "often engage in experimentation and risk-taking"; and that they "tend to be guided by emotions rather than reason." ASAP *amicus* brief at 4-8.

In summary, the ASAP concluded as follows:

> Adolescence is a critical developmental stage through which young persons must pass prior to entering adulthood. The clinical literature confirms what we all generally know and what the law has always recognized—adolescents are not adults. Adolescents are less capable and less responsible than adults, and more in need of protection and support.

Id. at 8.[7]

In light of the foregoing, there is certainly no cause for this Court to discard as a "now archaic judgment" its prior recognition that a state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child and that "a girl of tender years, under emotional stress, may be ill-equipped to make it

[7] ASAP filed a similar *amicus* brief the following term in *Stanford v. Kentucky*, *supra*, which was cited with approval in the dissenting opinion of Justice Brennan, joined by Justices Marshall, Blackmun and Stevens. 109 S. Ct. at 2989.

without mature advice and emotional support." *Bellotti II*, 443 U.S. at 640-41, quoting *Danforth*, 428 U.S. at 91 (Stewart, J., concurring).

III. A CONSTITUTIONAL MANDATE FOR PARENTAL NOTICE IS NOT A PREREQUISITE TO LEGISLATION PROVIDING FOR SUCH NOTICE.

Plaintiffs fault the State on pp. 27-32 of their brief for failing to establish an overriding constitutional "right to know" on the part of parents. This assertion is either irrelevant or untrue depending upon its intended meaning. Defendants have not asserted that parents have an absolute constitutionally mandated right to know about their daughters' abortion decisions. However, the issue in this case is not whether the Minnesota notice statute is constitutionally mandated, but merely whether it is constitutionally permitted. In that respect, it is clear that this Court has recognized the fundamental rights and role of parents as a constitutionally supported state interest which may be balanced by the legislature against minor's claims of personal autonomy, including those asserted in the area of abortion. *See Parham*; *Bellotti II*, 443 U.S. at 635-39; *Matheson*, 450 U.S. at 410.

Furthermore, it must be remembered that the position of the State in this case is not an effort to pit the rights of parents against the best interests of their children. What is at issue is the process whereby those interests are evaluated and furthered. Plaintiffs point out that the Court in *Parham* established procedures to be followed in cases of parents committing children to institutions. At the heart of those procedures, however, was the desire to protect the child's rights "by reducing risks of error without unduly trenching on traditional parental

authority and without undercutting 'efforts to further the legitimate interests of both the state and the patient that are served by' voluntary commitments." 442 U.S. at 606. The State's position here also seeks such an accommodation. Acceptance of plaintiffs' argument, however, would elevate the "right" to abortion far above the liberty right addressed in *Parham* by totally excluding any parental role at the sole discretion of the child. Plaintiffs cite no authority for the establishment of such a super-right in children.

IV. A NOTICE REQUIREMENT IS NOT, AS A MATTER OF LAW OR FACT, THE EQUIVALENT OF A CONSENT REQUIREMENT.

Plaintiffs assert that this Court has never considered any "abstract distinction" between notice and consent to be constitutionally significant. That claim is clearly untrue, both as a generality and with specific reference to the issue of minors' abortions.

As a general proposition the Court has, of course, recognized a constitutionally significant distinction between an entitlement of an interested person to control the outcome of a given decision and entitlement to mere notice. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (constitution entitles unwed father to notice and hearing upon the issue of parental fitness but not to absolute veto of adoption of child by third persons).

Specifically in the case of minors' abortions, plaintiffs' argument ignores both the language and result in *Matheson*. Prior to *Matheson*, the Court had declared unconstitutional Missouri and Massachusetts statutes which required parental consent without providing a court bypass mechanism found

by the Court to protect adequately against an absolute and arbitrary parental vote. If a requirement of mere notice is equivalent to a consent requirement, as suggested by plaintiffs, it must be assumed that the Court in *Matheson* would have declared invalid the Utah notice statute which provided for parental notice but no specific bypass procedure. However, the Court declined to find the Utah statute invalid either on its face or as applied to the minor plaintiff. Chief Justice Burger writing for the Court specifically said:

> The main premise of the dissent seems to be that a requirement of notice to the parents is the functional equivalent of a requirement of parental consent. . . . In *Bellotti II*, however, we expressly declined to equate notice requirements with consent requirements.

Id. at 411 n.17 (citations omitted). The Court expressly did not determine "in what circumstances a state must provide alternatives to parental notification." *Id.* at 412 n.22.

Plaintiffs are also wrong in asserting that the record fails to support the conclusion that a notice statute imposes less of a burden upon minors' ability to obtain an abortion than does a consent statute.[8] It is important to note that the Minnesota law does not require either consent or any other affirmative act by parents. Thus it does not permit parents, through inaction, to passively veto their daughter's decision to obtain

[8] Plaintiffs' claim at p. 9 n.12 of their brief that defendants have an obligation to prove clear error by the district court on this point conveniently ignores the fact that there is no "finding" by the trial court that the "burden" imposed by parental notice is the equivalent of that imposed by a consent requirement. Indeed to the extent that it addressed the matter, the trial court's conclusion has been consistent with that asserted by defendants: that a notice statute does impose a lesser burden. *See* Summary Judgment Order. Hodgson Appendix at 151a.

an abortion. It would seem too obvious to require proof that it is more difficult to accomplish any given result if the agreement of other persons is required, than it is if such persons simply have to be notified. If such proof is needed, however, it is evident in the record from plaintiffs' own experience. Certain clinics have, on occasion, in effect converted the Minnesota notice statute into something like a consent statute by insisting that parents not only must be notified but must perform some affirmative act such as giving written consent or acknowledgment of receipt of notice or of paternity. *See, e.g.*, Brief of Cross-Respondents at 19 n.37; P. Exh. 70A, J.A. 429; Wendt T. 48; J.A. 166. In these situations, according to plaintiffs, difficulties have been encountered when parents have refused properly to perform the required acknowledgment. *See, e.g.*, J.A. 287; Wendt T. 66-68. Thus, by their own actions, plaintiff clinics have demonstrated the differing "burdens" resulting from a mere notice requirement as opposed to one requiring some affirmative act of assent.

V. THE EXCEPTIONS TO THE NOTICE REQUIREMENT PERMIT AVOIDANCE OF NOTICE IN APPROPRIATE CIRCUMSTANCES.

A. Emancipation.

Minn. Stat. § 144.343, subd. 2, requires notice only to the parents of an unemancipated minor. Plaintiffs assert that the exception for emancipated minors is unworkable because there is no definition of emancipation in the statute. While it is the case that the Minnesota statute does not contain a definition of the specific term "emancipation," the term is given meaning by two preceding sections of Minnesota law. Minn. Stat. §§ 144.341 and 144.342 provide:

144.341. Notwithstanding any other provision of law, any minor who is living separate and apart from parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing personal financial affairs, regardless of the source or extent of the minor's income, may give effective consent to personal medical, dental, mental and other health services, and the consent of no other person is required.

144.342. Any minor who has been married or has borne a child may give effective consent to personal medical, mental, dental and other health services, or to services for the minor's child, and the consent of no other person is required.

It seems clear that the concepts of emancipation can be understood without the need for a declaratory judgment by reference to the circumstances referred to in these sections. Some of the clinics, themselves, have recognized the applicability of these definitions,[9] although at least one has undertaken to unilaterally impose "stricter" standards by requiring minors to have lived away from home for at least six months. Wendt T. 50.

B. Abuse.

The Minnesota law plainly and unequivocally provides an exception from the notice requirement for any child who says she has been physically or sexually abused or neglected. It seems clear that this exception would address virtually all of the situations in which plaintiffs assert a truly "compelling"

---

[9] P. Exh. 71 at pp. 1-2, P. Exh. 73, J.A. 435.

need to avoid notification. Plaintiffs argue that this exception is insufficient because children are reluctant to reveal violence or abuse in their families. Brief of Cross-Petitioners at 23-24. Even if it be assumed that an exception for abused minors is constitutionally required, the State may reasonably require that the minor disclose the abuse. In *Matheson*, for example, the Court held that a notice requirement may be applied to a minor who did not affirmatively assert any concrete reason to avoid parental notice. Thus it is clear that a minor who wishes to avail herself of a claimed exception to a notice requirement may constitutionally be required to at least assert that the factual basis for that exception exists. Certainly there is no basis for a claim that parents of non-abused minors should not be notified simply because some abused minors may be reluctant to report abuse.

Plaintiffs further argue that, since the Minnesota law requires the reporting of the abuse by the clinic to child protection agencies and subsequent investigation by those agencies, the claiming of the exception somehow violates a minor's right to "confidentiality." As noted above, however, while the Court has recognized a "right" of "mature" or "best interest" minors to choose abortion without being subjected to arbitrary parental veto, plaintiffs have cited no authority for the proposition that there further exists a generalized constitutional right of minors to "confidentiality" as against their parents in all matters associated with pregnancy and abortion.

Thus, even if it were true that the clinics' reporting of abuse might ultimately result in parents learning about their daughter's pregnancy and abortion after the fact,[10] that eventuality

[10] Plaintiffs' argument at pp. 24-25 of their brief appears to be that, when alleged abuse is investigated, the parents may learn that their daughter communicated the abuse to a clinic. However, as acknowledged by plaintiffs, the source of the report is, by law, confidential. *See* Minn. Stat. § 626.556, subd. 11. Furthermore, in any situation where a parent is the alleged abuser, the interview notice referred to by plaintiffs would only be required after an interview of the child by child protection authorities at the conclusion of the investigation and then would deal only with that interview. Minn. Stat. § 626.556, subd. 10(c).

would not constitute an impermissible veto over the abortion. Indeed, while plaintiff clinics have presumably notified authorities concerning cases of abuse coming to their attention, they cite no instances of any parental attempts to prevent any abortion resulting from such reports.

Plaintiffs' argument further ignores the fact that the reporting of child abuse by medical care providers is not a function of the statute at issue, nor of the child's wish to affirmatively claim any exemptions granted by the statute. It is, in fact, the legal duty of every medical care provider to identify and report child abuse or neglect which the provider knows or has reason to believe has occurred, regardless of whether the child may express a desire that such abuse be reported. *See* Minn. Stat. § 626.556, subd. 3. Given this absolute reporting requirement and the availability of the abuse/neglect exception, there is no good reason why minors who professed to be victims of abuse were nonetheless sent to court during the time the notice/bypass version of the statute was in effect.[11]

C. Medical Emergency.

The Minnesota law also provides an exception to the 48-hour notice requirement for situations in which prompt action is needed to save the minor's life. Plaintiffs assert at page 15 that this exception is insufficient in that it fails to permit an

[11] *See, e.g.*, Brief of Cross-Respondents at 11 n.15, n.19; P. Exh. 21, J.A. 382, J.A. 119.

immediate abortion necessitated by serious health problems which are not life threatening. The sole example of such a situation offered by plaintiffs is a situation in which a clinic employee thought that a patient might "spontaneously abort." Plaintiffs cite no testimony, however, that even this instance was a "serious health problem" or that the performance of an immediate artificially induced abortion was the appropriate treatment as opposed to mere hospital observation or other care. *See* T. 166.

D. Other Compelling Reasons To Avoid Notice.

The panoply of "compelling" reasons cited by plaintiffs and minor class members, and approved by certain judges, for keeping non-abusive parents ignorant discloses that the scope of the claimed constitutional "right to privacy" for minors' abortions goes well beyond minors who might be abused in some fashion.

Such "compelling" reasons include: her father was paraplegic (Brief of Cross-Respondents at 11 n.17), parents were divorcing, *id.*, mother was a recovering alcoholic, *id.*, mother lived in Maryland, *id.* n.18, father "disagrees" with abortion, *id.* at 13 n.23, father was "conservative," *id.* at 19-20 n.38, didn't want to "disrupt" anything, J.A. 114, might make her quit seeing her boyfriend, *id.*, and parents are "strict" and "religious," *id.* Furthermore, as indicated previously, a common reason to avoid parental notification is a desire not to upset a good parent-child relationship, or spoil a "good girl image." J.A. 114, 381-82, 460; T. 176, 427. No reason whatever is suggested, however, why, as a matter of constitutional law, recovering alcoholics, paraplegics, "conservatives" or "strict" or "religious" persons must be viewed as unfit parents.

Nor must parents who are "opposed" to abortion be *per se* denied an opportunity to know and respond to their daughter's plight. It cannot be automatically assumed that parents who are generally opposed to abortion would be unsupportive or obstructive of their own daughter's desire to have one. *See, e.g.*, testimony of Kathy M., T. 1233-34. Furthermore, while abortion is a medical procedure, the most serious issues surrounding it are not medical or scientific at all. The issue of how to deal with an unwanted pregnancy is one fraught with moral, ethical and spiritual concerns.[12] This Court has not declared, nor is the state required to regulate as if, abortion were an inherent good to be actively promoted.[13] Parents are not, of course, permitted by law to employ physical abuse or confinement to coerce their daughter. *See, e.g.*, Minn. Stat. § 609.255, subd. 3 (1988) (prohibiting unreasonable confinement or restraint of children by parents). However, there is no evidence to support the notion that previously non-abusive parents will suddenly resort to prohibited mistreatment, or that physically coercive parents are so common as to preclude notification to the vast majority of parents who would not engage in unlawful conduct. Accordingly, there is no sound basis for plaintiffs' apparent premise that only medical doctors, their hired abortion "counselors," teen "advocates" and pro-abortion parents are to be permitted an opinion on the abortion decision of a minor.

---

[12] *See, e.g., Danforth*, 428 U.S. 52, 102-03 (Stevens, J.); *Bellotti II*, 443 U.S. at 640 (Powell, J.)

[13] *Webster*, 109 S. Ct. at 3042.

CONCLUSION

For the foregoing reasons and those previously articulated in Cross-Petitioners' initial brief, the Court is urged to reverse the appeals court determination that parental notice may not be required without providing a court bypass option and to uphold the ability of a state to accord parents at least timely notice before taking the irrevocable step of performing an abortion upon their daughter.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
JOHN R. TUNHEIM
Chief Deputy
Attorney General
CATHARINE F. HAUKEDAHL
Solicitor General
KENNETH E. RASCHKE, JR.
Assistant Attorney General
JOHN B. GALUS
Special Assistant
Attorney General
Counsel of Record
525 Park Street, Suite 500
St. Paul, MN 55103
Telephone: (612) 297-2040
Counsel for Cross-Petitioners

(31) (30)

Nos. 88-1125 and 88-1309

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D., *et al.*, *Petitioners*,

—v.—

THE STATE OF MINNESOTA, *et al.*, *Respondents*.

THE STATE OF MINNESOTA, *et al.*, *Cross-Petitioners*,

—v.—

JANE HODGSON, M.D., *et al.*, *Cross-Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(Counsel of Record)
RACHAEL N. PINE
LYNN M. PALTROW
KATHRYN KOLBERT
JOHN A. POWELL
ELLEN K. GOETZ
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. THE DISTRICT COURT'S FACTUAL INQUIRY WAS CONSTITUTIONALLY MANDATED AND ITS FINDINGS WERE SUPPORTED BY THE EVIDENCE	1
A. Contrary To The Assertions Of Both Defendants And The Solicitor General, It Was Proper For The Trial Court To Make Factual Determinations	1
B. Defendants' Assessment Of The Evidence Contradicts The District Court's Findings Of Fact, Which Are Supported By The Factual Record And Are Not Clearly Erroneous	5
II. THE SOLICITOR GENERAL'S SUGGESTION THAT THIS COURT OVERRULE *ROE V. WADE* IS INAPPROPRIATE	11
III. COMMON LAW PRINCIPLES DEFINING MINORS' LEGAL RIGHTS WERE NEVER AS RESTRICTIVE AS THIS STATUTE AND CANNOT BE RESURRECTED TO SUSTAIN IT	17
CONCLUSION	20

PAGE

APPENDIX:

Exhibit A, Percentage of Pregnancies Ending in Abortion in Minnesota, 1975-87 ..... A-1

Exhibit B, Relative Risk of Second Trimester Abortions A-4

Exhibit C, Births to Minors by Marital Status..... A-6

TABLE OF AUTHORITIES

Cases: PAGE

Amadeo v. Zant, 108 S. Ct. 1771 (1988)..... 5

Anderson v. Bessemer City, 470 U.S. 564 (1985)..... 5, 6

Arizona v. Rumsey, 467 U.S. 203 (1984)..... 11

Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975) (three-judge court), *vacated*, 428 U.S. 132 (1976), *questions certified sub nom. Baird v. Attorney General*, 360 N.E.2d 288 (Mass. 1977), *on remand sub nom. Baird v. Bellotti*, 450 F. Supp. 997 (D. Mass. 1978) (three-judge court), *aff'd* 443 U.S. 622 (1979).. 18

Bell v. Wolfish, 441 U.S. 520 (1979) 3

Bellotti v. Baird, 443 U.S. 622 (1979).....*passim*

Betts v. Brady, 316 U.S. 455 (1942)..... 16

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 16

Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941)..... 19

Bowen v. Kendrick, 108 S. Ct. 2562 (1988) 1

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) 16

Breedlove v. Suttles, 302 U.S. 277 (1937) 16

Brown v. Bd. of Education, 347 U.S. 483 (1954) 2, 3, 16

Browning v. Hoffman, 90 W. Va. 568, 111 S.E. 492 (1922) 18

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) .. 2, 11

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)..... 4, 11

PAGE

City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) 1

Craig v. Boren, 429 U.S. 190 (1976) 3

Eisenstadt v. Baird, 405 U.S. 438 (1972)..... 16

Gideon v. Wainwright, 372 U.S. 335 (1963)..... 16

Griswold v. Connecticut, 381 U.S. 479 (1965).....12, 14, 16

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) 15, 16

H.L. v. Matheson, 450 U.S. 398 (1981)..... 4

Hoyt v. Florida, 368 U.S. 57 (1961)..... 16

In Re A.C., 533 A.2d 611 (D.C. 1987), *vacated & reh'g en banc granted*, 539 A.2d 203 (D.C. 1988) 13

Kassel v. Consolidated Freightways, 450 U.S. 662 (1981) 2

Loving v. Virginia, 388 U.S. 1 (1967) 16

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 5

McLaughlin v. Florida, 379 U.S. 184 (1964) 16

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 12

Michael H. v. Gerald D., 109 S. Ct. 2333 (1989) ...12, 14, 15

Minor v. Happerset, 88 U.S. (21 Wall.) 162 (1875)..... 16

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 2, 3

Muller v. Oregon, 208 U.S. 412 (1908) 4

Nat'l Ins. Co. of the District of Columbia v. Tidewater Transfer Co., 337 U.S. 582 (1949) 16

PAGE

Pace v. Alabama, 106 U.S. 583 (1883) 16

Palko v. Connecticut, 302 U.S. 319 (1937).....15, 16

Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983) 4

Plessy v. Ferguson, 163 U.S. 537 (1896) 16

Pullman-Standard v. Swint, 456 U.S. 273 (1982)..... 6

R. v. de Bourton, Y.B. Mich. 1 Edw.3, f.23, pl. 28 (1327) 15

R. v. Lichefeld, K.B. 27/974, Rex m.4 (1505) 15

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 1

Rhodes v. Chapman, 452 U.S. 337 (1981) 3

Rishworth v. Moss, 159 S.W. 122 (Tex. Civ. App. 1913) *aff'd*, 222 S.W. 225 (Tex. 1920) 18, 19

Roe v. Wade, 410 U.S. 113 (1973) .....*passim*

Shapiro v. Thompson, 394 U.S. 618 (1969) 16

Skinner v. Oklahoma, 316 U.S. 535 (1942)..... 16

Stanford v. Kentucky, 109 S. Ct. 2969 (1989) 4

Stanley v. Georgia, 394 U.S. 557 (1969) 13

Stanley v. Illinois, 405 U.S. 645 (1972) 16

Streitz v. Streitz, 363 N.W.2d 135 (Minn. Ct. App. 1985) 17

Taylor v. Louisiana, 419 U.S. 522 (1975) 16

Texas v. Johnson, 109 S. Ct. 2533 (1989)..... 5

Thompson v. Thompson, 218 U.S. 611 (1910)..... 18

Thornburg v. Gingles, 478 U.S. 30 (1986) 6

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 7, 11

PAGE

United States v. Leon, 468 U.S. 897 (1984) 3

United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 109 S. Ct. 1468 (1989) 12

Vitek v. Jones, 445 U.S. 480 (1980) 16

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 13

West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943) 5

Whalen v. Roe, 429 U.S. 589 (1977) 12

Zoski v. Gaines, 271 Mich. 1, 260 N.W. 99 (1935) 18

Constitutional Provisions and Statutes:

U.S. Const. Amend. XIX 16

Comstock Act, ch. 25 § 1, 17 Stat. 598 (1873) 14

Fed. R. Civ. P. 52(a) 6

Fed. R. Evid. § 702 ..... 3, 4

Minn. Stat. § 144.341 17

Minn. Stat. § 144.342 17

Minn. Stat. § 144.343(2)-(7) ..... *passim*

Other Authorities:

Brief for Senators Bob Packwood, *et al.*, as *Amici Curiae* in Support of Appellees, *Turnock v. Ragsdale*, No. 88-790 11

Brief of 274 Organizations in Support of *Roe v. Wade*, *Turnock v. Ragsdale*, No. 88-790 and *Ohio v. Akron Center for Reproductive Health*, No. 88-805 13

PAGE

Brief of 281 American Historians as *Amici Curiae* Supporting Appellees, *Webster v. Reproductive Health Services*, No. 88-605 15

Brief of the Solicitor General as *Amicus Curiae* Supporting Respondents, *Cruzan v. Director of Missouri Dep't of Health*, No. 88-1503 15

Dienes, C. Thomas, *Law, Politics, and Birth Control* (1972) 14

Carroll, Lewis, *Alice in Wonderland* (Brimax Books Ltd. 1988) 3

Gallagher, *Prenatal Invasions and Intervention: What's Wrong With Fetal Rights*, 10 Harv. Women's L.J. 9 (1987) 13

Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574 (1987) 2

Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L.J. 599 (1986) 13

Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* (1986) 8

Kamisar, *The School Desegregation Cases in Retrospect* in Argument (L. Friedman ed. 1969) 2

Kluger, *Simple Justice* (1975) 2

Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984) 13

Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978) 14, 16

Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988) 11

PAGE

Reed, *The Birth Control M vement and American Society: From Private Vice To Public Virtue* (1983)..... 14

Tribe, *American Constitutional Law* (2d Ed. 1988) 13

30 Cyclopedia of Law and Procedure, *Physicians and Surgeons* (1908) 18

30 C.J. *Husband and Wife* § 685 (1923)..... 18

46 C.J. *Parent and Child* § 103 (1928)..... 18

ARGUMENT

I. THE DISTRICT COURT'S FACTUAL INQUIRY WAS CONSTITUTIONALLY MANDATED AND ITS FINDINGS WERE SUPPORTED BY THE EVIDENCE.

A. Contrary To The Assertions Of Both Defendants And The Solicitor General, It Was Proper For The Trial Court To Make Factual Determinations.

In an effort to deflect the attention of this Court from the district court's factual findings, defendants argue that the "validity" of laws like Minnesota's is not "dependent in any way upon state-by-state factual proof" that the state's interests have been served. Brief of Respondents in No. 88-1125 at 31-32.[1] The Solicitor General, on behalf of *amicus* the United States, goes further, arguing that any time state legislation is grounded on assumptions which are "subjective, value-laden, and contestable . . . it is almost meaningless to inquire as to their truth or falsity." S.G. 26.[2] In so arguing, both defendants and the Solicitor ignore settled principles of law.

Factfinding is vital to the function of the lower federal courts, for a full factual record is essential to the adjudication of constitutional claims. *See, e.g., City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 721-22 (1989); *Bowen v. Kendrick*, 108 S. Ct. 2562, 2582 (1988) (O'Connor, J., concurring); *see also* B.P. 30 n.60. Even when applying the most deferential standards of review, this Court has held that a district court must base its decisions on findings of actual fact. *See, e.g., Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 444 n.19 (1978) ("presumption of validity . . . cannot justify a court in closing its eyes to uncontroverted evidence of rec-

---

1 In conformity with the citation format used in plaintiffs' prior briefs, citations to Brief for Cross-Respondents in No. 88-1309 are in the form "B.C-R." Citations to defendants' Brief of Respondents are in the form "B.R." Citations to Briefs of *amici* United States and AAPS are in the forms "S.G." and "AAPS" respectively.

2 The Solicitor goes on to argue that such a factual inquiry "is ultimately an assault on the right of the people . . . to govern themselves." S.G. 26-27.

ord."); *Kassel v. Consolidated Freightways*, 450 U.S. 662, 675-76 (1981) (court cannot ignore evidence regarding the safety of double trailers and defer to the state).[3] *See generally* B.P. 29-31.

These factfinding functions do not change simply because legislative assumptions have been "subjective, value-laden, [or] contestable." S.G. 26.[4] In this case, for example, the legislative judgment at issue is that Minnesota's interest in protecting immature minors will be served by a two-parent notice requirement.[5] Although this judgment may have been "contestable" at the time of enactment, it is not today. The argument that the

3 Such factual determinations are consistent with the proper role of a district court and required to ascertain, for example, whether the state's asserted interests were served by the statute. *Cf. Carey v. Population Servs. Int'l*, 431 U.S. 678, 703 (1977) (White, J., concurring) (concurring principally because the State did not prove that the statute "measurably contributes to the deterrent purposes which the State advances as justification for the restriction.").

4 If this were not true, legislative value judgments such as those about racial or gender inequality would also be unassailable in the courts. Indeed, in *Brown v. Bd. of Education*, 347 U.S. 483 (1954), the state argued that the district court's finding of fact regarding the effect of racial segregation on black children, *see id.* at 483 n.1, was " 'legally insignificant' and immaterial," Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1595-96 (1987) (quoting from Kamisar, *The School Desegregation Cases in Retrospect* in Argument 33 (L. Friedman ed. 1969)), because it " 'deals entirely with legislative policy, and does not tread on constitutional right.' " Kluger, *Simple Justice* 572 (1975) (quoting from Transcript of Argument). The Solicitor makes a similar argument today. The argument in *Brown* failed because this Court recognized then, as it has since, that "fixed notions concerning the roles and abilities of [blacks and whites as well as] males and females," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982), cannot shield a statute from an assessment of the factual record as to the legitimacy of a state's chosen means and objectives. *See generally id.* at 727-31. Accepting the reasoning advanced by defendants and the Solicitor would turn back the clock on a century of legal realism and would leave irrational or even reprehensible legislative value judgments unchallengeable and unreviewed, regardless of "their truth or falsity."

5 Both defendants and the Solicitor imply that plaintiffs seek to impugn legislative value judgments such as those articulated by this Court in *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*). Plaintiffs do not challenge general values, such as the advisability of good parent-child communication on matters of importance; instead, they challenge whether those values have been served by the statute at issue.

district court erred in inquiring into this fact disregards the undisputed duty of federal courts to perform a "searching analysis" of the relationship between legislative means and ends, *Hogan*, 458 U.S. at 728, as well as to determine the actual impact of a law in operation.[6] *See generally* B.P. 29-31.

The Solicitor seeks to discredit the district court's findings by arguing that "constitutional law does not rest on . . . opinions of experts" who "merely camouflage[ ] personal value judgments as impartial truths." S.G. 27. But this attack on the admissibility or reliability of expert testimony is misplaced. This Court has consistently relied on the opinions and research of experts in reaching conclusions of law.[7] Moreover, the dis-

6 Indeed, the Solicitor's argument that the district court erred in considering this evidence, S.G. 26-27, is worthy of Lewis Carroll:

> " 'Herald, read the accusation!' said the King.
>
> On this the White Rabbit blew three blasts on the trumpet and he unrolled the parchment-scroll, and read as follows:—
>
> 'The Queen of Hearts, she made some tarts,
> All on a summer day
> The Knave of Hearts, he stole those tarts
> And took them quite away!'
>
> 'Consider your verdict,' the King said to the jury.
>
> 'Not yet, not yet!' the White Rabbit hastily interrupted. 'There's a great deal to come before that!' "

Carroll, Lewis, *Alice in Wonderland* 97 (Brimax Books Ltd. 1988).

7 Expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. § 702. A district court may consider expert testimony even in constitutional cases. Experts may not only give opinions regarding a matter within their expertise, *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13 (1981) (expert opinions "may be helpful and relevant with respect to some questions") (citing *Bell v. Wolfish*, 441 U.S. 520, 543-44 n.27 (1979)), but may also introduce studies and statistics that the court may use in reaching a decision. *See, e.g., United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) (research on the effects of the exclusionary rule); *Craig v. Boren*, 429 U.S. 190, 199-204 (1976) (statistical evidence undermined, rather than supported, State's contention that liquor statute with gender-based age differential served interest in highway safety); *Brown*, 347 U.S. at 494 n.11 (noting studies concerning the psychological effect of racial segregation upon

trict court did not rely primarily on the opinions of experts without personal knowledge. Instead, the court heard and incorporated the evidence provided by a plethora of witnesses who were directly affected by the statute—minors, parents, clinic personnel, state court judges, and court officers. *See* B.P. 29 n.58. Although some of these witnesses were "experts" by training and experience, their testimony was not of the sort which this Court has, on occasion, called into question.[8]

Finally, defendants attempt to annul the district court's findings of fact by arguing that this Court's prior facial cases preclude anything but the most limited judicial review of a parental notice or consent law which has been, in their view, immunized from review by the addition of a facially adequate judicial bypass option. This argument supposes that plaintiffs seek to go beyond the holdings of these cases. To the contrary, however, plaintiffs only ask this Court to apply the holdings in *Bellotti II*, *H.L. v. Matheson*, 450 U.S. 398 (1981), and *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983),[9] to the facts of this case. B.P. 29-38.

---

which this Court relied); *Muller v. Oregon*, 208 U.S. 412, 419 n.† (1908) (noting the reports of experts such as statisticians, commissioners, inspectors, etc.).

8 *See, e.g., Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989). In *Stanford* this Court found that socioscientific evidence regarding the general psychological and developmental characteristics of adolescents was not material to an Eighth Amendment analysis, which requires the Court only to "*identify* the 'evolving standards of decency;' to determine not what they *should* be, but what they *are*." *Id.* (emphasis in original). Where, as here, a court assesses the constitutionality of a law in operation, witnesses with personal knowledge of the impact of the statute may appropriately be relied upon by a district court. While experts on matters such as family violence (*e.g.*, Dr. Lenore Walker) did testify, such testimony was supplementary in nature and served to "assist the trier of fact to understand the evidence" as to the overall impact of Minnesota's law. *See* Fed. R. Evid. § 702.

9 Defendants' suggestion that plaintiffs are seeking the overturn of *Bellotti II* is particularly puzzling in light of defendants' argument that a requirement of notification to both biological parents *without any bypass* is constitutional, despite the requirement established by the plurality in *Bellotti II* that a parental involvement statute "must" allow mature minors and best interests minors to avoid parental involvement, including *notification* to parents that bypass is sought. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 n.10 (1983).

In sum, at least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the federal judiciary has acknowledged its role in reviewing legislation to protect the constitutional rights of the minority. *See generally West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943). Where a majority favors a particular means of achieving a legislative objective that proves to be unconstitutional in practice, this Court may not evade its duty to uphold the Constitution even as against majority will. *See generally, Texas v. Johnson*, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring) ("[J]udicial power is often difficult in its exercise. We cannot here ask another branch to share responsibility . . . [f]or we are presented with a clear and simple statute to be judged against a clear command of the Constitution. The outcome can be laid at no door but ours.").

B. Defendants' Assessment Of The Evidence Contradicts The District Court's Findings Of Fact, Which Are Supported By The Factual Record And Are Not Clearly Erroneous.

Page for page, line for line, defendants' brief rejects the district court's basic factual finding that the Minnesota statute's two-parent notification requirement, even with a bypass, Minn. Stat. § 144.343(6) ("subdivision 6"), failed to "further[ ] in any meaningful way" any of the purposes which *Bellotti II* found to be significant.[10] 29a. Indeed, the trial court found that

---

10 Defendants seek to escape the overwhelming weight of evidence in support of this finding by selectively referring to isolated portions of the over 2600 pages of trial testimony and over 120 exhibits. But the conclusions they seek to draw from this minutia conflict with the finding of the district court. As this Court recently stated:

> If the district court's account of the evidence is plausible in light of the record *viewed in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted) (emphasis added); *see also Amadeo v. Zant*, 108 S. Ct. 1771, 1777-78 (1988). Where, as in this case, the trial court's findings of fact were based heavily on weighing the credibility of witness testimony, *see* 29a, 40a-41a, "Rule 52(a)

those interests—protecting the minor and fostering family communication—were actually *undermined* by subdivision 6.[11] 29a. An argument that relies on a factual version entirely incongruent with that of the trial court cannot succeed. We call attention below to the most egregious misstatements of fact made by defendants in their responding brief with reference to: (1) increased delay; (2) increased teenage motherhood; and (3) increased parental involvement.

1. Defendants properly recognize "that all other things being equal, it is medically preferable to have an abortion at an earlier gestational age than at a later gestational age." B.R. 16. In particular, as the district court found, "[s]econd trimester procedures entail significantly greater costs, inconvenience, and risk." 23a. But, as the statistics regarding second trimester abortions given in the Brief of *amicus* AAPS in support of defendants demonstrate, during each year in which the statute was in operation, minors, when compared to adult women, suffered an increased risk of second trimester abortion.[12] Thus,

demands even greater deference to the trial court's findings." *Anderson*, 470 U.S. at 575.

Moreover, contrary to the Solicitor's argument that the district court's finding is one of fact and law subject to *de novo* review, S.G. 25 n.14, "Rule 52(a) 'does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.' " *Anderson*, 470 U.S. at 574 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)). That the district court applied established legal standards to the evidence "does not alter the standard of review." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).

11 Defendants did not challenge the factual findings of the district court in the Court of Appeals below. 92a ("The state in response does not attack the findings of the district court . . ."). Nor did the Court of Appeals find any of the district court's factual findings to be clearly erroneous; rather, the Court of Appeals found itself foreclosed from *considering* the legal consequences of the district court's factual findings. 92a ("We are satisfied that the issue here then is not the district court's factual findings . . ."); *see also* 85a.

12 During the years in which subdivision 6 was in effect, minors were 100% more likely to have a second trimester abortion than adults, which is greater than in any of the years prior to the implementation of the statute,

when the statistics provided by the AAPS Brief are analyzed correctly (as in Exhibit B), defendants' threefold contention that minors suffered no medical harm from the statute, B.R. 17-18, that the statute involved no medically significant delays, B.R. 16-17, and, in particular, that the bypass procedure did not contribute to an increase in second trimester abortions, B.R. 18-21, collapses.

2. When government acts "to deter a woman from making a[n abortion] decision," *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986), it has, in effect, compelled women to carry their pregnancies to term.[13] During the period for which subdivision 6 was in effect, the *only* age group for which the percentage of pregnancies ending in abortion decreased was the 10-17 year old group. *See* Exhibit A *infra* at A-1-3. For every other group of women for which statistics were collected, the percentage of pregnancies ending in abortion either remained steady or increased during

and greater than the year (1987) since the statute was enjoined for which statistics are available. *See* Exhibit B *infra* at A-4-5. *Amicus* AAPS ignores this most basic implication of the data they present to this Court, making much of the fact that fluctuations in second trimester abortion rates for minors (10-17 years of age) and adult women occurred in tandem. AAPS 22-23. But this fact is not particularly significant, since small year-to-year fluctuations in second trimester abortion rates are attributable to random changes in physicians' assessments of gestational age.

13 Government-compelled childbirth is precisely the invasion of rights that lay at the core of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973):

> The detriment that the State would impose upon the pregnant woman by denying this choice [to obtain an abortion] is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Id. at 153. Many of the concerns voiced by the Court in *Roe* are heightened in the case of minors facing unwanted motherhood. *Bellotti II*, 443 U.S. at 642.

the same time period.[14] Taken together with the disproportionate increase in birth rate for Minneapolis teenagers, *see* B.P. 12 (discussing trial testimony of Dr. Ehlinger and P. Ex. 116),[15] and the district court's explicit finding that "[s]ome mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they . . . carry to term," 20a, the reduction in percentage of pregnancies ending in abortion strongly supports plaintiffs' assertion that subdivision 6 achieved only the illegitimate objective of deterring abortion, *see* 25a, B.P. 35 n.68., and therefore forced teenagers to carry to term against their will.

---

14 The AAPS Brief provides statistics for four age cohorts: 10-17; 18-19; 20-24; and 25-54 years old. A comparison of 1980 (the year before the statute went into effect) and 1985 (the last full year when the statute was in effect) reveals that for minors the percentage of pregnancies ending in abortion declined from 53.9% to 50.3%. The decline continued in 1986 (the statute was in effect until November 6, 1986), but ended in 1987, the first full year after the statute was enjoined. *See* Exhibit A *infra* at A-1.

15 *Amicus* AAPS impugns the significance of this fact with two arguments: First, they argue that the influx of Asian-Pacifics accounts for the dramatic increase in birth rate for teenagers in Minneapolis. AAPS 28 ("Dr. Paul Gunderson testified to the virtual non-existence of abortion to the Asian-Pacific population."). Abortion is far from "non-existent" among Asian-Pacifics. In fact, abortion is quite common in Asia. *See* Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 253, 255 (1986) (Japan has much higher abortion rate than United States). The AAPS brief suggests that it is "implausible that the notice law would selectively impact Asian-Pacifics more than other races in Minnesota." AAPS 28. However, it is not at all implausible that an Asian teenager, part of a culture which strongly values family ties and family honor, would be disgraced by being compelled to reveal her pregnancy to her parents or a court. In fact, the much higher percentage of total births to Asian-Pacific teenagers in Minneapolis, as compared with the percentage of births to Asian-Pacific teenagers in the United States as a whole, suggests that subdivision 6 did cause an increase in births among these teenagers. *See* AAPS 41a-42a.

Second, AAPS claims that there is no evidence that more minors carried unwanted pregnancies to term because the number of births to minors for the entire state fell while subdivision 6 was in effect. AAPS 15. This contention ignores the fact that the fall in the total number of births primarily reflects a decrease in the number of births to *married* minors. *See* Exhibit C *infra* at A-6 (number of births to minors out of wedlock remained substantially the same from 1981-88).

3. Defendants claim that subdivision 6 caused a "substantial increase in parental notification," B.R. 11, and that the district court's finding to the contrary is clearly erroneous.[16] But the district court found that:

> [S]everal witnesses who testified at trial were involved in providing abortions to minors both before and after the enactment of Minn. Stat. § 144.343(2)-(7). These witnesses could have testified as to a change in the level of parental participation occurring at about the time of the statute's effective date. Although these and other witnesses testified that a sizable proportion of minors seeking an abortion in Minnesota voluntarily notify at least one parent of their intention, *none testified that this proportion changed at or around the effective date of the Minnesota parental notification law.*

41a (emphasis added). Defendants cite testimony which they claim compares notification rates before and after 1981, when subdivision 6 went into effect. But the district court did not so interpret this testimony; indeed, no witness was asked to compare the level of notification before and after the enforcement date of the statute. The differences in notification rates referred to by defendants occurred in widely-spaced portions of lengthy testimony, and the district court could reasonably have concluded that these lay estimates did not form a proper basis for a conclusion contrary to the overwhelming weight of the evidence. Defendants' attempt to piece together testimony from several witnesses and divergent portions of testimony[17] does not

---

16 As the Court of Appeals noted, "the state did not offer any evidence concerning the effects of this notification." 83a n.9. Moreover, the Court of Appeals did not hold that the district court's finding was clearly erroneous, but merely "observe[d]" that "the percentage of parents notified of their daughters' intended abortion has increased." *Id.* As we have stated in our first brief, this observation is incorrect. *See* B.P. 21 n.46.

17 Defendants rely, for example, on Laura Hunter's testimony in support of their argument that notice increased after the statute went into effect. The following colloquy provides a sufficient basis for the court's conclusion that Hunter's testimony is insufficient support for this assertion:

undercut—and certainly does not render clearly erroneous—the district court's unequivocal finding that the statute did not effect a change in the level of parental notification.[18]

THE COURT: My question is do you have an opinion as to whether or not the statute resulted in some folks, minors talking to their parents who would not have talked to them absent the statute?

THE WITNESS: I wasn't working in the field before the statute existed.

Hunter Tr. 836. The defendants have pointed to isolated and ambiguous statements which they allege indicate an increase in communication. While the statute may have encouraged notification by some minors, it also discouraged notification by others. 31a. This offset is recognized by Hunter in answer to a general question regarding the statute's effects:

> Q. In your years of experience, in your opinion have you seen any effect that the statute requiring either notification of parents or going to court has accomplished in terms of achieving either better, in the family, communications or better quality in the decisionmaking process of the minor women?
>
> A. I would say to families where it has contributed to a better quality in her decisionmaking process, *that existed in those families where the communication was good to begin with* it was the family could share problems and stresses of daily life together to being [sic] with . . . . But in all the other cases where the families were either not that great a bunch dealing with adolescents or where there was [sic] some problems in the family, I don't think it did anything. It could have made it worse.

Hunter Tr. 834-35 (emphasis added). In light of this testimony, it is not surprising that the district court could not conclude that Hunter believed that the state's interest in increasing notification had been furthered by the law.

Defendants' citation to pages 789-90 of the transcript is not conclusive. There, Hunter states that "[p]robably 30% or so, a third" of minors indicate that they have told both their parents about their abortion by the time of the initial telephone counseling. Hunter Tr. 788-89. She then testifies that about 50% of minors use the bypass. Hunter Tr. 790. The change from 30% notification rate at the time of telephone counseling to an implied 50% by the time of the abortion is not a comparison between the pre-enforcement and post-enforcement rates as defendants assert. B.R. 13 n.13. Rather, it likely reflects the increasing, though voluntary, inclination of minors to consult with parents as the date of the procedure draws near.

18 Furthermore, even if the statute may have resulted in benefits for a few teenagers (e.g., a fall in pregnancy rates for teenagers—an argument raised only by *amicus* AAPS and never advanced by the state—or some increase in parental notification) such benefits for a few cannot be bought at the price of the harm this statute has imposed on the vast majority of teenagers seeking abortions in Minnesota. As Justice Stevens wrote in *Carey*:

> Although the State may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate . . . . Assuming that the State could impose a uniform sanction upon young persons who risk self-inflicted harm . . . by engaging in sexual activity, surely that sanction could not take the form of deliberately . . . infecting the promiscuous child.

431 U.S. at 715-16 (Stevens, J., concurring in part and concurring in the judgment). Where, as here, a method of achieving a state purpose directly and deliberately harms those the state seeks to protect, the law amounts to "indiscriminate[ ] and . . . random" imposition of harm violative of the due process clause. *Id.* at 716.

II. THE SOLICITOR GENERAL'S SUGGESTION THAT THIS COURT OVERRULE *ROE V. WADE* IS INAPPROPRIATE.

The Solicitor General, in defiance of principles of *stare decisis*,[19] urges this Court to sustain Minnesota's law on the ground that this Court's precedents in the area of privacy rights were "wrongly decided." S.G. 12. The Solicitor's argument that *Roe v. Wade* should be overturned in this case is not shared by the defendants, who specifically state that they do not seek the overturn of *Roe*. B.R. 28 n.23. Because no party has requested re-examination of *Roe*, this Court should decline to address that question in this case. *See Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 452 (O'Connor, J., dissenting).

In fact, this case can be decided without addressing the issue of abortion. A criminal statute requiring that both biological parents be notified about a medical decision of a very private

19 This Court has consistently held that, even in constitutional cases, "any departure from *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Even an "overriding conviction" of prior error is not sufficient to justify overruling a case. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 758 (1988). *See* Brief of Senators Bob Packwood, *et al.*, as *Amici Curiae* in Support of Appellees, *Turnock v. Ragsdale*, No. 88-790, at 9 n.20.

nature is a severe intrusion by the state into family life. By forcing two unrelated adults to communicate with each other against their will about sensitive and private information, the Minnesota statute implicates rights beyond the minor's abortion choice. When, for example, a new unitary family has been created—of mother, stepfather, and daughter—and all three agree on medical treatment for the daughter, forcing the mother to communicate with the biological father, who may never have lived with or seen the daughter, and who may have impregnated the mother by rape,[20] violates the informational privacy rights and associational rights of both the minor and her mother. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), *quoted in United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1476 (1989); *see also* J.A. 50; B.C-R. 32 n.63 (discussing burden on associational rights of single parents).[21]

Further, the Solicitor's sweeping assault on this Court's analysis in *Roe* would, if adopted, unravel not only privacy rights but also this Court's time-honored method of constitutional interpretation. As this Court has long held, the principle of "liberty" encompasses more than "mere[ ] freedom from bodily restraint . . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965). In the decades following *Meyer*, this Court has continued to affirm that "liberty" includes the right to be free of governmental intrusion in matters of purely personal concern. *See Whalen*, 429 U.S. at 599-600 (the right of privacy is composed of both an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of general decisions."); *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969). The Solicitor argues, however, that this Court should turn its back on over sixty years of settled decisions and rule that no fundamental right to reproductive privacy, and few fundamental rights in general, exist. S.G. 12.

20 Just last Term in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989), this Court rejected an analysis for determining liberty interests "in isolation from its effect upon other people," posing as a hypothetical a father who had begotten his daughter by rape. *Id.* at 2342 n.4.

21 The judicial bypass option does not alleviate this notice burden. *See* B.P. 36-38. For example, plaintiff Jackie H. was forced to go to court with her daughter and reveal, in front of her daughter, details of her ex-husband's physical abuse. J.A. 320. Her choice between revealing this information both to a judge and to her daughter, and revealing her daughter's pregnancy to an abusive ex-husband, was no choice at all.

The Solicitor urges this Court to replace its painstaking analysis of which liberty interests should be deemed "fundamental" with a restrictive historical approach.[22] Under the Solicitor's

22 The Solicitor's fallback argument is that abortion is different from the other interests protected by this Court's privacy decisions, because the state has an interest in protecting potential life throughout pregnancy. S.G. 13. This contention ignores the reality that no clear line exists between contraceptives and abortion because some contraceptives act after fertilization but prior to implantation. *See* Brief of 274 Organizations in Support of *Roe v. Wade*, *Turnock v. Ragsdale*, No. 88-790, and *Ohio v. Akron Center for Reproductive Health*, 88-805, at 8-9. Moreover, the Solicitor's argument confuses fundamental rights with limited state interests. In *Roe*, the Supreme Court found a compelling but limited state interest in potential life after viability, because it recognized that a woman's own life and health must be the state's paramount concern. 410 U.S. at 165. Viability marks the hypothetical point in pregnancy when the fetus, *if* independent, would have a chance of survival. It is this point at which, *if* it were outside of the womb, someone or something other than the mother could provide the necessities, like oxygen, to support the fetus. *See* Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1023 (1984); Tribe, *American Constitutional Law* 1357 (2d Ed. 1988); *cf. Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3075 n.9 (Blackmun, J., concurring in part and dissenting in part). This is, however, only a hypothetical, *see id.* at 3066 n.* (Scalia, J., concurring in part and concurring in the judgment), and so long as the fetus is still inside the woman's body, it is completely dependent on her for its survival. To recognize a state interest in the fetus from the moment of conception would strip the woman of her personhood, making her rights subordinate to those of the fetus. *See* Gallagher, *Prenatal Invasions & Intervention: What's Wrong With Fetal Rights*, 10 Harv. Women's L.J. 9 (1987); Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 Yale L.J. 599 (1986); *cf. In Re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated & reh'g en banc granted*, 539 A.2d 203 (D.C. 1988).

Furthermore, determining that the fetus's "right" to life begins at the moment of conception violates the First Amendment's Establishment Clause. Allowing states to arbitrarily choose the point of conception as the time at which the fetus's interest outweighs the woman's right imposes a particular religious doctrine upon all women. *Cf. Webster*, 109 S.Ct. at 3082 (Stevens, J., concurring in part and dissenting in part) ("I am persuaded that the

theory, because statutes limiting abortion were common when the Fourteenth Amendment was ratified, the abortion decision must be denied constitutional protection.[23] S.G. 13. In *Roe*, however, this Court undertook an extensive historical analysis and concluded that no long-standing tradition of laws proscribing abortion existed. 410 U.S. at 129-41 (1973); *cf. id.* at 171 (Rehnquist, J., dissenting) ("The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship.").[24] The history elucidated by this Court in *Roe* has not changed since 1973.[25]

absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause.").

23 The Solicitor General's arguments would also defeat the fundamental right to privacy recognized in *Griswold*. Although the first specifically anti-contraception statute was enacted in 1873, Comstock Act, ch. 258 § 1, 17 Stat. 598 (1873), anti-obscenity statutes had been used earlier to prosecute those who disseminated contraceptive information. Reed, *The Birth Control Movement and American Society: From Private Vice To Public Virtue* 9 (1983) (in the 1830's, Charles Knowlton was thrice convicted for distributing his pamphlet on birth control, *Fruits of Philosophy*). Further, the Comstock Act itself arose out of the "prevailing orientation of the period towards sexual matters. Contraception, abortion, sterilization, obscenity, vice were blended in the Puritan morality and unequivocally condemned." Dienes, C. Thomas, *Law, Politics, and Birth Control* 33 (1972).

24 Moreover, the Court noted that many of the 19th century anti-abortion laws were designed to protect women from the dangers of primitive medical techniques, not to harm them. *Id.* at 148-49.

25 This Court has held that even if historical analysis does not provide any explicit constitutional or statutory protection of a fundamental liberty interest, such an analysis must at least exclude a tradition of laws *denying* that interest. *Michael H.*, 109 S. Ct. at 2341 n.2. No such tradition exists with regard to abortion, which was permitted at the time of the Framers and at common law. *Roe v. Wade*, 410 U.S. at 140-41; Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, at 3-19 (1978). One *amicus* brief in this case purports to demonstrate that, contrary to this Court's position in *Roe*, abortion was criminal at common law and therefore part of a tradition that denied the existence of a liberty interest in abortion. *See* Brief *Amicus Curiae* of the American Academy of Medical Ethics in Support of Appellants in *Turnock*, No. 88-790, and Cross-Petitioners in *Hodgson*, 88-1309. A careful reading of this brief, however, reveals that its

Even if this Court were to reject its prior decision to look at the whole of our history, the state of the law in 1868 cannot be determinative of fundamental rights.[26] *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) ("In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."); *cf. Michael H.*, 109 S. Ct. at 2350 (Brennan, J., dissenting) ("Just as the common-law notions no longer define the property that the Constitution protects . . ., neither do they circumscribe the liberty that it guarantees."). The Nation's understanding of which interests are "implicit in the concept of ordered liberty" has evolved. *See Palko v. Connecticut*, 302 U.S. 319, 326 (1937). This evolution is illustrated by present-day condemnation of the major reasons for the adoption of anti-abortion laws

author is unable to cite even one early English common law case in which either a woman or an "abortionist" was criminally prosecuted for a successful, voluntary termination of pregnancy. Rather, the cases cited involved assaults that resulted in injury or death of a pregnant woman and her fetus, *see, e.g., R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505) (defendant charged as accessory to suicide, a felony killing), or the killing of a child born alive, which then, as now, was considered murder, *see, e.g., R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f.23, pl. 28 (1327) (man who violently beat a woman pregnant with twins indicted for death of twin who was born alive and then died, but not charged in death of unborn twin). These cases do nothing to substantiate the claim that abortion was criminal at common law. In the vain effort to identify a common law tradition of criminalization of abortion, the brief's author is reduced to unconvincing analogies involving the common law's increasing concern with the status of young children. *Id.* at 11-17. For a more thorough description of the origins and nature of abortion regulation in this country, *see* Brief of 281 American Historians as *Amici Curiae* Supporting Appellees, *Webster v. Reproductive Health Services*, No. 88-605.

26 The Solicitor's use of the mid-19th century as the point of reference for determining whether abortion is a right seems arbitrary at best, because he argues in another case pending before this Court that the historical sources to which one must refer include the Framers' understanding of the limits of "liberty," rather than solely the understanding of the 14th Amendment's ratifiers. Brief of the Solicitor General as *Amicus Curiae* Supporting Respondents, *Cruzan v. Director of Missouri Dep't of Health*, No. 88-1503, at 12. The Solicitor's decision not to refer to 1791 as the point of reference is unsurprising, given this Court's previous finding that abortion was not illegal at the time of the Framers. 410 U.S. at 129, 140-41. *See also* n.25 *supra*.

in the 1800's (i.e., nativist fears, the movement to consolidate control over the medical profession, and fears about rising status of women) as obsolete or illegitimate. Mohr, *supra* n.25, at 37, 166-170. To choose 1868 as the sole touchstone by which rights are validated is to state that many of our most unassailable rights are not truly "fundamental" at all.[27] "[N]either liberty nor justice would exist," *Palko*, 302 U.S. at 326, if the power over such a fundamental conscience-based decision as whether to bear a child was transferred from the individual to the government.[28]

---

27 " 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . purposely left to gather meaning from experience . . . . [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' " *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) (quoting *Nat'l Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582, 646-47 (1949) (Frankfurter, J., dissenting)).

28 Indeed, if the Solicitor's argument is accepted, the following would not be constitutionally protected: the right to be free from racial segregation, *Brown v. Bd. of Education*, 347 U.S. 483 (1954), overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896); the right to marry a person of another race, *Loving v. Virginia*, 388 U.S. 1 (1967); the right to live with a person of another race, *McLaughlin v. Florida*, 379 U.S. 184 (1964), overruling *Pace v. Alabama*, 106 U.S. 583 (1883); the right to be free from forced sterilization, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right of married persons to use contraceptives, *Griswold; the right of unmarried persons to use contraceptives, Eisenstadt v. Baird*, 405 U.S. 438 (1972); the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963), overruling *Betts v. Brady*, 316 U.S. 455 (1942); the right of women to vote, *Minor v. Happerset*, 88 U.S. (21 Wall.) 162 (1875), overruled by U.S. Const. Amend. XIX; the right of women to practice law, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (holding that women may be excluded from the practice of law); the right of women to serve on juries, *Taylor v. Louisiana*, 419 U.S. 522 (1975), overruling (in effect) *Hoyt v. Florida*, 368 U.S. 57 (1961); the right of poor people to vote, *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), overruling *Breedlove v. Suttles*, 302 U.S. 277 (1937); the right to raise one's natural but illegitimate children, *Stanley v. Illinois*, 405 U.S. 645 (1972); the right to be free from arbitrary transfers from prisons to psychiatric institutions, *Vitek v. Jones*, 445 U.S. 480 (1980). This list illustrates the hazards of relying exclusively on what the 50 states historically have recognized and legislated in determining the scope of "liberty."

III. COMMON LAW PRINCIPLES DEFINING MINORS' LEGAL RIGHTS WERE NEVER AS RESTRICTIVE AS THIS STATUTE AND CANNOT BE RESURRECTED TO SUSTAIN IT.

Both defendants and the Solicitor rely on history and what the latter calls its "single, powerful voice" to support the parental interests allegedly reflected in the statute. S.G. 17. Having argued that fundamental constitutional rights are generally limited by history, the Solicitor goes on to argue that in the case of minors, history supports the constitutionality of a two-parent notification requirement (with no exceptions or bypass). S.G. 19-20. However, no historical analysis can support the features of subdivision 6 that set it apart from other statutes: namely, its requirement that *both* biological parents be notified and that even emancipated minors be, in effect, subject to its requirements.[29]

---

29 *See* B.C-R. 25-27. Defendants admit in a footnote that Minnesota has "no general statutory definition of the term 'emancipation.' " B.R. 2 n.2. However, they argue that two Minnesota statutes, which permit minors living apart from their parents and managing their own affairs and minors who have been married or who have borne a child to consent to all health care, somehow define emancipation. B.R. 2 n.2. But these statutes were enacted 10 years before Minn. Stat. § 144.343(2)-(7), are not recognized as exceptions to subdivisions 2 and 6, and do not define emancipation in Minnesota. Moreover, case law in Minnesota decided after the date these statutes were passed does not mention Minn. Stat. § 144.341 or § 144.342 as the statutory definition of emancipation. *See, e.g., Streitz v. Streitz*, 363 N.W.2d 135 (Minn. Ct. App. 1985). Indeed, Suzanne Smith, supervisor of the Guardian *Ad Litem* Program in Hennepin County, the county used by the majority of minors for court bypass, testified as follows:

> The statute has language that refers to an emancipated minor which leads to many problems that there is such a thing as an emancipated minor. All of the attorneys and judges that have been working with us tell us in Minnesota juvenile court there is no such thing.
>
> . . . .
>
> Q If a minor is living on her own, married and has a child, you don't go through this and say you can go home now, you are not required to go to court under the statute, or do you take it to a judge?
>
> A We would take it to the court. Many of the questions we get from the clinics describe these kinds of situations and since we don't have any guidelines they go to court, so that there aren't any chances taken.

J.A. 230-31.

The common law never required the consent of both biological parents for *any* medical procedure; the consent of a single parent, originally the *father*, was always sufficient.[30] Thus, concerning the possibility that a child's mother might consent to medical treatment, the court in *Browning v. Hoffman*, 90 W. Va. 568, 111 S.E. 492 (1922), wrote "[i]t does not appear that she could have given consent *or obtained authority to do so from her husband*." *Id.* at 580, 111 S.E. at 497 (emphasis added); *see also* 46 C.J. *Parent and Child* § 103 (1928) ("mother has no right of action at common law where the parents are living together" for injuries to child).[31] Further, the common law rule of parental consent is founded on the pre-

30 As the court wrote in finding liability in *Rishworth v. Moss*, 159 S.W. 122 (Tex. Civ. App. 1913), *aff'd*, 222 S.W. 225 (Tex. 1920): "It was not alleged or proved by appellees that appellants [the parents of an 11 year old girl], *or either of them*, had any knowledge of the operation until after the death of the child, or that they, *or either of them*, consented to or authorized the operation." *Id.* at 123 (emphasis added). *See also Zoski v. Gaines*, 271 Mich. 1, 10, 260 N.W. 99, 103 (1935) ("In view of the child's age, the fact that *neither* of his parents were with him at the time of the operation, or came to the hospital with him, . . . we cannot allow consent to be implied in such situations."); *Bellotti II*, 443 U.S. at 648 ("The District Court found it to be 'custom' to perform other medical procedures on minors with the consent of only one parent") (citing *Baird v. Bellotti*, 393 F. Supp. 847, 852 (D. Mass. 1975)).

31 The rule requiring the consent of the father or parent for the physician to avoid tort liability has the same theoretical basis as the old common law rule prohibiting a married woman from suing for personal injury (including the technical assault involved in medical treatment for herself) unless her husband joins in the suit. *See* 30 C.J. *Husband and Wife* § 685 (1923); *see also Thompson v. Thompson*, 218 U.S. 611, 614-15 (1910) (expounding doctrine that "[a]t the common law the husband and wife were regarded as one," but noting that recent statutes have "enabled [a married woman] to protect the security of her person against the wrongs and assaults of others."). Yet even as early as 1908, the general rule requiring "the consent of the husband or father to the performance of an operation upon a married woman or child" was in doubt. 30 Cyclopedia of Law and Procedure, *Physicians and Surgeons* 1577 (1908).

sumed incapacity of minors to consent on their own behalf,[32] a reason not proffered by defendants in support of this statute.

Defendants' attempt to characterize notification to both biological parents as a constitutionally-based right of parents flowing from the common-law rule of parental consent thus misconceives both the common law rule (which never required the consent of both parents) and its basis (which was not a parental right, but an inability of the minor to consent for herself). Further, biological parents have no constitutional right to the assistance of the state in fulfilling the parental role or in creating a parental role they never had. *See* B.C-R. 27-32.

32 The underlying rationale for the common law requirement of parental consent before a physician could treat a minor stems from the truism that unconsented medical treatment represents a tort against the person of the patient. *See, e.g., Rishworth*, 159 S.W. at 124; *see also Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941). Since minors are incompetent to consent to a tort, "the consent of the parent is necessary for an operation on a child." *Id.*

The common law presumption of the incapacity of minors to consent to medical treatment has been abrogated by statute for mature minors in many states (*see* B.C-R. Exhibit F), and for all minors seeking specific types of health care in most states (*see* B.P. Exhibits C and D). Further, the common law rule has itself been modified to permit emergency or life-saving treatment of minors without parental consent or even in the face of parental refusal to consent. *See* cases cited in B.P. 42 nn. 82-83.

CONCLUSION

Petitioners respectfully request this Court to reverse the judgment of the Eighth Circuit Court of Appeals that Minn. Stat. § 144.343(6) is constitutional.

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(*Counsel of Record*)
RACHAEL N. PINE
LYNN M. PALTROW
KATHRYN KOLBERT
JOHN A. POWELL
ELLEN K. GOETZ
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

APPENDIX

Exhibit A

Percentage of Pregnancies Ending in Abortion in Minnesota, 1975-87*

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
10-17 yr. olds:													
No. of abortions:	1507	2060	2274	2186	2308	2327	1820	1564	1432	1395	1570	1545	1648
No. of pregnancies:	3958	4391	4573	4271	4364	4315	3714	3307	2987	3031	3122	3133	3249
% of pregnancies ending in abortion:	38.1%	46.9%	49.7%	51.2%	52.9%	53.9%	49.0%	47.3%	47.9%	46.0%	50.3%	49.3%	50.7%

(*chart continued on next page*)

* Numbers of pregnancies and abortions for 1975 to 1986 are taken from the Brief of AAPS as *amicus curiae* at 11a (Table 1). Numbers for 1987 are taken from *Minnesota Health Statistics: 1987*, published by the Minnesota Department of Health at 72 (Table 34). A copy of *Minnesota Health Statistics: 1987* has been lodged with the Clerk for the convenience of the Court by Counsel for Petitioners.

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
18-19 yr. olds:													
No. of abortions:	1758	2511	2693	3054	3293	3380	3064	2799	2547	2586	2531	2372	2306
No. of pregnancies:	6494	7017	7347	7738	8057	8301	7697	7052	6223	6112	5958	5493	5596
% of pregnancies ending in abortion:	27.1%	35.8%	36.7%	39.5%	40.9%	40.7%	39.8%	39.7%	40.9%	42.3%	42.5%	43.2%	41.2%
20-24 yr. olds:													
No. of abortions:	2702	3643	4528	5066	5683	6054	6047	5963	5487	6032	6067	5724	5576
No. of pregnancies:	22001	22431	24524	25058	26747	28093	27820	27256	24943	25032	24585	22792	21634
% of pregnancies ending in abortion:	12.3%	16.2%	18.5%	20.2%	21.2%	21.5%	21.7%	21.9%	22.0%	24.1%	24.7%	25.1%	25.8%

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
25-54 yr. olds:													
No. of abortions:	2161	2895	3529	3872	4355	4716	4881	5180	5012	5525	5812	6035	6183
No. of pregnancies:	31145	32837	36282	37849	40423	42198	43804	45003	44581	46748	48250	48544	50797
% of pregnancies ending in abortion:	6.9%	8.8%	9.7%	10.2%	10.8%	11.2%	11.1%	11.5%	11.2%	11.8%	12.0%	12.4%	12.2%

Exhibit B

Relative Risk of Second Trimester Abortions†

Total Number of Abortions

Age Group*	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
10-17	1507	2060	2274	2186	2308	2327	1820	1564	1432	1395	1570	1545
18-19	1758	2511	2693	3054	3293	3380	3064	2799	2547	2586	2531	2372
20-24	2702	3649	4528	5066	5683	6054	6047	5963	5487	6032	6067	5724
25 +	2161	2895	3529	3872	4355	4716	4881	5180	5012	5525	5812	6035

Number of Abortions Performed After 12 Weeks Gestational Age

Age Group	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
10-17	270	470	474	403	432	510	365	322	334	360	361	333
18-19	228	426	464	449	460	562	462	425	419	489	441	435
20-24	275	446	512	505	591	681	625	631	626	786	723	668
25 +	189	306	368	302	327	403	363	412	370	461	458	516

† This Exhibit uses raw data provided by the Minnesota Department of Health as reproduced in the Brief of AAPS as *amicus curiae* at 23a-24a (Table 3).

* Definition of symbols: "<" = ages less than; "+" = and ages above; "x/y" = formula for calculating ratio.

Percentage of Abortions Performed After 12 Weeks Gestational Age

Age Group	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
< 18	17.9	22.8	20.8	18.4	18.7	21.9	20.1	20.6	23.3	25.8	23.0	21.6
18-19	13.0	17.0	17.2	14.7	14.0	16.6	15.1	15.2	16.5	18.9	17.4	18.3
20-24	10.2	12.2	11.3	10.0	10.4	11.2	10.3	10.6	11.4	13.0	11.9	11.7
25 +	8.7	10.6	10.4	7.8	7.5	8.5	7.4	8.0	7.4	8.3	7.9	8.6
18 +	10.5	13.0	12.5	10.5	10.3	11.6	10.4	10.5	10.8	12.3	11.3	11.5

Ratio of Percentages of Minors and Adults

Age Group	Year											
	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
< 18/ 18 +	1.71	1.75	1.67	1.76	1.81	1.88	1.94	1.96	2.15	2.10	2.04	1.88

Exhibit C

Births to Minors by Marital Status*

Minnesota	1980	1981	1982	1983	1984	1985	1986	1987
Births < 18 (Total)	2033	1929	1778	1574	1654	1573	1626	1588
Percent Change in Births to Minors (Total), 1980-1986:				-20%				
Out of Wedlock Births < 18	1438	1396	1364	1243	1339	1335	1427	1390
Percent Change in Out of Wedlock Births, 1980-1986:				-0.7%				
Births to Married Minors	595	533	414	331	315	238	199	198
Percent Change in Births to Married Minors, 1980-1986:				-66.5%				

* Source: Table entitled, "Pregnancy Outcomes and Pregnancy Rates by Age of Woman, Minnesota Residents, 1980-1987," provided by the Minnesota Department of Health, November 1, 1989 (This table gives the numbers of births; the percentages were calculated).

Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(22) (24)

No. 88-1125 and 88-1309

In the Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, ET AL., PETITIONERS

v.

STATE OF MINNESOTA, ET AL.

STATE OF MINNESOTA, ET AL., CROSS-PETITIONERS

v.

JANE HODGSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NO. 88-1125 AND SUPPORTING CROSS-PETITIONERS IN NO. 88-1309

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
PAUL J. LARKIN, JR.
STEPHEN J. MARZEN
Assistants to the Solicitor General
STEVEN R. VALENTINE
Deputy Assistant Attorney General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

35 pp

QUESTION PRESENTED

The United States will address the following question:

Whether the constitutionality of a state statute that requires notification of both parents that their unemancipated daughter has sought an abortion should be assessed under a standard of review that asks whether it is reasonably designed to serve a legitimate state interest and, if so, whether that statute is constitutional.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	6
Argument:	
The Minnesota parental notification requirement does not violate the Due Process Clause	8
I. Abortion regulations, including parental notification requirements, should be upheld if they are reasonably designed to serve legitimate state interests	8
A. Abortion regulations are subject to heightened review under the Due Process Clause only if they implicate a fundamental right	10
B. No fundamental right is implicated by the Minnesota notification requirement	11
1. This nation's history and traditions do not establish that there is a fundamental right to an abortion	12
2. An unemancipated minor does not have a fundamental right to an abortion without her parents' consent	14
3. An unemancipated minor does not have a fundamental right to an abortion without her parents' knowledge	19
C. The "undue burden" analysis does not constitute a substitute for a standard of review	20

	Page
II. Parental notification requirements are reasonably designed to serve legitimate state interests	22
A. Parental notification requirements advance the legitimate state interests of informing and involving parents in decisions affecting the welfare of their minor children	22
B. Parental notification requirements are not subject to judicial cost/benefit analysis	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

	Page
Agar-Ellis, In re, [1883] 24 Ch. D. 317 (C.A.)	15
Baldwin v. *Missouri*, 281 U.S. 586 (1930)	21
Ballard v. *Anderson*, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971)	17
Bell v. *Wolfish*, 441 U.S. 520 (1979)	27
Bellotti v. *Baird*, 443 U.S. 622 (1979)	5, 9, 18, 20, 21
Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)	25
Bowen v. *American Hosp. Ass'n*, 476 U.S. 610 (1986)	16
Bowers v. *Hardwick*, 478 U.S. 186 (1986)	10, 11
Califano v. *Aznavorian*, 439 U.S. 170 (1978)	10-11
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977)	13
City of Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983)	5, 20
Cruzan v. *Missouri Dep't of Health*, cert. granted, No. 88-1503	14
DeShaney v. *Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989)	18

Cases—Continued:

	Page
Diane, In re, 381 A.2d 629 (Del. Ch. 1974)	17
Doe v. *Bolton*, 410 U.S. 179 (1973)	3
Ferguson v. *Skrupa*, 372 U.S. 726 (1963)	11
Ginsberg v. *New York*, 390 U.S. 629 (1968)	15
H.L. v. *Matheson*, 450 U.S. 398 (1981)	6, 9, 16, 22, 23
Harris v. *McRae*, 448 U.S. 297 (1980)	9, 13, 27
Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 714 (1985)	25
Ingraham v. *Wright*, 430 U.S. 651 (1977)	21
Jehovah's Witnesses v. *King County Hosp.*, 390 U.S. 598 (1968), aff'g 278 F. Supp. 488 (W.D. Wash. 1967)	18
Massachusetts v. *Sullivan*, No. 88-1279 (1st Cir. May 8, 1989)	2
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	16
Michael H. v. *Gerald D.*, 109 S. Ct. 2333 (1989)	10, 11, 12, 13, 15-16, 17
Moore v. *City of East Cleveland*, 431 U.S. 494 (1977)	10, 11
Palko v. *Connecticut*, 302 U.S. 319 (1937)	11
Parham v. *J.R.*, 442 U.S. 584 (1979)	15, 18
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	10, 15
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976)	3, 8, 14, 17, 18, 23
Planned Parenthood Ass'n v. *Ashcroft*, 462 U.S. 476 (1983)	5
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	16
Rhodes v. *Chapman*, 452 U.S. 337 (1981)	27
Roe v. *Wade*, 410 U.S. 113 (1973)	1, 2, 3, 6, 9, 11, 12, 13, 16, 18
Santosky v. *Kramer*, 455 U.S. 745 (1982)	15
Smith, In re, 16 Md. App. 209, 295 A.2d 238 (1972)	17
Snyder v. *Massachusetts*, 291 U.S. 97 (1934)	17
Stanford v. *Kentucky*, 109 S. Ct. 2969 (1989)	15, 16, 27

Cases—Continued: Page

State v. *Hultgren*, 295 Minn. 299, 204 N.W.2d 197 (1973) 3
Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 14, 20
Turner v. *Safley*, 482 U.S. 78 (1987) 10, 25
Vance v. *Bradley*, 440 U.S. 93 (1979) 26
Webster v. *Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) 1, 2, 6, 7, 11, 21, 22
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 11
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 16
Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), aff'd, 484 U.S. 171 (1987) 5, 22

Constitution, statutes, and rule:

U.S. Const. Amend. XIV 13
Due Process Clause 8, 10, 11, 26
Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976) (Hyde Amendment) 2
Adolescent Family Life Act of 1981, 42 U.S.C. 300z *et seq.* 2
Public Health Service Act of 1970, Tit. 10, 42 U.S.C. 300 *et seq.* 2
1971 Minn. Laws ch. 544 2
1981 Minn. Laws ch. 228 3
Minn. Stat. § 617.18 (1971) (repealed 1974) 3
Minn. Stat. Ann. (West 1989):
§ 144.343 3
§ 144.343(2) 3, 19
§ 144.343(2)(a) 4
§ 144.343(2)(b) 4, 19
§ 144.343(3) 3, 19, 24
§ 144.343(4) 4

Statutes, and rule—Continued: Page

§ 144.343(5) 4, 19
§ 144.343(6)(c)(i) 4
§ 144.343(6)(c)(ii)-(iv) 4
Fed. R. Civ. P. 52(a) 25

Miscellaneous:

1A M. Dunnell, Minnesota Digest 2d *Abortion* (3d ed. 1982) 3
Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 605 15
L. Hand, *The Bill of Rights* (1958) 27
W. Keeton, *Prosser and Keeton on The Law of Torts* (5th ed. 1984) 16
L. Nolan, *The Legal Status of Parent and Child 1986* (1987) 16, 20
Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 Va. L. Rev. 305 (1974) 17
Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 Case W. Res. L. Rev. 779 (1972) 17
Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655 (1988) 26
Recent Development, *Minors' Rights to Medical Care*, 14 J. Fam. L. 581 (1975) 15
U.S. Department of Commerce, *Statistical Abstract of the United States* (1989) 23

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1125

JANE HODGSON, ET AL., PETITIONERS

v.

STATE OF MINNESOTA, ET AL.

No. 88-1309

STATE OF MINNESOTA, ET AL., CROSS-PETITIONERS

v.

JANE HODGSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NO. 88-1125 AND SUPPORTING CROSS-PETITIONERS IN NO. 88-1309

INTEREST OF THE UNITED STATES

In *Webster* v. *Reproductive Health Services,* 109 S. Ct. 3040 (1989), the United States filed a brief as amicus curiae in which it joined the State of Missouri in urging the Court to abandon the framework for judicial review of abortion legislation established in *Roe* v. *Wade,* 410 U.S. 113 (1973), and to adopt in its place a standard of review that would ask whether such legislation is reasonably related to the advancement of legitimate governmental objectives. (A copy of our brief has been provided to the parties.) The Court was deeply divided in its response to that submission. Four Members of the Court expressed the view that *Roe* v. *Wade* and succeeding cases should be limited or overruled, 109 S. Ct. at 3056-3058 & n.15 (plurality

opinion); *id.* at 3064-3067 (opinion of Scalia, J.); a fifth Member was willing to reconsider *Roe* in a proper case, *id.* at 3061 (opinion of O'Connor, J.). In addition, although the plurality applied a standard of review similar to that endorsed by the United States, see *id.* at 3057, 3058, three dissenting Justices disagreed with that statement of the applicable standard, *id.* at 3076 (Blackmun, J., concurring and dissenting), and three other Justices authored separate opinions that did not expressly discuss the standard of review. See *id.* at 3058-3064 (O'Connor, J., concurring); *id.* at 3064-3067 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 3079-3085 (Stevens, J., concurring and dissenting). In *Webster*'s wake, there is now considerable uncertainty about the proper standard of review to be applied by courts in assessing the constitutionality of abortion regulations.

The United States has a substantial interest in the resolution of that question. Congress has previously enacted legislation concerning abortion. See, *e.g.*, Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976) (the Hyde Amendment); Title X of the Public Health Service Act of 1970, 42 U.S.C. 300 *et seq.*; the Adolescent Family Life Act of 1981, 42 U.S.C. 300z *et seq.* Moreover, federal regulations implementing Title X of the Public Health Services Act of 1970 are currently being challenged in the lower courts on the ground that they are inconsistent with *Roe* v. *Wade* and succeeding cases. *E.g.*, *Massachusetts* v. *Sullivan*, No. 88-1279 (1st Cir. May 8, 1989) (rehearing en banc granted). The manner in which the Court articulates the standard of review in this case could therefore affect the authority of Congress to enact legislation concerning abortion, and could have a direct impact on the outcome of pending constitutional challenges in the lower courts involving the federal government.

STATEMENT

1. In 1971, Minnesota enacted an exception to the common-law rule that required parental consent before medical treatment could be provided to minor children. 1971 Minn. Laws ch. 544. Section 3 of that statute authorized minors to "give effective

consent for medical, mental, and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. Ann. § 144.343 (West 1989). Because abortion was at that time a crime under Minnesota law,[1] the statutory exception for pregnancy-related medical care did not authorize minors to consent to an abortion.

On February 2, 1973, less than two weeks after this Court decided *Roe* v. *Wade* and *Doe* v. *Bolton*, 410 U.S. 179, the Minnesota Supreme Court held, on authority of *Roe*, that the Minnesota abortion statute was unconstitutional in its entirety. *State* v. *Hodgson*, 295 Minn. 294, 204 N.W.2d 199; *State* v. *Hultgren*, 295 Minn. 299, 204 N.W.2d 197. By striking down the Minnesota abortion statute, the Minnesota Supreme Court in effect enabled minors to consent to abortions under the exception for pregnancy-related medical care in Minn. Stat. Ann. § 144.343 (West 1989).

In 1981, the Minnesota legislature amended Section 144.343 by adopting the provisions at issue in this case. 1981 Minn. Laws ch. 228. The legislature did not attempt to require parental consent for an abortion.[2] Instead, in Subdivision 2 of the 1981 amendment the legislature qualified the statutory exception to the general parental consent requirement by directing "the physician or an agent" to notify both parents of an unemancipated minor in writing that their daughter has sought to have an abortion. Minn. Stat. Ann. § 144.343(2) (West 1989).[3]

---

[1] Minn. Stat. § 617.18 (1971) (repealed 1974) contained an exception for abortions "necessary to preserve the life of the woman or of the child." Minnesota's prohibition of abortions dated from the late 1800s. See 1A M. Dunnell, Minnesota Digest 2d *Abortion* § 2.00 (3d ed. 1982).

[2] In the years between 1973 and 1981, this Court had ruled that a State cannot require parental consent in all cases before a minor can have an abortion. *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 74-75 (1976).

[3] Subdivision 3 requires notification of both parents only "if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the woman has one." Minn. Stat. Ann. § 144.343(3) (West 1989).

Notification can be delivered personally to the parents at their residence, or by certified mail if return receipt is requested and delivery is restricted to the parents. *Id.* § 144.343(2)(a) and (b). Performance of an abortion must be delayed "at least 48 hours" after written notification has been delivered. *Ibid.* Notice is not required in cases in which (1) the attending physician certifies that an abortion is necessary to prevent the death of the minor and there is insufficient time to notify her parents; (2) the abortion is authorized in writing by the person(s) entitled to notice; or (3) the minor declares that she is a victim of sexual or physical abuse, or neglect *Id.* § 144.343(4). The Act makes it a misdemeanor and a basis for a civil action for any person to perform an abortion without complying with its requirements. *Id.* § 144.343(5).

Subdivision 6 of the Act contains an alternative procedure to become effective if the above requirements are held invalid or are restrained by a court. Under the alternative procedure, a minor can obtain an abortion without notifying her parents if she can prove in court that she is sufficiently mature to make that decision for herself or that performing an abortion without notifying her parents is in her best interests. Minn. Stat. Ann. § 144.343(6)(c)(i) (West 1989). The Act specifies procedures to be followed in making those determinations. *Id.* § 144.343(6)(c)(ii)-(iv).

2. On July 30, 1981, just two days before the Act was to go into effect, petitioners filed this class action against the State in federal district court seeking a declaration that the Act was unconsitutional and an injunction against its enforcement. The district court issued a temporary restraining order and later a preliminary injunction enjoining the operation of the parental notification requirement contained in Subdivision 2, but not the alternative procedure in Subdivision 6. 88-1125 Pet. App. 14a. Thereafter, the court granted the State partial summary judgment, ruling that the alternative procedure specified in Subdivision 6 was facially constitutional. The court reserved for trial the question whether Subdivision 6 was being applied in an unconstitutional manner. *Id.* at 146a-157a.

After a bench trial, the district court held that the statute was unconstitutional in its entirety. 88-1125 Pet. App. 10a-52a. Relying on *Bellotti* v. *Baird* (*Bellotti II*), 443 U.S. 622, 647 (1979) (plurality opinion), the court ruled that the parental notification requirement in Subdivision 2 "unduly burden[ed]" a minor's right to an abortion. 88-1125 Pet. App. 38a. Relying on *Bellotti II, City of Akron* v. *Akron Center for Reproductive Health,* 462 U.S. 416 (1983), and *Planned Parenthood Ass'n* v. *Ashcroft,* 462 U.S. 476 (1983), the court determined that the alternative procedure set forth in Subdivision 6, standing alone, would constitutional, although it also found that this procedure did not serve the State's interests in fostering intra-family communication and protecting pregnant minors. 88-1125 Pet. App. 40a-45a. The court then separately considered the constitutionality of the requirement in Subdivision 3 that both parents be notified. The court held that requirement invalid, even though Subdivision 6 permitted a minor to avoid notifying both parents by obtaining court authorization for an abortion. *Id.* at 45a-47a. The court also separately examined the 48-hour waiting period required by Subdivision 2. The court held that "a 48 hour waiting period is excessively long" because it would compound the delays associated with making travel arrangements in rural areas, and because a shorter waiting period would serve the State's interests "as completely." *Id.* at 49a. After ruling that the two-parent notification requirement could not be severed from the remainder of the Act, the court held the Act invalid in its entirety and permanently enjoined the State from enforcing it. *Id.* at 51a-52a.

3. Both sides appealed. The en banc court of appeals, by a divided vote, affirmed in part and reversed in part. 88-1125 Pet. App. 73a-109a.[4] Relying on the plurality opinion in *Bellotti II*

[4] A panel had previously affirmed the district court's judgment in its entirety. 88-1125 Pet. App. 53a-72a. The panel later vacated its judgment and held the case in abeyance pending this Court's decision in *Zbaraz* v. *Hartigan,* 763 F.2d 1532 (7th Cir. 1985), aff'd by an equally divided Court, 484 U.S. 171 (1987). 88-1125 Pet. App. 158a-159a. When this Court evenly divided in *Zbaraz,* the full court of appeals granted rehearing en banc. Pet. App. 160a.

and on the combination of concurring and dissenting opinions in *H.L.* v. *Matheson*, 450 U.S. 398 (1981); see *id.* at 420 (Powell, J., concurring); *id.* at 434-454 (Marshall, J., dissenting), the court held unconstitutional the parental notification requirement of Subdivision 2. 88-1125 Pet. App. 81a. By contrast, the court upheld the alternative procedure set forth in Subdivision 6, ruling that it complied with *Bellotti II*, *Akron*, and *Ashcroft*. *Id.* at 81a-96a. The court also upheld the two-parent notification and 48-hour waiting period requirements, ruling that they serve legitimate state interests and do not unduly burden a minor's right to an abortion. *Id.* at 96a-97a.[5]

SUMMARY OF ARGUMENT

1. This Court's decisions in the highly contested abortion area have suggested a variety of different formulations for the applicable standard of review. Most of those decisions, starting with *Roe* v. *Wade* itself, have proceeded on the assumption that the regulation of abortion implicates a fundamental right, and thus should be subject to a heightened standard of judicial review, such as the "compelling state interest" standard applied by *Roe* itself. See 410 U.S. at 155. In *Webster* v. *Reproductive Health Servs.*, however, the plurality concluded that *Roe* v. *Wade* should be "modif[ied] and narrow[ed]," 109 S. Ct. at 3058; consistent with that judgment, the plurality would have upheld the viability testing required by the Missouri law challenged in that case because it was "reasonably designed" to

[5] The court also rejected petitioners' equal protection challenges to the Act. 88-1125 Pet. App. 98a. Petitioners appear to have abandoned those claims in this Court.

Judges Lay, McMillian, and Heaney dissented. Judges Lay and McMillian concluded that the two-parent notification requirement served no purpose if a minor's parents were divorced or separated and the custodial parent consents to an abortion. 88-1125 Pet. App. 99a-106a. They also concluded that the 48-hour waiting period unduly burdens a minor's right to an abortion. *Id.* at 106a-108a. Judge Heaney said that the two-parent notification requirement is unconstitutional, but a one-parent notification requirement would be valid. *Id.* at 109a.

serve legitimate state interests. *Ibid.* We believe that the Court should adopt the standard articulated by the *Webster* plurality as the applicable standard of review for all abortion regulations.

This Court's recent decisions demonstrate that a liberty interest is "fundamental" and therefore deserving of a heightened standard of review only if our Nation's history and traditions have protected that interest from state restrictions. But the Nation's history and traditions do not demonstrate that there is a fundamental right to an abortion; to the contrary, state laws condemning or limiting abortion were common when the Fourteenth Amendment was ratified. In particular, our Nation's history and traditions do not prove that an unemancipated minor has any such right independent of her parents' consent. At common law, a physician could not operate on a minor patient without the parents' consent. And before *Roe* and *Danforth*, only three of the 17 States that permitted some form of abortion exempted that procedure from the operation of the prevalent statutory or common-law rules requiring parental consent. Finally, even if an unemancipated minor were deemed (under *Roe* and *Danforth*) to have a right to an abortion regardless of her parents' consent, any such right does not imply a fundamental right to an abortion without her parents' knowledge. Thus, Minnesota's parental notification statute cannot be said to implicate a fundamental right. The appropriate standard of review for determining the constitutionality of that statute, therefore, is the standard endorsed by the plurality in *Webster*.

2. There can be little doubt that the Minnesota parental notification law is reasonably designed to serve a legitimate state interest. Parental notification requirements advance the legitimate state interests of informing and involving parents in decisions affecting their minor child's welfare. Given the grave medical, emotional, and psychological consequences of the abortion decision, the State can reasonably provide an opportunity for parental consultation in recognition of parents' traditional concern and responsibility for their child's upbringing. Such consultation benefits even mature minors, and those benefits are more secure when both parents are notified, rather than just one. In the majority of cases, both parents will be

responsible for their daughter's welfare, either because they are married and live together or because they hold custody jointly. Even a non-custodial parent may care very deeply about his or her daughter. Finally, because it is administratively infeasible to restrict notification to "functional" but not "dysfunctional" families, the State may require notification of both parents in all families to achieve the benefits demonstrable in most.

Parental notification requirements are not subject to a judicial cost/benefit analysis. The approach petitioners urge camouflages as impartial truths "expert" opinions that were unpersuasive in the legislative process. Due process does not authorize a court to review de novo the wisdom of a state law in the guise of assessing its factual support, its effectiveness, or its overall merit. Due process only permits a court to ask whether a law deprives a party of a historically protected liberty without sufficient justification. Because this law does not do so, the district court's "factual" findings are immaterial.

ARGUMENT

THE MINNESOTA PARENTAL NOTIFICATION REQUIREMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

I. ABORTION REGULATIONS, INCLUDING PARENTAL NOTIFICATION REQUIREMENTS, SHOULD BE UPHELD IF THEY ARE REASONABLY DESIGNED TO SERVE LEGITIMATE STATE INTERESTS

Because none of the opinions in *Webster* commanded a majority of the Court, there is now considerable uncertainty about the standard of review to be applied when abortion legislation is challenged under the Due Process Clause. That uncertainty is compounded in the present case by the divergent formulations of the applicable standard offered by the Court in previous cases concerning abortion and parental rights. In its initial decision on this issue, *Planned Parenthood* v. *Danforth,* 428 U.S. 52, 74 (1976), the Court held that the fundamental right recognized in *Roe* extends to unemancipated minors, and

framed the inquiry in terms of whether a requirement of parental consent would permit a "veto" of that right. Three years later, in *Bellotti II,* a plurality of four Justices reaffirmed *Danforth,* but appeared to formulate the question before the Court in terms of whether a provision for parental notice and consent would "unduly burden the right to seek an abortion." 443 U.S. at 640. And in *H.L.* v. *Matheson,* a different plurality sent conflicting signals about the proper standard. On the one hand, the plurality, using language reminiscent of *Roe* v. *Wade,* see 410 U.S. at 155, stated that a parental notification statute would be upheld if "narrowly drawn" to serve "important state interests." 450 U.S. at 413. But the *Matheson* plurality also quoted language from *Harris* v. *McRae,* 448 U.S. 297, 325 (1980), to the effect that such a measure would be upheld if "rationally related to the legitimate governmental objective of protecting potential life"—suggesting a more relaxed standard of review. 450 U.S. at 413.

The parties to this case devote relatively little attention to the standard of review, but they, too, disagree about what it should be. Petitioners appear to endorse a variation on one of the standards suggested by the *Matheson* plurality, stating that parental notification laws "must 'plainly serve[] important state interests [and be] narrowly drawn to protect only those interests.' " Pet. Br. 28-29 (quoting *Matheson,* 450 U.S. at 413). Petitioners do not, however, consider what impact *Webster* may have had on this standard. The State cross-petitioners briefly discuss the significance of *Webster,* and attempt to synthesize a multi-tiered standard of review based on the various opinions in that case. They conclude that although an "outright prohibition" of abortion is subject to strict scrutiny and may be sustained only upon the showing of a "compelling state interest," when a state statute "imposes some burden short of virtual prohibition or severe limitation it should be upheld if it rationally furthers legitimate public purposes." Cross-Pet. Br. 24. Thus, the cross-petitioners appear to endorse a standard of review similar to that applied by the *Webster* plurality, at least with respect to the issues presented by this case.

The question of the correct standard of review in abortion cases is manifestly in need of clarification by this Court if lower courts, litigants, and legislative bodies are to have adequate guidance in this difficult and contentious area. For the reasons set forth below, we believe that the standard articulated by the *Webster* plurality—which asks whether an abortion regulation is reasonably designed to serve a legitimate state interest—states the correct standard and should be applied both to questions involving parental authority and to abortion regulations generally.

A. Abortion Regulations Are Subject To Heightened Review Under The Due Process Clause Only If They Implicate A Fundamental Right

The Due Process Clause, by its terms, is primarily concerned with ensuring that interests in life, liberty, and property are afforded the "process" to which they are due. In addition, however, this Court's decisions establish that the Clause provides a measure of substantive protection to certain liberty interests. *Turner* v. *Safley*, 482 U.S. 78, 94-99 (1987); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Court has been justifiably cautious in identifying such rights, recognizing that once it ventures beyond the "core textual meaning" of liberty as freedom from bodily restraints, the imputation of substantive content to the concept of liberty is necessarily a " 'treacherous' " undertaking. *Michael H.* v. *Gerald D.*, 109 S. Ct. 2333, 2341 (1989) (plurality opinion). As stated in *Bowers* v. *Hardwick*, 478 U.S. 186, 194 (1986), the Court "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."

The general standard of review in assessing substantive due process claims is highly deferential to legislative judgments. As a rule, a state (or federal) statute that trenches upon a liberty interest will be upheld so long as it is rationally related to a legitimate state interest. See, *e.g.*, *Califano* v. *Aznavorian*, 439

U.S. 170, 176-178 (1978); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). In certain narrow areas, however, the Court has gone further, and has held that particular liberty interests are subject to a more exacting standard of review. The critical determination in finding that a liberty interest will be afforded this heightened protection is the conclusion that it constitutes a "fundamental" right. *Michael H.*, 109 S. Ct. at 2341 (plurality opinion). Thus, the applicable standard of review in substantive due process cases is primarily a function of the method employed by the Court for identifying those rights that are deemed to be constitutionally fundamental.

In recent decisions, the Court has consistently stated that a right will be regarded as fundamental if it is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), or "deeply rooted in this Nation's history and tradition," *Moore*, 431 U.S. at 503 (plurality opinion). See *Bowers*, 478 U.S. at 192-194. Under either rubric, the applicable methodology is historical. *Michael H.*, 109 S. Ct. at 2342-2343 (plurality opinion); *Moore*, 431 U.S. at 504 n.12 (plurality opinion); *Bowers*, 478 U.S. at 192-194; *Palko*, 302 U.S. at 325. By limiting the scope of "fundamental rights" to those liberties historically regarded as essential to our Nation, the Court has sought, in the words of the *Michael H.* plurality, both to "prevent future generations from lightly casting aside important traditional values," and yet also to assure that the Due Process Clause does not become a judicial license "to invent new ones." *Id.* at 2341 n.2. See *Moore*, 431 U.S. at 504 n.12 (plurality opinion).

B. No Fundamental Right Is Implicated By The Minnesota Notification Requirement

Petitioners' claim that Minnesota's parental notification statute should be reviewed under heightened scrutiny rests on the assumption that the state law implicates a fundamental right. At bottom, of course, the fundamental right on which they rely is the right to abortion identified in *Roe* v. *Wade*. For the reasons discussed below and set forth more fully in our brief in *Webster* v. *Reproductive Health Servs.*, we continue to

believe that *Roe* was wrongly decided and should be overruled. But regardless of *Roe*'s continuing vitality, petitioners' argument in support of heightened scrutiny necessarily rests on two further premises: that the parents of an unemancipated minor may not exercise a "veto" over her decision to have an abortion—the holding of *Danforth*—and that the parents of an unemancipated minor are not even entitled to notice that she has sought an abortion. In our view, none of the three assumptions on which petitioners' case for heightened scrutiny is built is tenable: there is, in view of the Nation's history and traditions, no fundamental right to abortion; there is no fundamental right of a minor to an abortion without parental consent; and there is no fundamental right of a minor to an abortion without parental knowledge. If any of these three claims of fundamental right is rejected by the Court, and each should be, then the statute at issue must be upheld as long as it reasonably advances a legitimate state interest.

1. This Nation's History And Traditions Do Not Establish A Fundamental Right To An Abortion

If abortion is not a fundamental right, there is no appropriate basis for subjecting the Minnesota statute in this case to heightened scrutiny. As we explained more fully in our brief in *Webster*, there is simply no credible foundation for the proposition that abortion is a fundamental right. This conclusion follows whether the inquiry is framed broadly, in terms of a right to "privacy" or a right to "reproductive choice," or narrowly, in terms of a right to abortion. Compare *Michael H.*, 109 S. Ct. at 2344-2345 n.6 (opinion of Scalia, J.), with *id.* at 2346-2347 (O'Connor, J., concurring in part).

Roe discovered a fundamental right to abortion by generalizing broadly from previous decisions, which it characterized as recognizing a "guarantee of personal privacy." 410 U.S. at 152. Those decisions, the Court said, "make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465

(White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer* v. *Nebraska*, [262 U.S. 390 (1923)]." 410 U.S. at 152-153. The Court then concluded that "[t]his right of privacy * * * is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

If we look more specifically at the historical record regarding abortion, however, it cannot seriously be maintained that abortion is a right so deeply rooted in our history and traditions that it can be ranked as fundamental. To the contrary, state laws condemning or limiting abortion were common when the Fourteenth Amendment was ratified. In 1868, at least 36 state or territorial laws limited abortion, and 21 of those laws were in effect in 1973. *Roe*, 410 U.S. at 174-176 & n.1 (Rehnquist, J., dissenting).[6] Plainly, our history does not "exclude * * * a societal tradition of enacting laws *denying* that interest." *Michael H.*, 109 S. Ct. at 2341 n.2 (plurality opinion). In fact, the historical record in favor of the liberty in question here is no stronger than it was in *Michael H.* or *Bowers*, where the Court found no warrant in the common-law tradition for identifying a fundamental right to visitation privileges for adulterous fathers, or a fundamental right to engage in homosexual sodomy.

Moreover, even if the decisions relied upon by *Roe* may be said to establish a "right of privacy"—or a right "whether to accomplish or prevent conception," *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977)—it does not follow that this right extends to the decision to have an abortion. A decision not to conceive does not entail the deliberate destruction of fetal life; a decision to abort manifestly does. *Harris* v. *McRae*, 448 U.S. at 325; *Carey*, 431 U.S. at 690. The State's interest in protecting fetal life throughout pregnancy thus provides an entirely adequate basis for limiting any right of privacy or procreative choice to the decision not to conceive. Here again, the

---

[6] The abortion of a fetus after "quickening" was regarded as a crime at common law. *Roe*, 410 U.S. at 132-136. The earliest English abortion statute, adopted in 1803, made abortion a crime throughout pregnancy. *Id.* at 136.

interest in protecting fetal life is at least as compelling as the interest in promoting family autonomy (at issue in *Michael H.*) or the interest in condemning homosexual conduct as immoral (at issue in *Bowers*)—both of which were found by the Court to be sufficient to defeat any claim that a generalized right to privacy should be extended to those cases. See *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792-793 & n.2 (1986) (White, J., dissenting); *id.* at 828 (O'Connor, J., dissenting). In short, whether viewed in terms of a general right of privacy or reproductive choice, or more narrowly in terms of abortion itself, it cannot reasonably be said that the right to abortion is fundamental.[7]

2. An Unemancipated Minor Does Not Have A Fundamental Right To An Abortion Without Her Parents' Consent

Even were the Court not to revisit the underlying question whether there is a fundamental right to an abortion, it may wish to reconsider the next step in petitioners' argument for heightened scrutiny. This Court held in *Danforth* that an unemancipated minor has a fundamental right to abortion that may not be qualified by "an absolute, and possibly arbitrary, veto" by her parents. 428 U.S. at 74. If that conclusion was in error—that is, if the State can constitutionally require that parents must give their *consent* to a minor's abortion—then there can be no claim that an unemancipated minor has a fundamental right to avoid *notice* to her parents that she has sought an abortion. Notice is indisputably a less intrusive form of parental involvement than consent, which necessarily entails notice.

1. Our history and traditions provide no support for the notion that a minor has a fundamental right to an abortion without her parents' consent. That conclusion follows, regardless of the level of specificity at which this inquiry is made.

---

[7] By contrast, a state law *mandating* abortions would present a starkly different question. See *Cruzan* v. *Missouri Dep't. of Health*, cert. granted, No. 88-1503 (to be argued Dec. 6, 1989). Our Nation's history and traditions establish that a competent adult may generally refuse unwanted medical intrusions. This right would, we believe, extend to an unwanted abortion.

At the most general level, there can be no doubt that our legal traditions recognize the right of parents to control their childrens' upbringing. Anglo-American law has "historically * * * recognized that natural bonds of affection lead parents to act in the best interests of their children." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979); *id.* at 621 (Stewart, J., concurring in the judgment) (collecting authorities). See Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 B.Y.U. L. Rev. 605, 615-619. Accordingly, common law courts were extremely reluctant to interfere in the parent-child relationship as long as the parents did not treat their children cruelly or immorally. See, *e.g.*, *In re Agar-Ellis*, [1883] 24 Ch. D. 317 (C.A.); Recent Development, *Minors' Rights to Medical Care*, 14 J. Fam. L. 581, 581-583 (1975). This strong tradition of parental control continues today. Every State limits the participation of minors in a substantial number of activities in which adults may engage, such as marriage, voting, or driving a car. Such restrictions "reflect[] the simple truth derived from our communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life." *Stanford* v. *Kentucky*, 109 S. Ct. 2969, 2988 (1989) (Brennan, J., dissenting).

This Court's decisions, rendered in a variety of constitutional contexts, reflect the same understanding. The Court has long recognized that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce*, 268 U.S. at 535. Consequently, this Court has repeatedly acknowledged that "a natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children" ' " is itself a significant liberty interest. *Santosky* v. *Kramer*, 455 U.S. 745, 758-759 (1982) (citations omitted); see also, *e.g.*, *Michael H.*, 109 S. Ct.

at 2342 (plurality opinion); *Matheson,* 450 U.S. at 410; *Wisconsin* v. *Yoder,* 406 U.S. 205, 231-233 (1972); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer* v. *Nebraska,* 262 U.S. 390, 399-401 (1923). Indeed, if there is a fundamental right implicated by this case, this Court's decisions suggest it is the right of *parents* to direct the upbringing of their children, not the right of children to evade parental control.

The conclusion drawn from the general historical understanding of parent-child relations is reinforced by more specific consideration of the traditions regarding the provision of medical treatment to children. The rule at common law was that a physician could not treat a minor without parental consent. W. Keeton, *Prosser and Keeton on The Law of Torts* ch. 4, § 18, at 115 (5th ed. 1984). Over time, common law courts developed limited exceptions to this rule for emergencies, emancipated minors, relatively safe operations for mature minors, and necessary lifesaving treatment. *Id.* at 114-118; L. Nolan, *The Legal Status of Parent and Child 1986,* at 161-172 (1987). But all jurisdictions today still follow the common-law rule unless it has been modified by case law or statute. L. Nolan, *supra,* at 161. See *Stanford,* 109 S. Ct. at 2988 (Brennan, J., dissenting) (37 States by statute fix 18 as the age of consent for medical treatment); *Bowen* v. *American Hosp. Ass'n,* 476 U.S. 610, 627-628 & n.13 (1986) (plurality opinion) (summarizing current law).

Even when we consider history and tradition at the most specific level—and ask whether a minor was generally recognized to have a right to an abortion without parental consent—the answer is the same: there was no such generally recognized right. Specifically, in those States that had legalized abortion to some extent prior to this Court's decision in *Roe* v. *Wade,* the general rule was that parental consent *was* required before the operation could be performed on an unemancipated minor. Of the 17 States that permitted some form of abortion in 1971, eight had laws expressly requiring minors to obtain parental consent, and six continued to apply the common-law rule of

parental consent. Pilpel & Zuckerman, *Abortion and the Rights of Minors,* 23 Case W. Res. L. Rev. 779, 783-785 (1972). Only three state courts had construed state laws allowing minors to consent to pregnancy-related medical care to permit a minor to obtain an abortion without parental consent. *Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); *In re Diane,* 318 A.2d 629 (Del. Ch. 1974). See *In re Smith,* 16 Md. App. 209, 225, 295 A.2d 238, 246 (1972) (a minor may refuse to have an abortion over parent's objection). See also Note, *The Minor's Right to Abortion and the Requirement of Parental Consent,* 60 Va. L. Rev. 305, 305 (1974).

Thus, whether considered at the most general level of parent-child relations, or at the most specific level of a minor's right to have an abortion without her parents' consent, the historical record speaks with a single, powerful voice. Against this background, it simply cannot be said that a minor's right to have an abortion without her parents' consent is so "rooted in the traditions and conscience of our people" as to be deemed fundamental. *Michael H.,* 109 S. Ct. at 2341 (plurality opinion). To the contrary, the conscience of the American people, as embodied in law, *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934) (Cardozo, J.), stands unmistakably for the proposition that unemancipated minor children are not free to make such profoundly important decisions without the involvement of their parents.

2. Nor does the reasoning of *Danforth,* as amplified by *Bellotti II,* support the notion that a minor has a fundamental right to an abortion without obtaining her parents' consent. Starting with the premise that the State cannot (subject to certain qualifications) veto an adult's decision to have an abortion—the holding of *Roe*—*Danforth* held that a State cannot allow parents to veto their unemancipated daughter's decision to have an abortion. 428 U.S. at 74. But that conclusion does not follow from the premise. While a State cannot ordinarily veto an adult's decision to obtain (or forgo) medical care, a State *can* give a minor's parents the right to select medical care for their child. Thus, even if the decision whether to have an

abortion is ultimately only a medical decision (as *Roe* treated it, 410 U.S. at 156-162), the State should be free to leave the decision to a minor's parents, just as the State leaves all other medical decisions to them.[8]

Danforth also reasoned that a parental consent requirement was unlikely to promote family unity and parental authority when a minor's pregnancy "already has fractured the family structure." 428 U.S. at 75. The *Bellotti II* plurality elaborated on this point, stating that the question of whether a minor should have an abortion is fraught with "grave and indelible" consequences, and that the parent's decision may be "arbitrary." 443 U.S. at 642-643.

The issue, however, is not whether a minor's unwanted pregnancy is a stressful event having lasting consequences both for her and her family; it surely is. And the question is not whether certain parents will exercise poor judgment in deciding what is in the best interests of their daughter; they surely will. Rather, the issue is whether a State may reasonably conclude that a minor's parents are, as a general matter, better suited to make these critical decisions than a minor and her physician, or a minor and her physician in conjunction with a judge. There is no legal presumption that parents will not act in the best interests of their child; to the contrary, the presumption lies in precisely the other direction. *Parham,* 442 U.S. at 602. And unless the minor's life is at risk, her pregnancy is the result of incest, or she is the victim of parental abuse, there is no objective standard by which to determine whether the parents' decision is "arbitrary." The pregnant minor is confronted with choices that implicate the most basic values—not just about the minor's future options, but also about the morality of abortion itself. It strains credulity to think that these matters are more properly resolved by the minor and persons who, in all probability, are

[8] To be sure, a State can intervene in the parent-child relationship, for example, to supply a child with life-saving medical care. *Jehovah's Witnesses* v. *King County Hosp.*, 390 U.S. 598 (1968), summarily aff'g 278 F. Supp. 488 (W.D. Wash. 1967). But just as due process does not require the State to intervene even in that setting in order to protect a minor from her parents, *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989), due process should not compel a State to allow a physician to intervene either.

strangers she will never meet again, than by the minor in consultation with those who have a lifetime commitment to her care, nurturing, and upbringing.

3. An Unemancipated Minor Does Not Have A Fundamental Right To An Abortion Without Her Parents' Knowledge

Pretermitting the two foregoing questions—whether there is a fundamental right to an abortion and whether there is a fundamental right on the part of minors to an abortion without parental consent—petitioners still must show that the fundamental right recognized in *Roe* and *Danforth* extends to a provision requiring only that parents be given *notice* of their minor daughter's request for an abortion. Parental notification differs in obvious respects from parental consent. Notification laws like Minnesota's do not empower parents to "veto" their child's decision; at most they postpone that decision for a brief period in order to allow parents to discuss that decision with their child.[9] In fact, a parental notification requirement does no more than preserve for parents the opportunity they have traditionally enjoyed to discuss with their daughter significant decisions that arise during her minority, and to be aware of important actions taken by third parties toward her.

There is utterly no support for the proposition that a minor has a fundamental right to keep her parents in the dark about her welfare. The historical materials surveyed above concerning the right of parents to control the upbringing of their children and their right to select the medical procedures performed on

[9] The Minnesota statute clearly differs from the laws held invalid in *Akron, Bellotti II,* and *Danforth.* It requires that written notification be personally delivered to the parents, Minn. Stat. Ann. § 144.343(2) (West 1989), but there is no requirement that the parents (or anyone else) provide written evidence that such notice was given. The attending physician or his clinic can send the notice by mail, *id.* § 144.343(2)(b), and the 48-hour waiting period can run while the abortion is being scheduled, 88-1125 Pet. App. 97a n.18. Only one parent need be notified if the other parent cannot be located by reasonably diligent effort. Minn. Stat. Ann. § 144.343(3) (West 1989). It is an affirmative defense that a person attempted with reasonable diligence to deliver notice, but was unable to do so. *Id.* § 144.343(5). None of these provisions is similar to a parental veto.

their children—including abortion—conclusively refute the notion that a child has a fundamental right to conceal important facts about her physical condition and well-being from her parents.[10] In the final analysis, petitioners' objection to notifying parents—*i.e.*, that disclosure of their minor daughter's pregnancy and desire for an abortion will disrupt everyone's life without any attendant benefit—supports concealing the pregnancy from the parents even *after* their daughter has had an abortion. But there is no support in this Court's cases or common sense for the remarkable principle that a minor has a fundamental right to keep her parents in ignorance about her welfare. What petitioners' argument ultimately reveals is how far afield their claim is from the history and traditions of this Nation, and from what due process can be said legitimately to protect.

C. The "Undue Burden" Analysis Does Not Constitute A Substitute For A Standard of Review

In *Bellotti II*, the plurality analyzed the parental consent provisions at issue in that case not in terms of a conventional standard of review, but rather in terms of whether the statute would "unduly burden the right to seek an abortion." 443 U.S. at 640. Similarly, Justice O'Connor, in her dissenting opinions in *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. at 452-475, and *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. at 827-833, examined a variety of abortion restrictions under an "undue burden" analysis. Indeed, the United States, in an amicus brief filed in *Akron*, also urged the Court to adopt an "undue burden" approach.

Although we believe that there is a limited role for an "undue burden" analysis in constitutional adjudication, we do not believe, upon full reflection, that the "undue burden" inquiry

[10] Plaintiffs are correct that a number of States, including Minnesota, have enacted laws increasing a minor's right to consent to medical care. See generally L. Nolan, *supra*, Apps. A-F, at 442-461. Abortion, however, is not among those medical procedures.

can legitimately substitute for a standard of review. The basic problem is revealed within the very formulation of the *Bellotti II* plurality: the question is whether a statute will "unduly burden *the right to seek an abortion.*" 443 U.S. at 640 (emphasis added). In other words, undue burden analysis *presupposes* that there is a fundamental right potentially implicated by the regulation at issue; the analysis cannot assist in distinguishing between fundamental rights and other liberty interests. Thus, unless we are to embrace the assumption that *any* regulation touching upon the question of abortion necessarily implicates a fundamental right, the undue burden analysis begs the question at issue: whether there is a fundamental right at stake that requires application of heightened scrutiny.

The "undue burden" analysis suffers from an additional infirmity when coupled with a judicially created, highly abstract, or generalized right—such as the "right to privacy" or the "right to abortion." In such a context, asking whether a particular measure unduly burdens the right provides no meaningful guidelines for assessing the weight of the competing interests, or for determining how much deference to give to legislative judgments. The only measure of constitutionality would be the courts' own subjective assessment of what is "due" or "undue" in any particular context. In these circumstances, the undue burden analysis would offer "no guide but the Court's own discretion," *Baldwin* v. *Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting); see *Webster*, 109 S. Ct 3066 n.* (Scalia, J., concurring in part and concurring in the judgment), and would serve only to mask judgments made on the basis of assumptions that would remain unarticulated. In our view, great caution should be exercised in resolving important constitutional controversies under the "undue burden" mantle.[11]

[11] This is not to say that the "undue burden" approach may not play a proper role in cases where the relevant universe of constitutional rights is fully specified and well defined. In those circumstances, we believe that the "undue burden" inquiry would operate in a fashion analogous to the principle reflected in the maxim *de minimis non curat lex*—that minor or de minimis incursions upon settled rights do not call for judicial redress. See *Ingraham* v. *Wright*, 430 U.S. 651, 674 (1977).

II. PARENTAL NOTIFICATION REQUIREMENTS ARE REASONABLY DESIGNED TO SERVE LEGITIMATE STATE INTERESTS

Because Minnesota's parental notification statute does not implicate any fundamental right, it should be assessed under the standard of review formulated by the *Webster* plurality. As previously noted, that standard asks whether a particular regulation is "reasonably designed" to serve a legitimate state interest. 109 S. Ct. at 3058. There can be little doubt that the Minnesota statute readily passes muster under this standard.

A. Parental Notification Requirements Advance The Legitimate State Interests Of Informing And Involving Parents In Decisions Affecting The Welfare Of Their Minor Children

The State unquestionably has a legitimate interest in informing and involving parents in decisions affecting the welfare of their minor children. See *Matheson, supra.* This interest clearly extends to the decision whether to have an abortion. "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." *Matheson,* 450 U.S. at 411. And a parental notification requirement, in association with a reasonable waiting period, furthers these legitimate interests. Such laws postpone a minor's decision for a brief period to allow her parents to discuss with her what is likely to be the most important and irrevocable decision of her minority life. A State thus has a significant interest in promulgating a parental notice requirement in order to ensure that a minor will not act improvidently, and to preserve her parents' traditional responsibility for her nurturing and upbringing. *Matheson,* 450 U.S. at 409-413; *id.* at 421-425 (Stevens, J., concurring in the judgment); *Zbaraz* v. *Hartigan,* 763 F.2d 1532, 1548-1557 (7th Cir. 1985) (Coffey, J., dissenting), aff'd by an equally divided Court, 484 U.S. 171 (1987).

The foregoing considerations apply whether or not the minor is determined to be "mature" (*i.e.*, able to give informed consent). The abortion decision "is an important, and often a

stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Danforth,* 428 U.S. at 67. A minor's parents can counsel their daughter about the moral and psychological consequences of her decision, and thereby assist her to make an informed judgment. Parents can also help their daughter select a competent physician, and can supply the physician with necessary medical and psychological information, some of which their child may not know. In addition, parents can provide emotional support both before and after the procedure, and ensure that their child receives any necessary post-operative care. *Matheson,* 450 U.S. at 411; *Zbaraz,* 763 F.2d at 1549-1551 (Coffey, J., dissenting). For these reasons, a State may reasonably conclude that parents' awareness of their daughter's pregnancy and consultation about the options available to her will improve the quality of her decision, even if she is mature. And if she is not, we believe that few would genuinely argue that her parents should not be informed about, and involved in, the decision whether she is to have an abortion. It is well to remember that thousands of minors below the age of fifteen have abortions every year; they should not have to face this profoundly important decision alone.[12]

A State may also reasonably conclude that a hearing before a judge is not an acceptable substitute for notification of the minor's parents. First, the respective roles of judge and parents are manifestly different. The judge is charged with determining either that the pregnant minor is mature or that an abortion is nonetheless in her best interests. In contrast, the parents' responsibility is the overall welfare of their daughter, which encompasses advice on a wide range of considerations bearing on her decision. Second, the background and interest of the judge and

---

[12] According to statistics supplied by the Alan Guttmacher Institute, whose Director of Research testified for plaintiffs as an expert on the Institute's statistics, J.A. 97, approximately 16,000 women less than fifteen years old had abortions in the United States in 1983. U.S. Department of Commerce, *Statistical Abstract of the United States* 70 (1989).

the parents are by no means identical. The judge has probably never seen the minor before, will likely never see her again, and his duty lies in discharging his statutory obligations. In contrast, a minor's parents, in the typical situation, will have known and cared for their daughter from her birth, and they will be deeply, lovingly concerned about her well-being. Third, the nature of the judicial proceeding prevents judges from acting as surrogate parents. Hearings are secret (to protect anonymity), abbreviated (to minimize delay), and *ex parte*. Even under the best of circumstances and with the best of intentions, a judge would find it enormously difficult to do anything more than make an educated guess about whether a minor is mature or whether an abortion is in her best interests.[13]

It is also reasonable for Minnesota to insist that both parents be notified where possible. If both parents are married and live together, a two-parent notification rule is no more burdensome than a one-parent notification rule. If the parents are separated or divorced but hold custody jointly, both parents will be responsible for their daughter's welfare and will be interested in her decision. Even if only one parent has custody, the noncustodial parent may well have strong emotional bonds with his or her daughter (and vice versa), and notifying the noncustodial parent may help preserve those ties. Moreover, notifying both parents may help to ensure that the attending physician will receive important medical information. On the other hand, it would be administratively infeasible to notify both parents in "functional" families but not in "dysfunctional" families, at least without establishing an expensive and cumbersome (and highly intrusive) threshold judicial proceeding to distinguish between the two. In lieu of that unwieldy process, Minnesota was entitled to require notification of both parents in all families where both parents can be located "through reasonably diligent effort." Minn. Stat. Ann. § 144.343(3) (West 1989).

[13] The chance that a judge will guess correctly is greatly reduced if he believes that his job is " 'a routine clerical function on my part, like putting my seal and stamp on it.' " Pet. App. 25a (quoting a judge). Moreover, any advice volunteered by the professional staff of an abortion clinic will be limited for similar reasons of role, background, and setting. Peer counseling is even less reliable.

B. Parental Notification Requirements Are Not Subject To Judicial Cost/Benefit Analysis

The district court "f[ou]nd[] as a matter of fact that Minn. Stat. § 144.343(2)-(7) fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors." 88-1125 Pet. App. 42a. That factual finding, if that is what it is,[14] does not contradict the conclusion that parental notification is reasonably designed to advance legitimate state interests. Nor does the district court's "finding" demonstrate that Minnesota's parental notification law is unconstitutional as applied to petitioners. To the contrary, the facts establish that parental notification is valid in the case of the vast majority of unemancipated Minnesota minors.[15]

[14] The district court's conclusion, like many of the court's other "findings," is not a "fact" in the sense used by Fed. R. Civ. P. 52(a) to identify determinations to which an appellate court must defer. Under that rule, only the evidence and legitimate inferences therefrom are reviewed under the clearly erroneous standard; everything else is subject to de novo review. See *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 714, 715 (1985); *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984). Because the district court's conclusion presupposes application of the correct legal standard to the evidence, it is a mixed finding of law and fact to which Rule 52(a) indicates no special deference is owed. See *Bose Corp.*, 466 U.S. at 501; *Turner*, 482 U.S. at 93-94 n.*.

[15] As the court of appeals pointed out, the district court's conclusion that parental notification imposed an undue burden on pregnant minors rested "primarily on its factual findings regarding the burden imposed on minors in family units that have either 'broken apart or never formed.' " 88-1125 Pet. App. 92a-93a. These findings in turn were based on "somewhat limited factual findings" predicated on "the minor living in a one-parent household who notified only her custodial parent." *Id.* at 93a n.16. Accepting the district court's factual findings for all they are worth – namely, that involvement of the non-custodial parent introduces either a "traumatic distraction" or "disruptive and unhelpful participation" and that these events are "not uncommon," *id.* at 22a; see *id.* at 30a-31a – those findings still say nothing about the 58% of Minnesota minors who live with both parents, *id.* at 29a, as well as those minors whose parents naturally take an interest in their welfare even though they are living apart.

The district court's unprecedented inquiry represents, according to one of petitioners' counsel, a new mode of fact-based "across-the-board constitutional challenge" dubbed an "operational challenge." Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights,* 136 U. Pa. L. Rev. 655, 703 (1988). Under this provocative approach, courts are entitled to weigh for themselves the costs and benefits of legislation. Properly understood, this mode of attack has nothing to do with abortion, or even adjudication of claims involving fundamental constitutional rights. Because all legislation must (if challenged) pass muster under the Due Process Clause, this methodology puts every legislative enactment on trial at least to determine whether it is rational. That novel approach, employed by the district court and urged by petitioners, is misguided both in conception and execution.

To begin with, that approach fails to recognize that legislation is a product of a complex collective judgment by a representative body about the desirability or morality of a specific goal, the social utility of different ways to achieve it, and the trade-offs necessary to enact it. There is no scientifically correct answer to any of these questions, and the Constitution does not demand the impossible—that a legislative judgment be error-proof. To the contrary, the Constitution assumes, absent some reason to presume antipathy, that improvident decisions will be rectified by the democratic process. *Cf. Vance* v. *Bradley,* 440 U.S. 93, 97 (1979).

Indeed, petitioners' approach rests on a pervasive confusion of "facts" and legitimate legislative value judgments. The "factual" inquiry pursued by the district court—whether a parental notification requirement, on balance, benefits or harms minors and their parents—touches matters so subjective, value-laden, and contestable that it is almost meaningless to inquire as to their truth or falsity. Indeed, it transforms the judicial process into that of a super-legislature acting outside the constraints of the democratic process.[16] It is ultimately an assault on the right

[16] It is not obvious that statistics, surveys, or expert opinions—the bulk of petitioners' evidence—can confirm or disprove the hypothesis that, as a general matter, a minor's parents should be aware of and involved in her sexual upbringing, since there is no objective standard to guide a court in making that judgment. Nor is the evidence considered by the district court illuminating. The court dismissed the benefits of parental notification by reference to the opinions of experts who, at bottom, simply disagreed with the state legislature that parents can contribute to their daughter's sexual upbringing. See, *e.g.*, 88-1125 Pet. App. 26a-29a.

of the people, subject to constitutional constraints, to govern themselves. When a law is based on normative, not empirical, grounds, the adducing of "expert" opinions merely camouflages personal value judgments as impartial truths. Cf. L. Hand, *The Bill of Rights* 38 (1958). For that reason, the Court has consistently held that constitutional law does not rest on the opinions of experts. *Stanford* v. *Kentucky,* 109 S. Ct. at 2979-2980 (plurality opinion); *Rhodes* v. *Chapman,* 452 U.S. 337, 348-349 n.13 (1981); *Bell* v. *Wolfish,* 441 U.S. 520, 543-544 n.27 (1979).

This Court firmly rejected an approach similar to that now urged by petitioners in *Harris* v. *McRae,* 448 U.S. at 326, which involved the constitutionality of abortion funding restrictions. The district court in that case, after holding a year-long evidentiary hearing into the public funding of abortions, concluded that " '[t]he interests of . . . the federal government . . . in the fetus and in preserving it are not sufficient, weighed in the balance with the woman's threatened health, to justify withdrawing medical assistance unless the woman consents . . . to carry the fetus to term.' " 448 U.S. at 325-326 (quoting district court decision). This Court held that the district court had undertaken the wrong equal protection inquiry and that the question was one for the legislature, not the court, to decide:

> It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply because they may be unwise, improvident,

> or out of harmony with a particular school of thought. Rather, when an issue involves policy choices as sensitive as those implicated [here] . . ., the appropriate forum for their resolution in a democracy is the legislature.

Id. at 326 (citations and internal quotation marks omitted). These observations, grounded firmly in democratic theory, apply with equal force to the wide-ranging "fact finding" undertaken by the district court in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed in No. 88-1125 and reversed in No. 88-1309.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
PAUL J. LARKIN, JR.
STEPHEN J. MARZEN
Assistants to the Solicitor General
STEVEN R. VALENTINE
Deputy Assistant Attorney General

OCTOBER 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00548

MOTION FILED
AUG 3 1989

Nos. 88-1125 and 88-1309

In The

Supreme Court of the United States

October Term, 1988

No. 88-1125

JANE HODGSON, M.D., et. al.

Appellants,

vs.

THE STATE OF MINNESOTA,

Appellees.

No. 88-1309

THE STATE OF MINNESOTA,

Appellants,

vs.

JANE HODGSON, M.D., et. al

Appellees.

On Appeal From The United States Court
Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA AND BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC.

PEGGY M. COLEMAN
P.O. Drawer 2440
107 Parkgate Drive
Tupelo, Mississippi 38803
(601) 844-5036

Counsel of Record
For Amicus Curiae

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE STATE OF MINNESOTA	1
TABLE OF AUTHORITIES	6
LAW AND ARGUMENT	8
I. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF BOTH PARENTS OF A MINOR'S DECISION TO OBTAIN AN ABORTION	8
II. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF A MINOR'S PARENTS 48 HOURS PRIOR TO PERFORMING AN ABORTION . . .	22
CONCLUSION	27
CERTIFICATE OF SERVICE	28

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

American Family Association, Inc. (AFA), Moving Party herein, respectfully moves this Honorable Court for an order granting leave to file the attached Brief Amicus Curiae. AFA has requested permission from Appellants by their attorney, Mr. William Z. Pentelovitch, Esq., and from Appellee, State of Minnesota, from its Attorney, Mr. Hubert H. Humphrey, III, Esq.

The attached Brief supports the position of the Appellee in this case. The issue before this Court concerning the constitutionality of the parental notification provision will significantly affect the position of Amicus as it seeks

to encourage the preservation of unborn children and to act to strengthen traditional American families.

INTEREST OF AMICUS CURIAE

The American Family Association, Inc., is a non-profit organization incorporated in 1977 under its original name National Federation for Decency, Inc. (NFD). AFA continues to operate as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. As Amicus, American Family Association, Inc., has members in all 50 states; over 520 chapters of local citizens who are active in offering individuals alternatives to abortions; and over 360,000 subscribers to its monthly newsletter, AFA Journal. Amicus

also provides counseling and referral services to pregnant women who seek alternatives to abortion.

The ability of a state to protect the welfare of all its citizens, including the unborn, is vital to the efforts of the American Family Association membership. American Family Association, Inc., seeks to promote a healthful family environment for all Americans and it recognizes the need to afford the unborn such an opportunity. The position of the American Family Association, Inc., will support the interest of the State of Minnesota to protect the lives of the unborn and to permit the State to act in a manner which will respect the traditional family structure.

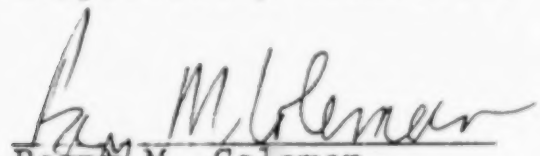
Serious efforts have been underway

to offer minors alternatives to abortions and AFA will continue to do so. In the interest of this educational process on behalf of AFA and its members concerning abortion alternatives this action is most important. The parties have written comprehensive arguments and AFA will not repeat them. Rather, AFA will highlight certain concepts it wishes the Court to consider.

The ability of AFA to continue to offer minors viable alternatives to abortion is fundamentally affected by the court's ruling. Amicus and the citizens they represent would be severely harmed by a finding that the parental notification provision is unconstitutional.

Therefore, AFA respectfully requests this Honorable Court to grant leave to file the attached Brief Amicus Curiae in this important case and to affirm the decisions of the court below.

Respectfully submitted,



Peggy M. Coleman
Attorney for AFA

TABLE OF AUTHORITIES

	Page
Cases	
Bellotti v Baird, 443 U.S. 622 (1979)	12
City of Akron v Akron Center for Reproductive Health, 462 U.S. 416 (1983)	12
Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982) . . .	10
Goss v Lopez, 419 U.S. 565 (1975).	11
Harris v McRae, 448 U.S. 297 (1980)	8
Hodgson v State of Minnesota, 678 F.Supp. 756 (D. Minn. 1986)	21
Hodgson v State of Minnesota, 853 F.2d 1452 (8th Cir. 1988)	16, 17 18, 19
In re Gault, 387 U.S. 1 (1967) . .	11
Maher v Roe, 432 U.S. 464 (1977).	21
Meyer v Nebraska, 262 U.S. 390 (1923)	10
New York v Ferber, 458 U.S. 747	

(1982) 10

Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1976) 8, 11, 13, 14

Prince v Massachusetts, 321 U.S. 158 (1944) 10

Roe v Wade, 410 U.S. 113 (1973) . . 7

Tinker v Des Moines School District, 393 U.S. 303 (1969) 11

Webster v Reproductive Health Services, ____ U.S. ____, 57 U.S.L.W. 5023 (1989) 8, 20, 21

Wisconsin v Yoder, 406 U.S. 205 (1972) 10, 15

Statutes

Minn. Stat. Ann. §144.343(2) . . . 19

Minn. Stat. Ann. §144.343(3) . . . 16

LAW AND ARGUMENT

I. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF BOTH PARENTS OF A MINOR'S DECISION TO OBTAIN AN ABORTION.

A. Parental Notification is a Constitutionally Sound Response By The State For The Protection of Pregnant Minors.

The allegation on the part of the abortion providers that the parental notification requirement actually undermines family interest and communication for many minors is without foundation. Further, this allegation is based upon the false assumption that a minor has the same privacy interests as her adult counterpart.

The Court in Roe v Wade, 410 U.S. 113, 154 (1973), found that a pregnant

woman had a certain privacy right, "but that this right is not unqualified and must be considered against important state interests in regulation." The Court has found that the State's interests have outweighed the pregnant woman's privacy interests, even early in the term, in the use of public monies for abortions, Harris v McRae, 448 U. S. 297 (1980); in the requirement that the abortion be based upon "informed consent," Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1976), and in the prohibition of the use of public facilities or public employees to perform abortions, Webster v Reproductive Health Services, ____ U.S. ____ 57 U.S.L.W. 5023 (1989). It is abundantly clear that the privacy right which has been attached to a woman's decision to

abort a child is limited by certain state interests.

While there has appeared to be a lack of continuity or cohesiveness in the decisions addressing abortion regulation, two underlying principles emerge which may be helpful to the present analysis. First, the State may treat the abortion procedure as it does any other medically similar procedure. Second, the State should be able to treat minors differently from adults who seek an abortion.

Applying the first premise, based upon the interest of the State to regulate medical procedures, the State may impose certain restrictions and notice requirements on medical practitioners. The State requires that before a medical professional removes a

child's tonsils or her appendix he must obtain permission from the parent or guardian. If a child wishes to have her ears pierced, the practitioner must obtain permission from the child's parents or guardian. To suggest that the health interests of the State are less in the case of a child undergoing an abortion than they are when she has her ears pierced is to acquiesce to the absurd.

Second, this Court has long recognized that children and adults may be treated differently under the law and that there is a different protection under the Constitution for children than for adults. In the present case, there are several recognized rights which must be considered. The first is the right of the parents to "establish a home and

bring up children". Meyer v Nebraska, 262 U.S. 390, 399 (1923). The second interest is that of the State in "safeguarding the physical and psycholcgical well-being of a minor." Globe Newspaper Co. v Superior Court, 457 U.S. 596 (1982). The State may require a child to receive educational instruction, Wisconsin v Yoder 406 U.S. 205 (1972); it may prohibit children from being used in production of sexually explicit material, New York v Ferber, 458 U.S. 747 (1982); and it may limit the duration and type of employment in which a child may engage, Prince v Massachusetts, 321 U.S. 158 (1944). In his dissent in Danforth Justice Stevens noted:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the

consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel when he pleases, or even attend the exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman's already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.

428 U.S.at 102.

Finally, this Court has recognized that minors are entitled to certain protections afforded under the Constitution. Goss v Lopez, 419 U.S. 565 (1975); In re Gault, 387 U.S. 1 (1967); and Tinker v Des Moines School District, 393 U.S. 303 (1969). These Constitutional rights are limited by

virtue of the condition of the person's minority.

Without precedent this Court has acknowledged a distinction between "mature" minors and "immature" minors. Bellotti v Baird, 443 U.S. 622 (1979); City of Akron v Akron Center for Reproductive Health, 462 U.S. 416 (1983). This distinction, however, is not upheld elsewhere in the law.

The courts have not engaged in an analysis based upon the rights of a "mature" versus an "immature" minor in these areas. The debate concerning a "mature" versus an "immature" minor in these circumstances was properly conducted by the Minnesota legislature when it fixed the age of majority. The same is true with respect to the requirement of parental notification.

The legislature found, as evidenced by the statute, that those women under the age of eighteen are immature for the purpose of this statute and must be afforded greater protection. To judicially carve out a subset from the class of minors is an act of assumption of legislative right and authority.

The Court in reviewing the parental notification provision must balance the interests of the state in the child's welfare and the interest of parents in the upbringing of the child against the child's privacy interests in obtaining an abortion. Mr. Justice Stevens, in his dissent, provided an eloquent analysis of the role parents play in a minor's decision making process in Planned Parenthood of Central Missouri v Danforth, 428 U.S. 52 (1986).

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents, An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster the welfare by helping a pregnant distressed child to make and to implement a correct decision.

428 U.S. at 103-04.

This same reasoning is applicable to the present parental notification provision.

The parents are under a legal obligation to care for the child and may be otherwise legally responsible for the child. To require a parent to support a child and have legal responsibilities for the child while preventing or facilitating the prevention of a parent's role in the child's decision to procure an abortion is inconsistent if not irrational.

In Yoder, 406 U.S. 205, 232 (1972). this Court stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parent in the upbringing of their children is now established beyond debate

as an enduring American tradition." It is this tradition and function of parenting which is being assaulted by the attempt to eliminate parental notification in favor of notification only to a judicial officer.

B. The Two-Parent Notice Requirement Is Not Unduly Burdensome.

The Eighth Circuit concluded that "[b]y providing for judicial by-pass, the statute safeguards those minors for whom parental involvement may not be in this best interest while at the same time encouraging parental involvement for those minors who may be greatly assisted at a difficult time. We cannot conclude the two-parent notice requirement imposed in conjunction with a bypass option unduly burdens the right of a mature or

best interests minor to obtain an abortion." Hodgson v State of Minnesota, 853 F.2d 1452, 1464 (8th Cir. 1988).

The statute requires notice be given to both parents, if living, or one parent if one is dead or cannot be located through reasonably diligent efforts. Minn. Stat. Ann. §144.343(3). The abortion providers attack the two-parent notice requirement on two bases. First, the abortion providers alleged that the statute is unduly burdensome because of the statistical incidence of divorced or never-married biological parents. Second, the Court heard their allegations that such notification requirements were harmful to the minor particularly in a dysfunctional family.

The Court below noted:

Although some parents may be

> abusive, or at best unhelpful to their minor child faced with the decision whether to have an abortion, that is hardly a reason to discard pages of experience teaching that parents generally do as in their child's best interests. ***. While the District Court found that the non-custodial parent often has little communication with the child, this does not mandate completely casting aside the principles enunciated by the Supreme Court as to the parental role, which apply to non-custodial parents as well as custodial parents.

853 F.2d at 1464.

The argument which is based upon the absence of one parent through divorce or failure to marry versus the notification requirement as an instrument for compelling a certain degree of participation by the non-custodial parent. The statute merely requires notification or a good faith attempt to reach the non-custodial parent. The fact

that a number of minors who seek an abortion do not have regular contact with both parents should not be viewed as an overriding reason to thwart the State's efforts to uphold parental involvement in the child's decision making process.

The State's interests in promoting the general societal welfare are furthered through encouraging and supporting a two-parent family unit, even to the extent those family units may be fractured or may have never legally bonded.

Therefore, since certain minors seeking an abortion may be required to take an additional step prior to the abortion, such a requirement is clearly for the benefit of children and their parents and is not unduly burdensome.

II. THE STATE MAY CONSTITUTIONALLY REQUIRE NOTIFICATION OF A MINOR'S PARENTS 48 HOURS PRIOR TO PERFORMING AN ABORTION.

The Eighth Circuit found that "[c]onsidering the statute as a whole, the 48-hour delay requirement is not a significant burden upon the minor's abortion rights." 853 F.2d at 1465. The primary objection raised to the waiting period requirement has been with respect to external factors such as travel time, scheduling conflicts and weather conditions that may result in a delay of a week or more.

The statute merely prohibits an abortion being performed on a minor until after 48 hours from written notice to the parents. Minn. Stat. Ann §144.343(2). As the Court below noted, the minor is not prohibited from scheduling the

appointment or traveling to the area in which the abortion facility is located prior to the completion of the notification process. 853 F.2d at 1465.

The abortion providers stated that a delay of a period of a week would burden the minor because the pregnancy would have progressed into the second trimester and the minor would face additional costs, inconvenience and risk. As to the effect these factors have on the constitutionality of the statute, only the risk to the minor's health is particularly significant. Such an evaluation of the health risk to the minor in relation to the privacy rights involved in procuring an abortion is best left to the Minnesota legislature. The evidentiary process necessary to make such a determination is best undertaken

in a public hearing before a duly elected legislative body.

As to the two other concerns raised in the objection to a parental delay, the additional cost associated with certain regulations of abortion was recently addressed by this Court in Webster v Reproductive Health Services, ____ U.S. ____, 57 U.S.L.W. 5023 (1989). The Court noted that "the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the validity of the fetus. ***. But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe §188.029 to be Constitutional." 57 U.S.L.W. at 5031.

The District Court found that the

cost for an abortion in the first trimester (under 12 weeks gestation) was $225. The cost for an abortion performed from the twelfth through the fourteenth week of pregnancy was $275. Hodgson v State of Minnesota, 678 F.Supp. 756, 761 (D.Minn. 1986). Applying the abortion providers' argument the increase in cost caused by the delay described would be $50. Such an increase can hardly be said to be burdensome particularly in light of the fact that the court in Webster upheld the viability-testing regulation which would have added $125 to $250 to the cost of an abortion. 57 U.S.L.W. at 5029.

The final reason cited as an undue burden is the inconvenience the minor will be subject to by the delay. The State is permitted to make a value judgment which favors childbirth over

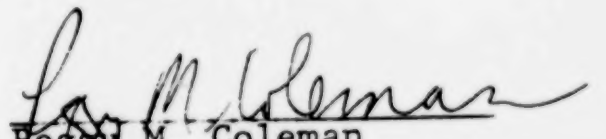
abortion Maher v Roe, 432 U.S. 464, 474 (1977). Any inconvenience a minor may encounter as a result of the 48-hour waiting period is a reflection of the State's responsibility to protect its children and a value judgment to favor childbirth over abortion. To suggest that the State has a Constitutional duty to provide a minor the opportunity to procure an abortion free from inconvenience is an affront to the Constitution and to the millions of individuals who diligently strive to protect unborn life.

CONCLUSION

Parental notification and a reasonable waiting period are Constitutionally sound regulations the State of Minnesota may implement to protect minors and to preserve the family unit.

For these reasons, in addition to those urged by Appellant herein, the decision below should be corrected and reversed.

Respectfully submitted,
American Family
Association, Inc.



Peggy M. Coleman
Legal Counsel
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this third day of August, 1989, to the following counsel of record:

Mr. William Z. Pentelovitch
Maslon, Edelman, Borman & Brand
801 Nicollett Mall
1800 Midwest Plaza
Minneapolis, Minnesota 55402

Attorney General Hubert H. Humphrey III
Mr. John B. Galus
Special Assistant Attorney General
102 State Capitol
St. Paul, Minnesota 55155

All parties required to be served have been served.

Peggy M. Coleman
Attorney for Amicus Curiae

(13) (7) (4)

Nos. 88-805, 88-1125, 88-1309

FILE
AUG 28 19
JOSEPH F. SPANIO
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

JANE HODGSON, *et al.*,

Petitioners,

v.

STATE OF MINNESOTA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE STATES OF OHIO AND MINNESOTA

MARK E. CHOPKO *
General Counsel

U.S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, DC 20017
(202) 541-3300

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. SIMPLIFYING THE INTRICATE RULES IN THIS COURT'S ABORTION JURISPRUDENCE EFFECTIVELY MEANS RECONSIDERATION OF *ROE v. WADE*	6
A. The Abortion Decisions Reflect Increasingly Complex Legislative Activity by the Court	7
B. Judicial Review of State Health and Welfare Laws Should Exhibit Deference to the Legislative Process	11
II. A STATE MAY PERMISSIBLY REQUIRE NOTICE TO PARENTS OF THEIR DAUGHTER'S INTENTION TO SEEK AN ABORTION AND A REASONABLE CHANCE TO CONFER WITH HER	14
A. Protection of Family Integrity Is An Important Public Welfare Interest that Merits Legislative Protection	15
B. The Court Should Reject Efforts to Redraft State Statutes That Promote the States' and the Family's Interests in Family Integrity	19
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: Page

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 7, 10, 14, 19
Akron Center for Reproductive Health v. Slaby, 854 F.2d 852 (6th Cir. 1988), *juris. noted*, 109 S.Ct. 3239 (1989) (No. 88-805) 6, 9, 10, 18
Application of President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) 16
Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1983) 12
Bellotti v. Baird (I), 428 U.S. 132 (1976) 9
Bellotti v. Baird (II), 443 U.S. 622 (1979) ..... *passim*
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 7
Berger v. New York, 388 U.S. 41 (1967) 8
Berman v. Parker, 348 U.S. 26 (1954) 12
Butler v. Pennsylvania, 51 U.S. (10 How.) 402 (1850) 11
Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) 15
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 11, 25
Ginsburg v. New York, 390 U.S. 629 (1968) 16, 18, 21
Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985) 10
Goss v. Lopez, 419 U.S. 565 (1975) 17
Harris v. McRae, 448 U.S. 297 (1980) 2
Hartigan v. Zbaraz, 484 U.S. 171 (1987) (evenly divided court), *aff'g*, 763 F.2d 1532 (7th Cir. 1985) 9
H. L. v. Matheson, 450 U.S. 398 (1981) ..... *passim*
Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 3240 (1989) (Nos. 88-1125, 88-1309) 6, 10, 18
Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) 20
In Re Gault, 387 U.S. 1 (1967) 17
Kleppe v. New Mexico, 426 U.S. 529 (1976) 21
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870) 5, 13, 25
Lehr v. Robertson, 463 U.S. 248 (1983) 4, 15, 18

TABLE OF AUTHORITIES—Continued

Page

Maher v. Roe, 432 U.S. 464 (1977) 19
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 12
McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 17
Meyer v. Nebraska, 262 U.S. 390 (1923) 15, 16
Michael H. v. Gerald D., 109 S.Ct. 2333 (1989) 17
Moore v. City of East Cleveland, 431 U.S. 494 (1977) 4, 15
New Jersey v. T.L.O., 469 U.S. 325 (1985) 16
Otis v. Parker, 187 U.S. 606 (1903) 5, 12, 25
Parham v. J.R., 442 U.S. 584 (1979) 17, 23
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 15, 16
Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) ..... *passim*
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) ..... *passim*
Prince v. Massachusetts, 321 U.S. 158 (1944) 14, 15, 16, 18
Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 12
Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*
Santosky v. Kramer, 455 U.S. 745 (1982) 5, 17
Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 19
Stanford v. Kentucky, 109 S.Ct. 2969 (1989) 12
Thompson v. Oklahoma, 108 S.Ct. 2687 (1988) 12, 22
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) ..... *passim*
Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) 16
Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) ..... *passim*
Wisconsin v. Yoder, 406 U.S. 205 (1972) 14, 15, 16, 17, 23

Statutory Provisions:

Omnibus Crime Control Act, Title III, 18 U.S.C. §§ 2510, *et seq.* 8

TABLE OF AUTHORITIES—Continued

Miscellaneous:	Page
Bernardin, "The Role of the Religious Leader in the Development of Public Policy," 34 *De Paul L. Rev.* (1984) (Address to ABA)	2
W. Blackstone, *Commentaries on the Laws of England* (1765)	15
Brief *Amicus Curiae* of U.S. Catholic Conference in *Webster v. Reproductive Health Services*, No. 88-605	7
B. Cardozo, *The Nature of the Judicial Process* (1921)	12
Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their 'Rights,'" 1976 *B.Y.U. L. Rev.* 604	15, 17
S. Jordan, *Decision Making for Incompetent Persons* (1985)	13
J. Kent, *Commentaries on American Law* (Da Capo ed. 1971)	15
G. Melton (ed.), *Adolescent Abortion: Psychological and Legal Issues* (1986)	24
J. Noonan, *A Private Choice: Abortion in America in the Seventies* (1979)	13
Rue, "Abortion in Relationship Context," 9 *Int'l Rev. of Natural Family Planning* 95 (1985)	23
U.S. Bishops' Committee for Pro-Life Activities and American Jewish Congress, *Joint Statement on Treatment of Handicapped Newborns* (1985)	19
U.S. Bishops, *Statement on the Christian Family* (Nov. 21, 1949)	18
U.S. Catholic Conference, Administrative Board, *Political Responsibility: Choices for the 1980s* (Oct. 26, 1979) and (Rev. Ed. Mar. 22, 1984)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-805, 88-1125, 88-1309

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

JANE HODGSON, *et al.*,

Petitioners,

v.

STATE OF MINNESOTA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF THE STATES OF OHIO AND MINNESOTA

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic

Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the Church are the protection of family life and the protection of unborn life.[1] Both are implicated in the cases at bar.

Both Ohio and Minnesota request this Court to clarify the scope of a State's authority to legislate in the area of abortion when it concerns the rights and responsibilities of parents regarding their children. Because both States seek more definitive and detailed judicial direction of the content of their laws, this *amicus* is concerned that the Court will be tempted to grant those requests. Less not more specificity about the intricacies and facets of legislation is required from this Court. Unless plainly unconstitutional, a legislature's balance of the various rights, interests, and obligations in abortion, as in other areas of the law, should receive judicial deference, not redrafting. These cases offer the Court an opportunity to restore what *Roe v. Wade* and subsequent cases have denied: legitimate legislative prerogatives to set public policy in matters deeply affecting the welfare of parents and children.

---

[1] Although such values may have religious or denominational roots, they are shared by many, including those who profess no religion. The suggestion that legislation restricting abortion "establishes" religion is spurious. *Harris v. McRae*, 448 U.S. 297 (1980). The mere fact that religious organizations advocate particular legislative approaches does not establish "religion" but only "free expression," a right we do not surrender by either self-restraint or enforced silence. *Compare Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3085 (1989) (Stevens, J., dissenting) *with* Bernardin, "The Role of the Religious Leader in the Development of Public Policy," 34 *DePaul L. Rev.* 1 (1984) (Address to ABA).

These cases also present an opportunity for this Court to resist efforts to portray parental notice laws as creating conflicts between rights of parents and rights of children, and in the process, to strengthen family integrity. This Court has historically affirmed and strengthened family life in many areas, but has not done so meaningfully in the context of abortion. If a family is to retain any vitality when confronted by this reality, its members must, at a minimum, be entitled to reflect upon and discuss whether a pregnant dependent adolescent should consider termination of her pregnancy through abortion. To rule that a State may not shield the family for a brief time for this kind of consultation is to deny family integrity and ultimately to undermine familial relationships.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

In its most recent Term, this Court upheld portions of a Missouri statute regulating abortion and establishing the State's policy regarding unborn life. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). A plurality recognized a conflict with existing decisions on abortion and expressed a willingness to narrow their scope or even overrule them if necessary. Certainly, as the plurality there recognized, the Court's jurisprudence has encouraged judicial involvement in the crafting of a "code of regulations rather than a body of constitutional doctrine." *Id.* at 3057. Its abortion decisions being essentially legislative, this Court until recently effectively reserved to the judiciary the task of writing the rules that would govern abortion regulation.

The States have continually expressed frustration over the constant and detailed involvement of the federal courts in the development of their statutory law. A particular area of concern has been the extent to which this Court has constitutionalized an adolescent's choice to have

an abortion, contrary to her parents' views or even without their knowledge. Starting with *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), this Court has ruled in one fashion or another on the permissible parameters of that choice some eight times. Still, the ultimate issue of who must settle the scope of parents' involvement in their child's decisions persists. As the courts continue to prescribe the intricate details of the law, the legislatures—the traditional forum in which such issues are resolved—are stripped of their legitimate policy-making functions. In the process, the family unit suffers.

Society owes much of its stability to the strength of the family and has a vital interest in preserving family integrity. "The intangible fibers that connect parents and child . . . are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Indeed, "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality).

Abortion chalienges that institution and its values, as well as society itself, in fundamental ways. Under the abortion decisions of this Court, one member of a household may dictate to all the others whether new life—plainly a member of the family—may be allowed to be born. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 70-71, 74-75. When the person making that decision is an adolescent, the implications are especially serious. If she is to appreciate meaningfully the import and consequences of her actions, the adolescent needs guidance from knowledgeable and caring persons, not abortion clinic employees who lack intimate information about her life. *Id.* at 91 (Stewart, J., concurring).

The persons she may and should look to are her parents or those who legally stand in their place. *Bellotti v. Baird (II)*, 443 U.S. 622, 640 (1979) (plurality).

This Court has recognized the importance of parental consultation and consent when the person seeking an abortion is an adolescent. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983); *H.L. v. Matheson*, 450 U.S. 398, 409-11 (1981). The process of intra-family discussion and decisionmaking is advanced by statutes requiring that an adolescent pause for a brief time, facilitating consultation with her parents. It is well settled that such a legislative judgment, which reflects a proper balance of State, family and individual interests, should not be lightly set aside, and then only when it is "clearly incompatible" with supervening constitutional mandate. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1870); *Otis v. Parker*, 187 U.S. 606, 608 (1903). The legitimacy of such a legislative judgment, presented in this case, cannot be seriously doubted. The normative principle that should guide this Court is its teaching that parents, even in families under stress, have a "vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). That vital interest is properly advanced by the statutes under review here, and should be affirmed by this Court.

But more is needed. The underlying problem presented by these cases is the narrow role some would accord the legislature in the regulation of abortion. Opponents of parental notice demand that the trial courts entertain their opinion evidence that such laws are impractical and unwise, and for this reason, unconstitutional. Whatever merit these opinions might have, they are misdirected. Such argumentation, with corresponding rebuttal, would ordinarily be presented to the legislatures, not the courts, for debate and resolution. The increasingly intricate jurisprudence of this Court encourages, unfortunately, a

contrary result. A thorough reevaluation of *Roe v. Wade*, 410 U.S. 113 (1973), and the sixteen years of subsequent decisions, would lead to, at least, one singular result—restoration of the legislative function to the State legislatures. That kind of reconsideration should begin with these cases, where such issues are legitimately presented.

ARGUMENT

I

SIMPLIFYING THE INTRICATE RULES IN THIS COURT'S ABORTION JURISPRUDENCE EFFECTIVELY MEANS RECONSIDERATION OF *ROE v. WADE*.

Both Ohio and Minnesota sought review from this Court to clarify certain questions of statutory detail on the general issue of parental notice in instances of adolescent abortion. *E.g.*, Jurisdictional Statement of Ohio at 18-19; Cross-Petition for Writ of Certiorari of Minnesota at 16-17. Both lower courts endorsed the principle of parental involvement in the lives of their children. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 857-58 (6th Cir. 1988); *Hodgson v. Minnesota*, 853 F.2d 1452, 1455 (8th Cir. 1988) (*en banc*). However, both courts questioned specific aspects of the statutes and in fact found fault in one or another detail of the statutes. *Akron Center*, 854 F.2d at 861; *Hodgson*, 853 F.2d at 1457. Minnesota notes that, in any other context, the principle advanced by the statute would be nondebatable: that parents should know about important aspects of their children's lives and be involved in their significant, life-affecting decisions. Cross-Petition at 15. Ohio goes further, noting that this case is a "paradigm of the inability of State legislatures to enact laws that effectuate the States' interest in encouraging parental involvement in the decision of a minor." Jurisdictional Statement at 16. Both States call for more definitive direction about the details of their statutes

from this Court. In other words, they seek an outline of a permissible statute.

These cases illustrate problems inherent in this Court's abortion jurisprudence. The Court has taken onto itself a broad rule-writing function, and created a code that has become even more ponderous and difficult, not only for the legislatures to interpret and apply, but also for courts to review. Until this Court is willing to face the issues legitimately presented by these cases[2] and reconsider the jurisprudence begun in *Roe v. Wade*, these problems will persist.[3]

A. The Abortion Decisions Reflect Increasingly Complex Legislative Activity by the Court.

In 1973, the Court created a new constitutional right to obtain an abortion with an accompanying "legislative"

---

[2] Neither state has yet expressly sought reconsideration of *Roe v. Wade*. *But see* Ohio Jurisdictional Statement at 16-17. There is sentiment on the Court for avoiding such reconsideration unless the issue is actually presented *and* a proper party demands it. *Compare Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting) (conflict but no demand) *with Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3060 (1989) (O'Connor, J., concurring) (demand but no conflict). In these cases, however, the scope and role of proper legislative activity is raised legitimately and should be resolved. *See id.* at 3058 (plurality). So too, the legislative balance given to competing interests, each of which this Court has called "fundamental" at one time or another, gives a legitimate basis on which to reconsider *Roe v. Wade*. *See* note 3, *infra*.

[3] Because the existence of a federal constitutional right to abortion is crucial to subject matter jurisdiction, the efficacy of *Roe v. Wade*, under which the federal question is presented, is always at issue in abortion cases, whether raised by a party or not. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 547 (1986). It is plain that unless the Court is willing to take action in an appropriate case, such as these, litigation will compound the Court's problems and the problems for those who must live or die with its decisions. Brief *Amicus Curiae* of U.S. Catholic Conference in *Webster v. Reproductive Health Services*, No. 88-605 at 4-6.

outline for how the right should be exercised.[4] *Roe v. Wade*, 410 U.S. at 156. In that case, however, this Court declined to rule that the newly discovered right was broad enough to encompass the decision of a minor to terminate her pregnancy. *Id.* at 165 n.67. In 1976, when the issue was presented, this Court concluded that a child had at least some protected privacy interest that precluded an absolute decision on her behalf by her parents, backed by the authority of the law. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Although this Court discussed the rights of minors to seek and obtain abortions without regard to the views of their parents, the Court's holding does not use language that reflects the adolescent in her precise status, namely, an unemancipated minor whose most fundamental relationship is not with her physician but with her parents.[5] Instead, it created a conflict between a "patient" (the adolescent) and a "third party" (her parents) and resolved the supposed struggle in favor of the "decision

---

[4] The Court essentially acts "legislatively" any time it announces rules or guides the subsequent action of the legislature. *Compare Berger v. New York*, 388 U.S. 41 (1967) *with* Omnibus Crime Control Act, Title III, 18 U.S.C. §§ 2510, *et seq.* Nonetheless, the Court's abortion jurisprudence goes much further than other examples of judicial direction of legislation. Whereas other illustrations draw distinctions or offer singular guidance, abortion cases are repetitious and divisive, and involve the courts in readjusting delicate balances, resolving matters of deep dispute, and redrafting the intricate details of statutes and regulations.

[5] Justice Stevens dissented, and implied that there was some broader role for the States to play in this jurisprudence. For example, in *Danforth* he would have voted to uphold the parental consent requirement as consistent with the holding in *Roe*. 428 U.S. at 102-103. On balance, Justice Stevens indicated that "a legislative determination that children should be entitled to the advice and moral support of parents is not irrational." Indeed, he pointed out the absence of focus by the majority on the status of the child and relationship with her parents, and the unseemly focus on the relationship with the physician as the "constitutionally permissible yardstick for determining whether a young woman can independently make an abortion decision." *Id.* at 105.

of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding [parental] consent." *Id.* (emphasis added).

By 1979, the Court took further legislative action in *Bellotti v. Baird (II)*, 443 U.S. 622 (1979),[6] when it not only held the Massachusetts consent law invalid but also specified the circumstances under which parental consent could be valid and included an outline for what has become known as a judicial bypass procedure. It should therefore not have been surprising that in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983), such a statute was upheld when it followed the recipe offered in *Bellotti II*. Although the present cases deal with parental notice rather than consent, the same kind of detailed judicial direction is common nonetheless.

In these many years of abortion litigation, in only one case has this Court ruled directly on parental notice.[7] In *H. L. v. Matheson*, 450 U.S. 398 (1981), the Court upheld a Utah parental notice statute but only after the majority narrowed the class represented by the plaintiffs to unemancipated dependent minors. It did not answer the question presented by the statute precisely, nor did

---

[6] In 1976 the Court in *Bellotti v. Baird (I)*, 428 U.S. 132 (1976), held open the prospect that the Court might defer to legislative judgment in particular cases by abstaining from passing on the particulars of the Massachusetts statute until the Massachusetts Supreme Judicial Court had construed that law. By abstaining, this Court reserved the right to decide in appropriate cases when consent could be required and under what circumstances, and decided *not* to strengthen the legislative role. *See Bellotti v. Baird (II)*, 443 U.S. 622, 656 n.4 (1979).

[7] In *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), this Court divided evenly without opinion on the validity of a State statute that coupled parental notice with a waiting period. That order left standing a lower court determination that such a law was unconstitutional. 763 F.2d 1532 (7th Cir. 1985). Unfortunately, despite the narrow effect of the ruling, one of the courts below attempted to read some larger precedential principle into it. *Akron Center v. Slaby*, 854 F.2d at 861.

it answer the question posed by Justice Stevens in his concurring opinion. Justice Stevens pointed out that unlike parental consent laws, parental notice involved a much different calculus of competing values, most notably because it did not require a final parental decision. The principles he espoused in earlier cases (note 5, *supra*) "plainly dictate[d] that the Utah statute now before us be upheld." 450 U.S. at 421. Because the majority specifically narrowed the scope of its own decision, *H. L. v. Matheson* became the subject of speculation in the next series of abortion cases.

In *Akron v. Akron Center for Reproductive Health*, the majority asserted, but did not decide, that an "alternative procedure" is required under any law that would provide for parental involvement in their child's abortion decision. 462 U.S. 416, 428 n.10 (1983). Lower courts reading the Akron majority *dicta* believe they have divined both the mind of the Court favoring particular kinds of statutes as well as the specifics of the "legislative" relief that this Court would provide if the case were presented. *E.g., Glick v. McKay*, 616 F. Supp. 322, 324-25 (D. Nev. 1985).[8] This supposed need for an alternative procedure has invited the lower courts in these very cases to mandate the specifics of parental notice statutes. *Akron Center v. Slaby*, 854 F.2d at 860-61; *Hodgson v. Minnesota*, 853 F.2d at 1455-56. That this issue was not even presented in *H. L.*, as pointed out by Justice O'Connor in *Akron*, 462 U.S. at 469 n.12, was not discussed in those cases. Nor was it apparent that

[8] In the cases at bar, the Ohio litigation is truly a paradigm of the inability of the legislature to legislate. Juris. Stat. at 16. In that case, the court of appeals rejected the statute simply on the alleged inadequacy of various details in the bypass or "alternative" procedure. It is difficult to imagine how a court could act less like a court and more like a legislature in deciding how a statute *should* be constructed. The point is not how an "alternative" procedure is designed or even if one is "required." Rather, the decisionmaker and the designer should be the State legislature, not a federal court.

this kind of judicial role was inappropriate, or subject to any limits.

As the plurality in *Webster v. Reproductive Health Services* noted, the Court's abortion jurisprudence has indeed become "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine." 109 S.Ct. at 3057. The solution to these cases does not lie in adding to the weave of the fabric but in untangling it. When courts usurp the legislative role, they frustrate not only the legislatures but themselves. *Id.* "The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Id.* at 3058. When the legislature balances competing interests to promote meaningful family consultation on issues that are deeply life-affecting, that legislative judgment is entitled to great respect and, unless plainly unconstitutional, should be sustained.

B. Judicial Review of State Health and Welfare Laws Should Exhibit Deference to the Legislative Process.

Chief Justice John Marshall once counseled that judging the unconstitutionality of State legislation was a task of "much delicacy, which ought seldom, if ever to be decided in the affirmative in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). *See Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415 (1850). Legislation should not be voided "on slight implication and vague conjecture." *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 128. Rather, in reviewing the conformance of a statute with the Constitution, a court must not so act unless and until it forms "a clear and strong conviction of their incompatability [sic] with each other." *Id.* The philosophy inherent in Chief Justice Marshall's admonition is judicial restraint—that courts reach constitutional issues only when strictly necessary. Among other

things, this philosophy serves "the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

The constitutional authority to resolve public debates over which actions shall be undertaken in the public interest is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). A legislature's role in matters affecting important health and safety interests is paramount, especially when it resolves matters of intense public controversy.[9] *See Webster v. Reproductive Health Services*, 109 S.Ct. at 3058; *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794-96 (1986) (White, J., dissenting). It is not the province of a court to frustrate the legislative will because the law "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. at 608; *see Baltimore Gas & Electric Company v. NRDC*, 462 U.S. 87, 97 (1983); B. Cardozo, *The Nature of the Judicial Proc-*

[9] In the juvenile death penalty cases, this point has been amply illustrated. In *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988), a plurality decided there were numerous State statutes expressing the view that minors did not have the experience, education, or maturity to evaluate the consequences of their conduct, citing, among other things, *Bellotti v. Baird*. *See id.* at 2709 (O'Connor, J., concurring). This rule of law was strengthened, not vitiated, by reconsideration of the juvenile death penalty cases in the last Term. *Stanford v. Kentucky* stands for the proposition that the jury system is best suited to determine individual responsibility *in the absence of some considered legislative judgment* evaluating the entire class of juveniles. 109 S.Ct. 2969, 2975-76 (1989). Thus the views expressed last Term reinforced the principle that legislative judgments on matters within their competence should ordinarily be upheld. Unfortunately, that has not always been the case when abortion statutes are involved. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

ess, 141 (1921). Rather, it is incumbent upon those attacking a statute to show that the law is "clearly incompatible" with the Constitution. *Legal Tender Cases*, 79 U.S. at 530-31. Although courts are and should be vigilant in the protection of fundamental rights (such as religious freedom), the means by which the courts act are essentially procedural, allocating burdens of proof and setting standards of certitude. Courts do not displace the legislative process entirely, especially where there is more than one claim to a fundamental interest.[10]

Because the intricate jurisprudence of this Court on abortion has departed from these normative principles, it continues to frustrate even a carefully exercised and balanced legislative will. The problem lies in the nature of the jurisprudence rather than in particular statutes that come before the Court. The law becomes more cumbersome to administer, and more difficult to predict with certainty by the States. *Thornburgh v. American College*, 476 U.S. at 814 (O'Connor, J., dissenting). The answer for the Court, not just for these cases, but for the many cases to come, lies in a thorough reconsideration of the line of cases that begins with *Roe v. Wade*. Such a reconsideration was demanded by the dissenters in *Thornburgh* and *Akron* and finally broached by a plurality in *Webster*. While there may be merit in the

[10] In abortion decisions, the calculation is never simply one of individual interests competing with interests of the State. The choices made in an abortion decision are complex and certainly affect the life interests of others: the unborn child, the father, other members of the family, and society itself. S. Jordan, *Decision Making for Incompetent Persons* 19 (1985). The decision implicates the procreative interests of both partners, can affect the sanctity of a marriage relationship, ends a life, and has other impacts on family relations, alienating children from their parents and separating those parents from their unborn grandchildren. It subjugates liberties that in other contexts are found to be fundamental, but in this context are found to be less worthy of protection. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 90-95, 190 (1979).

suggestion that such reconsideration should allow "time enough . . . to do so carefully," *Webster*, 109 S.Ct. at 3061 (O'Connor, J., concurring), the problem grows more urgent with each case. For this Court the time has come to decide whether to continue to write rules or to allow legislatures to legislate. *Akron*, 462 U.S. at 456 (O'Connor, J., dissenting).

II

A STATE MAY PERMISSIBLY REQUIRE NOTICE TO PARENTS OF THEIR MINOR DAUGHTER'S INTENTION TO SEEK AN ABORTION AND A REASONABLE CHANCE FOR THEM TO CONFER WITH HER PRIOR TO EXECUTION OF HER DECISION TO ABORT HER CHILD.

Both States present a plain, and plainly valid, argument to this Court through their respective parental notice laws: parents should know about and be involved in life-affecting decisions made by their children. Such a proposition would appear to be beyond dispute. However, those who oppose parental notice in these cases suggest that these legislative efforts neither aid families nor promote legitimate exercise of rights, to the extent that parents may act to deny their adolescent daughters unfettered access to abortion. By framing the debate in these cases as a conflict between parents' rights and children's rights, those opponents have missed the most important point. This Court has cautioned against "intrusion by a State into family decisions," *Wisconsin v. Yoder* 406 U.S. 205, 231 (1972), delineating instead a "private realm of the family which the State cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). As with other significant subjects that might come up from time to time within a family, the family must be given the opportunity to consider and resolve for itself matters relating to abortion.

A. Protection of Family Integrity Is an Important Public Welfare Interest that Merits Legislative Protection.

The mutual support and interdependence of family members have been strongly endorsed and protected in American law. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. at 256. Protection of the family is a principle of life and law "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).[11]

Drawing on this rich historical tradition, this Court found the "natural duty of parents" to educate their children to be part of the fourteenth amendment liberty interest in marriage, establishing a home, and raising children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). Parental nurture and direction of children is more than a "right" but a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).[12] In *Prince v. Massachusetts*, this Court stated:

---

[11] At common law in England and in the United States, the duties of parents to maintain, support, and educate their children were well-established. I W. Blackstone, *Commentaries on the Laws of England*, Ch. 16, 435, 440-41 (1765); II J. Kent, *Commentaries on American Law*, 160 (Da Capo ed. 1971). The duties of children relative to their parents were also well-established. *Id.* The common law family relationship may be described as mutual and reciprocal. I Blackstone at 440-41; II Kent at 170-73. Each member was bonded to the other in what one court called a "mutual interest in interdependence." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). *See* Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their *'Rights,'*" 1976 *B.Y.U. L.Rev.* 604, 615-17, 651-52.

[12] The Court in *Wisconsin v. Yoder*, 406 U.S. 205, 213, 232 (1972) described *Pierce v. Society of Sisters* as a "charter of the

> It is cardinal with us that the custody, care and nurture of the child must reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. And it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the *private realm of the family which the State cannot enter.*

321 U.S. at 166 (emphasis added); *see Ginsburg v. New York*, 390 U.S. 629, 639 (1968).[13] The "primary role of the parents in the upbringing of their children is now established as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. at 232.

Children, however, have rights as against certain kinds of parental actions and as against the State. Children cannot, at their parents' direction, be refused beneficial medical treatment or subjected to extensive work hours. *See Application of President and Directors of Georgetown College*, 331 F.2d 1000, 1007-1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *Prince v. Massachusetts*, *supra*. Similarly, children cannot be denied rights to political expression or to an expectation of privacy in public schools. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 506, 511 (1969); *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). Nor can children be

---

rights of parents to direct the religious upbringing of their children." If anything, this should apply even more strongly to situations involving consideration of abortion where strong moral and religious convictions are implicated.

[13] In *Ginsburg v. New York*, the Court upheld a statutory ban on sale of non-obscene but adult-oriented magazines to all minors. 390 U.S. 629 (1968). The Court observed it "has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society [quotation from *Prince v. Massachusetts* omitted]. The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639.

deprived of liberty without due process in public schools or in courts. *Goss v. Lopez*, 419 U.S. 565, 574, 575 (1975); *In Re Gault*, 387 U.S. 1, 13 (1967). The Court has not automatically either extended these rights to children, or granted them the full adult scope of the rights; both actions have been made dependent upon the nature of the countervailing State and parental interests. *E.g.*, *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

The resulting blend of "rights," "duties," and "obligations" is the family unit as it is now recognized in the law.[14] Although it has recognized children's "rights," the Court has affirmed the principle that parents play a "substantial, if not the dominant role" in their children's lives. *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *see Wisconsin v. Yoder*, 406 U.S. at 244 (Douglas, J., dissenting). This role is displaced only where there is a serious threat to the child's health or safety or a "potential for significant social burdens." *Id.* at 233-34; *see Thornburgh*, 476 U.S. at 793 n.2 (White, J., dissenting). Even in families where relations between parents and children are strained, parents, because of their interest in preventing the "destruction of their family life," must have a chance to resolve their problems apart from State interference. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).[15]

In *Bellotti v. Baird (II)*, the plurality strongly endorsed the need for familial involvement in the lives of dependent children. 443 U.S. at 634, 640. Protection of family integrity may be advanced even in competition

---

[14] Hafen, *supra* note 11 at 616-17 and authorities noted therein.

[15] This Court recently reaffirmed its long-standing deference to legislative judgments preserving the integrity of the marital family against asserted rights to establish paternity. *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2342, 2345 (1989).

with the separate interests of its members. "The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Id.* at 634. In particular, relying on *Ginsburg v. New York* and *Prince v. Massachusetts*, the plurality noted that "minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635-36.

Although neither lower court in the cases on review disputed these principles,[16] the opponents of the legislation in effect urge this Court to abandon the time honored conclusion that the integrity of the family unit is itself a privacy interest deserving constitutional protection. *Lehr v. Robertson*, 463 U.S. at 258. For reasons developed below, in many cases such as the present, that interest is superior to and may limit the interest of a minor in unfettered access to abortion. More to the point, protection of the family is sufficiently important to justify appropriate limitations on a minor's access to abortion on her exclusive demand. "There is . . . an important State interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." *Id.* at 648. This case presents an opportunity to reaffirm that principle.[17]

---

[16] *Akron Center v. Slaby*, 854 F.2d at 857-58; *Hodgson v. Minnesota*, 853 F.2d at 1555.

[17] The Catholic Church's moral teaching on the role of and protection for the family reflects similar considerations. The Vatican Charter of the Rights of the Family (Oct. 22, 1983) provides that: "[p]ublic authorities must respect and foster the dignity, lawful independence, privacy, integrity and stability of every family (Article 6)." The Bishops of the United States have long recognized the need to stabilize and strengthen family life. U.S. Bishops, *Statement on the Christian Family* ¶¶ 8-10 (Nov. 21, 1949); USCC Administrative Board, *Political Responsibility: Choices for the 1980s* ¶¶ 42-43 (Oct. 26, 1979) (Rev. Ed. Mar. 22, 1984). They have likewise recognized that parents may not do that which is injurious to their children. U.S. Bishops' Committee for Pro-Life Activities and American Jewish Congress, *Joint Statement on Treatment of Handicapped Newborns* (1985).

B. The Court Should Reject Efforts to Redraft State Statutes that Promote the States' and the Family's Interests in Family Integrity.

Parental notice statutes are well within the permissible range of legislative action under this Court's family jurisprudence. Through these statutes, the States assure some private space for a family to discuss an adolescent's decision to seek an abortion. *Bellotti v. Baird (II)*, *supra*. It is as if the State has drawn a line around the family members to shield them for a brief moment to allow discussion of a decision that intimately affects the entire family relationship.[18] Both the parents' rights and their child's rights are implicated by abortion. *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 428 n.10 (1983). The child's desire for her solution can strain against her parents' natural desire to provide guidance, direction, and support in making a responsible decision. In that time and private space, no one "right" is more important than the others. The integrity of the family is at stake. In devising such a statute, the legislature may decide that the family members normally act out of love, concern, and respect for each other. Evidence that a statute is not operating as designed, or that perhaps the legislature incorrectly balanced the various outlooks and perspectives, should not be presented to a court on judicial review, but rather should be presented to the legislature which has the constitutional authority in the first instance to make such a resolution. *Maher v. Roe*, 432

---

[18] "The importance of the familial relationship, to the individual involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' . . . ." *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (citing *Wisconsin v. Yoder*, 406 U.S. at 231-34).

U.S. 464, 479 (1977). In a doubtful case, in which there are various viewpoints in competition with each other in the legislature, that judgment itself may not be displaced because it is alleged to be unwise or impractical.

What the statutory opponents demand of this Court is that federal district courts become the means by which such legislative action is reconsidered and refined. They insist that, although legislatures may act on the basis of factual presumptions in enacting statutes, subsequent evidence that casts doubt on the wisdom or efficacy of a particular approach and its underlying presumptions is an adequate basis for any court to declare that statute unconstitutional. Hodgson Petition for Writ of Certiorari at 16-17, 21, 23.[19] As the *Hodgson* court noted, the opponents' record in the district court "raise[d] considerable questions about the practical wisdom of this statute. Nevertheless, we believe these are questions for the legislature." 853 F.2d at 1459. The opponents' renewed insistence that the lower courts should have relied only on the trial record that they created[20] appears to be nothing more than a guise to entice a court to substitute its judgment for that of a legislature. Redrafting the law should be the task of those who initially weighed the competing evidence and resolved conflicts in drafting the statute.

---

[19] In that petition, the statutory opponents urge the Court to void not just Minnesota's two parent notice statute, but more broadly, "to revisit the question of the constitutionality of [notice] laws . . . on the factual record herein." Hodgson Petition at 17. Such an action would not only be inappropriate for lack of standing and other reasons, it shows the reach of the opponents' aims—to shut children off from parents.

[20] For example, the overwhelming majority of witnesses testified as part of the opponents' main case in *Hodgson v. Minnesota*, 648 F. Supp. 756, 774 (D. Minn. 1986). The district court nonetheless found that parental notice was effective. *E.g.*, Finding 58, *id.* at 766.

These are not cases in which the States blur the distinction between facial and operational challenges by urging a more rational and deferential judicial review. If a statute that is valid on its face nonetheless unduly burdens a constitutional right in practice, a court is free to consider that evidence and so rule without engaging in "legislative" activity. Here, only some of the argument or evidence goes to the application of either statute on review. The bulk of the opponents' case is directed at pushing this Court to redraw lines already set by the legislature, something a court may not do. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541 n.10 (1976). These opponents, having lost in their legislatures, seek to enlist the courts in refighting their battles. Why these opponents could not just as readily reopen the legislative process goes unexplained. One searches the opponents' papers and the opinions below in vain for some reason excusing their abandonment of the legislative process.

One possible excuse implicit in the opponents' position lies in the fact that this Court continues to describe a woman's choice of abortion in constitutional terms. Although this *amicus* plainly disagrees, assuming *arguendo* the existence of a constitutional right, there is still no reason to second-guess legitimate choices designed to protect the family. First, the mere existence of a constitutional right does not empower the judiciary to assume a greater role. The first amendment interest advanced in *Ginsburg v. New York* is presumably no less fundamental. 390 U.S. at 636. Yet this Court flatly refused to sustain a child's interest as the dominant concern, siding instead with the legislature and the parents' obligations and interests. *Id.* at 639. Neither the absence of an opportunity to demonstrate "emancipation" or "maturity," nor the prospect of a parental veto was fatal. Likewise in the abortion context, at least a plurality has recognized that advancement of parental authority was not "inconsistent with our tradition of in-

dividual liberty . . . . Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti v. Baird (II)*, 443 U.S. at 639. This implicit acknowledgment of the parents' fundamental rights offers more, not less, reason for deference to legislation that seeks to balance and resolve various concerns.

Second, the mere existence of a constitutional right does not guarantee the corresponding capacity to exercise it wisely. For this reason there are many restrictions on otherwise available and necessarily private choices for adolescents, without regard to "emancipation" or "maturity," including, *inter alia*, the privilege to drink, drive an automobile, marry, make purchases or enter into contracts. *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2698-99 (1988); *see* note 9, *supra*. Yet opponents of parental notice accompanied by a waiting period for family discussion assert that such statutes "unduly burden" a minor's decision to obtain an abortion because parents might, on occasion, discourage the abortion that these opponents have decided is in the best interests of all minors.[21] This assertion involves two erroneous assumptions: that parents act contrary to their children's best interests and that abortion *is* in the best interests of the child.

As to the first assumption, our common law heritage from Blackstone and Kent to the most recent decisions of this Court (see note 11, *supra*) presumes that the

[21] For example, one of the principal pieces of evidence that the opponents have used against the Minnesota law is the statistic that the teenage birthrate has increased over the duration of the statute, while remaining more or less constant for the age group not covered by the statute. The implicit assumption is that those births would or should have been prevented by abortion. Hodgson Petition at 11 n.16. This is relevant only if there is a mandate to perform as many abortions as possible.

"natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. at 602. Although "experience and reality may rebut what the law accepts as a starting point . . ., [s]imply because the decision of a parent is not agreeable to the child or because it involves risks does not automatically transfer the power to make that decision from the parents . . . ." *Id.* at 602, 603. This Court has repeatedly resisted the suggestion that it presume the worst. *H.L. v. Matheson*, 450 U.S. at 413; *Wisconsin v. Yoder*, 406 U.S. at 232. Where evidence exists as to specific concerns, it does not serve the public interest for this Court, on the basis of "expert" opinion in one trial court, to upset centuries of tradition.[22] Respecting parental rights and familial obligations, other decisions of this Court allow parents a "substantial, if not the dominant role" in making medical treatment decisions for their children. *Parham v. J.R.*, 442 U.S. at 604 (analyzing and rejecting *Danforth*). Because this Court has found that "children, even in adolescence, simply are not able to make sound judgments concerning . . . medical care or treatment," *Parham v. J.R.*, 442 U.S. at 603, it must not divest parents of meaningful input to their dependent child's abortion decision. What the Court recognized in *H.L. v. Matheson*, 450 U.S. at 412-13, about the grave consequences of abortion strengthens the need for effective and meaningful parental involvement.

As to the second assumption, *H.L. v. Matheson* authoritatively dismissed the assertion that abortion is in the child's best interest:

[22] If this is not the measure for constitutional adjudication, it would be just as reasonable for this Court to note the existence of contrary expert opinion supporting the need for parental consultation in these circumstances. Rue, "Abortion in Relationship Context," 9 *Int'l Rev. of Natural Family Planning* 95, 97-99 (1985). Crisis, argument, and discussion are inherent in family decision-making. Fear of the process does not justify judicially mandated avoidance by those who stand to benefit most.

> If the pregnant girl elects to carry her child to term, the *medical* decision to be made entails few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort.

450 U.S. at 412-13; *see id.* at 411 and n.20 (describing unique medical, emotional and psychological complications associated with an adolescent's decision to have an abortion not present in adult cases). These considerations are particularly important in the abortion context:

> The abortion decision differs in important ways from other decisions that may be made during minority.
>
> * * * *
>
> [C]onsidering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. . . . [T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.
>
> Yet, an abortion may not be the best choice for a minor. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interest.

Bellotti v. Baird (II), 443 U.S. at 642-43.[23] G. Melton (ed.), *Adolescent Abortion: Psychological and Legal*

[23] The plurality endorsed Justice Stewart's view that the State may encourage a minor "to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Id.* at 641 (quoting *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring)). Justice Stewart tied his reliance on parental involvement to the fact that the adolescent "under emotional stress, may be ill-equipped to make [the decision] without mature advice and emotional support." *Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring). Clinic personnel, with an economic interest at stake, would not likely offer such "counsel and support." *Id.* As the plurality expanded in *Bellotti v. Baird (II)*, 443 U.S. at 642 n.21: "Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent and unethical." Parental "consulation and consent" are the "traditional way by which states have sought to protect children from their own immature and improvident decisions." *Planned Parenthood v. Danforth*, 428 U.S. at 95 (White, J., dissenting).

Issues 84 (1986). Those consequences are too grave to secure unrestricted exercise of the abortion decision for minors.

The effort to overturn the considered judgment of the legislatures, advancing meaningful family discussion over the *de minimis* "burden" imposed on the adolescent, must be firmly rejected. In *H.L. v. Matheson*, *supra*, this Court found that any inhibition of the decision to obtain an abortion based on actual or perceived parental action due to statutory notice was of *no* constitutional significance. Moreover, this Court has upheld consent statutes which present the possibility that parents may withhold consent and there may be *no* abortion. *Planned Parenthood Ass'n v. Ashcroft*, *supra*. Given these prior decisions, the statutes challenged here are plainly constitutional.

It is not the province of the courts to speculate about the quality of family relations and about the wisdom of particular legislation. *See Otis v. Parker*, 187 U.S. at 608. To do so is to exercise judicial review by, as John Marshall stated, "slight implication and vague conjecture." *Fletcher v. Peck*, *supra*. Unless the legislation is "clearly incompatible" with the Constitution, *Legal Tender Cases*, *supra*, it may not be set aside. Here, both Ohio and Minnesota were on firm constitutional ground in striving to balance important life interests. The opponents of these parental notice statutes seek to discourage parental involvement in their children's lives. Allowing them to succeed contravenes important constitu-

tionally protected interests, and sacrifices family integrity to the adolescent's perceptions of self-interest. There is simply no legitimate basis upon which to allow rejection of the statutes in question.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be reversed and the judgment of the Court of Appeals for the Eighth Circuit should be reversed in part and affirmed in part.

Respectfully submitted,

MARK E. CHOPKO *
General Counsel

U.S. CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, DC 20017
(202) 541-3300

* Counsel of Record

Nos. 88-805, 88-1125, 88-1309

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

JANE HODGSON, M.D., *et al.*,
Petitioners,
v.
THE STATE OF MINNESOTA, *et al.*,
Respondents.

THE STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,
v.
JANE HODGSON, M.D., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS*	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY	5
A. Marriage	5
B. Travel	8
C. Contract	10
II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION	11
III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED	16
A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases	16
B. The Lower Courts' Decisions Highlight The Flaws In *Roe*	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES: Page

Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) 18
Akron Center for Reproductive Health v. *Slaby*, 854 F.2d 852 (6th Cir. 1988) 2
Bellotti v. *Baird*, 428 U.S. 132 (1976) 17
Bellotti v. *Baird*, 443 U.S. 622 (1979) ..... *passim*
Ginsberg v. *New York*, 390 U.S. 629 (1968) 14, 20
Haig v. *Agee*, 453 U.S. 280 (1981) 10
H.L. v. *Matheson*, 450 U.S. 398 (1981) 18
Hodgson v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*) 2, 22
Loving v. *Virginia*, 388 U.S. 1 (1967) 5
McNeil v. *Director Patuxent Institution*, 407 U.S. 245 (1972) 13
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 12, 14
Michael H. v. *Gerald D.*, 109 S.Ct. 2333 (1989) 11, 15
O'Connor v. *Donaldson*, 442 U.S. 563 (1975) 13
Parham v. *J.R.*, 442 U.S. 584 (1979) 13, 19, 20
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) ..... *passim*
Planned Parenthood Ass'n of Kansas City v. *Ashcroft*, 462 U.S. 476 (1983) 18
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) ..... *passim*
Poe v. *Ullman*, 367 U.S. 497 (1961) 21
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 15, 20
Roe v. *Wade*, 410 U.S. 113 (1973) 4, 21, 22
Rowan v. *Post Office Dep't.*, 397 U.S. 728 (1970) 14
Santosky v. *Kramer*, 455 U.S. 745 (1982) 15, 16
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 8
Smith v. *Organization of Foster Families*, 431 U.S. 816 (1977) 4, 20
Stanley v. *Illinois*, 405 U.S. 645 (1972) 15
Thornburgh v. *American College of Obst. & Gyn.*, 476 U.S. 747 (1986) 21, 22
Turner v. *Safley*, 107 S.Ct. 2254 (1987) 5
Webster v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989) 21, 22
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 12

TABLE OF AUTHORITIES—Continued

Page

Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) 18

U.S. CONSTITUTIONAL PROVISIONS:

Amendment I 12
Amendment XIII 11
Amendment XIV 11

STATUTES AND REGULATIONS:

10 U.S.C. § 505 (1982) 10
10 U.S.C. § 2104 (1982) 10
10 U.S.C. § 2107 (1982) 10
10 U.S.C. § 2107a (1982) 10
42 U.S.C. § 1981 (1982) 10
22 C.F.R. § 51.27 (1988) 10
Ala. Code § 30-1-5 (1983) 7
Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989) 9
Alaska Stat. § 25.05.171 (1988) 8
Alaska Stat. §§ 47.15.010 - 47.15.080 (1988) 9
Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989) 9
Ariz. Rev. Stat. Ann. § 25-102 (West 1976) 7
Ark. Stat. Ann. §§ 9-11-102 - 105 (1987) 7
Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987) 9
Cal. Bus. & Prof. Code § 22-706 (Deering 1989) 10
Cal. Civ. Code § 4101 (West 1983) 7
Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989) 9
Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) 7
Colo. Rev. Stat. §§ 24-60-701 - 708 (1988) 9
Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989) 9
Conn. Gen. Stat. Ann. § 46b-30 (West 1986) 7
Del. Code Ann. Tit. 13, § 123 (1981) 7
Del. Code Ann. Tit. 18, § 2707 (1988) 10
Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985) 9

TABLE OF AUTHORITIES—Continued

	Page
D.C. Code Ann. § 30-111 (1988)	7
D.C. Code Ann. §§ 32-1101 - 32-1106 (1988)	9, 10
Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988)	9
Fla. Stat. Ann. § 741.04-0405 (West 1988)	7
Ga. Code Ann. § 19-3-2 (1982)	7
Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982)	9
Haw. Rev. Stat. § 572-1 (1985)	7
Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988)	9
Idaho Code §§ 16-901 - 16-1910 (1979)	9
Idaho Code § 32-202 (1983)	7
Ill. Rev. Stat. ch. 23, ¶¶ 2591-2597 (Smith-Hurd 1988)	9
Ill. Rev. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982)	7
Ind. Code Ann. §§ 31-6-10-1 - 31-6-23-4 (West 1979 & Supp. 1989)	9
Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986)	7
Iowa Code § 232.171-72 (Supp. 1989)	9
Iowa Code § 595.2 (1980 & Supp. 1989)	7
Kan. Stat. Ann. § 23-106 (1988)	7
Kan. Stat. Ann. §§ 38-1001 - 1007 (1986)	9
Ky. Rev. Stat. § 402-210 (1988)	7, 8
La. Rev. Stat. Ann. § 9:211 (Supp. 1989)	7
La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982)	9
Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988)	7
Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988)	9
Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988)	7
Md. Code Ann. Art. 83c, §§ 3-101 - 3-110 (1989)	9
Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969)	9
Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989)	8
Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981)	9

TABLE OF AUTHORITIES—Continued

	Page
Mich. Comp. Laws Ann. § 551.51 (West 1988)	7
Minn. Stat. Ann. §§ 260.51 - 260.57 (West 1982 & Supp. 1989)	9
Minn. Stat. § 517.02 (1969 & Supp. 1989)	7
Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988)	7
Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981)	9
Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983)	9
Mo. Ann. Stat. § 451.090 (Vernon 1986)	7
Mont. Code Ann. § 40-1-213 (1989)	7
Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987)	7
Neb. Rev. Stat. § 42-105 (1988)	7
Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988)	9
Nev. Rev. Stat. §§ 122.020 - 122.025 (1985)	8
Nev. Stat. §§ 214.010 - 214.060 (1986)	9
N.H. Rev. Stat. Ann. §§ 169-A:1-11 (1978 & Supp. 1988)	9
N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988)	8
N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976)	9
N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989)	8
N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986)	8
N.M. Stat. Ann. §§ 32-3-1 - 32-3-8 (1986 & Supp. 1988)	9
N.Y. Dom. Rel. Law § 15 (McKinney 1988)	7
N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989)	9
N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988)	7
N.D. Cent. Code § 14-03-02 (1981)	7
N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974)	9
Ohio Rev. Code Ann. §§ 2151.56 - 2151.61 (Baldwin 1989)	9
Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984)	7, 8
Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987)	9
Okla. Stat. Ann. Tit. 43 § 3 (West 1979)	7
Or. Rev. Stat. § 106.060 (1983 & Supp. 1988)	7
Or. Rev. Stat. §§ 417.010 - 417.080 (1987)	9

TABLE OF AUTHORITIES—Continued

	Page
Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989)	8
Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1981)	9
R.I. Gen. Laws §§ 14-6-1 - 14-6-11 (1989)	9
R.I. Gen. Laws § 15-2-11 (1989)	8
S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985)	7
S.C. Code Ann. § 27-17-10 (1976)	9
S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989)	7
S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989)	9
Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988)	9
Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988)	8
Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989)	8
Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986)	9
Utah Code Ann. § 30-1-2 (1989)	7
Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986)	9
Vt. Stat. Ann. Tit. 18 § 5142 (1987)	8
Vt. Stat. Ann. Tit. 33 §§ 551 - 575 (1981)	9
Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988)	9
Va. Code Ann. § 20-48, 49 (1989)	7
Wash. Code § 26.04.010 (1988)	7
Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962)	9
West Va. Code § 48-1-1 (1986)	8
Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988)	7
Wyo. Stat. § 20-1-102 (1987)	7
Lord Hardwicke's Act, 1753, 26 Geo. 2, ch. 33	5, 6
LEGISLATIVE MATERIALS:	
Cong. Globe, 38th Cong., 1st Sess. (1864)	11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:	Page
W. Blackstone, *Commentaries*	5
J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* (1973)	19
Hobbes, *Leviathan* (Fuller, ed. 1952)	4
Locke, *Concerning Civil Government* (Brit. ed. 1952)	4
Restatement (2d) Contracts, §§ 6, 14 (1981)	10
J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951)	11
2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

No. 88-1125

JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass procedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honored doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed. 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their children arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty*; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

---

after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

---

[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark Stat. Ann. § 9-11-102 - 105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-111 (1988); Fla. Stat. Ann. § 741.04 - 0405 (West 1988); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988); N.D. Cent. Code § 14-03-02 (1981); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. Tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989); Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (West 1976) (same); Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. § 572-1 (1985) (same); Idaho Code § 32-202 (1983) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 18); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

---

minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. §§ 122.020 - 122.025 (1985) (same); N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (minors under 18 require parents' consent, girls under 16 also require court's consent); Vt. Stat. Ann. Tit. 18 § 5142 (1987) (same); West Va. Code § 48-1-1 (1986) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified circumstances); N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14, girls over 13 in its discretion); Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause"); Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. § 37:1 - 6 (West 1968 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. § 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-five states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures for a "parent . . . entitled to legal custody of a juvenile

---

[5] *See* Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989); Alaska Stat. §§ 47.15.010 - 47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989); Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987); Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701 - 708 (1988); Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989); Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985); D.C. Code Ann. §§ 32-1101 - 32-1106 (1988); Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988); Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982); Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901 - 16-1910 (1979); Ill. Rev. Stat. ch. 23 ¶¶ 2591 - 2597 (Smith-Hurd 1988); Ind. Code Ann. §§ 31-6-10-1 - 31-6-10-4 (West 1979 & Supp. 1989); Iowa Code § 232.171-72 (Supp. 1989); Kan. Stat. Ann. §§ 38-1001 - 1007 (1986); La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988); Md. Code Ann. Art. 83c, §§ 3-101 - 110 (1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969); Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981); Minn. Stat. Ann §§ 260.51 - 260.57 (West 1982 & Supp. 1989); Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981); Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983); Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987); Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988); Nev. Rev. Stat. §§ 214.010 - 214.060 (1986); N.H. Rev. Stat. Ann. § 169-A:1-11 (1978 & Supp. 1988); N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976); N.M. Stat. Ann. 32-3-1 - 32-3-8 (1986 & Supp. 1988); N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989); N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974); Ohio Rev. Code Ann. §§ 2151.56 - 2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987); Or. Rev. Stat. §§ 417.010 - 417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989); R.I. Gen. Laws § 14-6-1 - 14-6-11 (1981); S.C. Code Ann. § 24-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989); Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551 - 575 (1981); Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962). The exceptions are Kentucky and North Carolina, which repealed their enactments of the Compact, and West Virginia, Wisconsin and Wyoming.

. . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passport. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104 (b)(4), 2107(b)(4), 2107a(b)(4) (1982).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have

---

[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22-706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for [his] additional obligations.*

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (" 'the Con-

---

[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued the natural evils of slavery that the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951). Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

stitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition' ") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court held, interfered "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce*. . . ." *Id.* at 231-32

(citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see also O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. *See* 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder.*" 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED.

Danforth and its progeny are at odds with ~~both~~ the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the

physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, *quoting Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents.*" *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (emphasis added).

---

[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent; (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion; and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry, for ex-

[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

ample.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in *Danforth* that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity*. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). Cf. *Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live to profoundly regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham, supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith, supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsburg, supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince, supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, *etc.*, thus do not *delegate* anything. Rather, they recognize and reinforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. *Cf. Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. *See, e.g.*, *Hodgson*, 853 F.2d at 1456.[15] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debilitating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

---

[15] *Amicus* submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate

CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

(9) (6)

Nos. 88-1125 and 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, *et al.*,
Petitioners and Cross-Resondents,
v.
STATE OF MINNESOTA, *et al.*,
Respondents and Cross-Petitioners.

On Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICI CURIAE OF FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL, RACHEL ELY, MYOSHI CALLAHAN, TERESA WIBBLESMAN FANGMAN, HOLLY TRIMBLE, LINDA ROSELLI, ANN MARIE LOZINSKI, ROBERT C. WIBBLESMAN, AND AMERICAN VICTIMS OF ABORTION, IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS

H. ROBERT SHOWERS
(Counsel of Record)
RICHARD M. CAMPANELLI
GAMMON & GRANGE
1925 K Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 862-2000
Attorneys for Amici Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

51pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. PARENTAL CONSULTATION PROTECTS VULNERABLE ADOLESCENTS AND FAMILIES FROM HARM, IN FURTHERANCE OF LEGITIMATE STATE INTERESTS	4
A. Parental Consultation Promotes Maternal Health In The Pregnant Adolescent By Reducing The Physical And Psychological Risks Of Abortion	5
1. Physical Risks From Abortion	6
2. Mortality Risks From Abortion	8
3. Emotional And Psychological Harms From Abortion	10
B. Parental Consultation Substantially Benefits The Minor's Decision Making Process	13
C. Parental Consultation Helps Protect Vulnerable, Immature Minors From Exploitation	17
D. Parental Consultation Promotes Legitimate Parental Authority And Family Unity	22
1. Parental Control	22
2. Family Involvement	24
II. STATE NOTIFICATION AND CONSENT LAWS ARE RATIONALLY RELATED TO LEGITIMATE STATE INTERESTS AND DO NOT "UNDULY BURDEN" A MINOR'S RIGHT TO HAVE AN ABORTION	25
III. FEDERAL COURTS MUST GIVE GREAT JUDICIAL DEFERENCE TO STATE ABORTION LEGISLATION, PARTICULARLY IN MATTERS INVOLVING PARENT-CHILD RELATIONS	28
CONCLUSION	30
APPENDIX A—Description of Amici	1a
APPENDIX B—The Confused State of Parental Consultation Laws	11a

TABLE OF AUTHORITIES

Cases — Page

Akron Center for Reproductive Health v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), *appeal filed sub. nom. Ohio* v. *Akron Center for Reproductive Health, prob. juris. noted*, No. 88-805, (U.S. July 3rd 1989) *(Akron II)*. 1, 4

Bellotti v. *Baird*, 428 U.S. 132 (1976) (*Bellotti I*)..... 20,30

Bellotti v. *Baird*, 443 U.S. 622 (1979) *(Bellotti II)*... *passim*

Carey v. *Population Services International*, 431 U.S. 678 (1977) 26

City of Akron v. *Akron Center for Reproductive Health*, 416 U.S. 462 (1983) *(Akron I)*..... *passim*

Ginsberg v. *New York*, 390 U.S. 629 (1968)..... 22, 23, 29

Harris v. *McRae*, 448 U.S. 297 (1980) 26

H. L. v. *Matheson*, 450 U.S. 398 (1981)..... *passim*

Hodgson v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (Nos. 86-5423 and 86-5434) *(en banc) cert. granted*, No. 88-1125 (U.S. July 3, 1989) (Cross-Petition No. 88-1309)..... 1, 12, 13

Maher v. *Roe*, 432 U.S. 474 (1977)..... 26, 29

Moore v. *City of East Cleveland*, 431 U.S. 494 (1974)... 29

Oregon v. *Michell*, 400 U.S. 112 (1970) 29

Parham v. *J. R.*, 442 U.S. 584 (1979) 29

Prince v. *Massachusetts*, 321 U.S. 158 (1944)..... 22, 23, 29

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)..... 22, 29

Planned Parenthood of Kansas City v. *Ashcroft*, 462 U.S. 476 (1983)..... 30

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976)..... *passim*

Poekler v. *Doe*, 432 U.S. 519 (1977) 26

Roe v. *Wade*, 410 U.S. 113 (1973)..... 4, 10, 26, 27, 28

Thornburgh v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).... 26, 27, 28, 29, 30

Webster v. *Reproductive Health Services, 57 U.S.L.W. 5023 (U.S. June 27, 1989)*..... 26, 27, 28, 29

Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 26

Wisconsin v. *Yoder*, 406 U.S. 205 (1972)..... 22, 23, 29

Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985) *aff'd mem.*, 108 S. Ct. 479 (1987)..... 4

Table of Authorities Continued

Page

OTHER AUTHORITIES:

Center for Disease Control, U.S. Department of Health & Human Services, Abortion Surveillance (1985) 5

Letter from Sue Liljenberg to Senator Gordon Humprey (June 6, 1986) 20

BOOKS AND SCIENTIFIC MATERIALS:

Adler & Dolcini, *Adolescent Abortion: Psychological Issues In Abortion For Adolescents* in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 84 (G. Melton Ed. 1986)..... 10, 21

Babikian & Goldman, *A Study of Teenage Pregnancy*, 128 AM. J. PSYCH. 755 (1971)..... 10

Barglow, Bornstein, Etsome, Wright and Visodsky, *Some Psychiatric Aspects of Illegitimate Pregnancy During Early Adolescence*, 37 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 266 (1967)..... 15

Benson & Stack, *Help or Hindrance: Parental Impact on Pregnant Teenagers' Resolution Decisions*, 31 FAMILY RELATIONS 271 (1982) 18

Blum, *Impact of Parental Notification Law*, 77 AM. J. PUBLIC HEALTH 619 (1987) 18

Brittain, *Adolescent Choices and Parent-Peer Cross Pressures*, 28 AM. SOC. REV. 385 (1963)..... 21

J. Burtchaell, RACHEL WEEPING AND OTHER ESSAYS ON ABORTION (1982)..... 13, 19

Butler & Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 POST GRAD. MED. 208 (1971)..... 12

Cates, *Adolescent Abortion in the United States*, 1 J. ADOLESCENT HEALTH CARE 18 (1980) 11

Cates, Schultz and Grimes, *Risk Associated With Teenage Abortion*, 309 NEW ENGLAND JOURNAL OF MEDICINE 621 (1983)..... 6

Clary, *Minor Women Obtaining Abortion: The Study of Parental Notification in Metropolitan Areas*, 72 AM. J. PUB. H. 283 (1982) 16

Cobliner, *Pregnancy and Single Adolescent Girls: The Role of Cognitive Functions*, 3 JOURNAL OF YOUTH AND ADOLESCENTS 17 (1974)..... 14

Table of Authorities Continued

Page

C. Cowell, *Problems of Adolescent Abortion*, Ortho Panel 14, Toronto General Hospital (1975) 7

Cohen, Laurie, Roth and Susan, *Coping With Abortion*, 10 JOURNAL OF HUMAN STRESS 140 (1984) .. 13

David, Rausmussen and Holst, *Post Partum and Post Abortion Psychotic Reactions*, 13 FAMILY PLANNING PERSPECTIVES 88 (1981) 12

Doctor's Abortion Business is Lucrative, The San Diego Union, Oct. 12, 1988, at 3A col. 5 18

Eisen, Zellman, Liebonitz, Chow and Evans, *Factors Discriminating Pregnancy Resolution Decisions of Unmarried Adolescents*, 108 GEN. PSYCH. MON. 69 (1983)..... 16

Etozioni, *The Husband's Rights in Abortion*, 12 TRIAL 56 (1976)..... 25

Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 FAMILY PLANNING PERSPECTIVES 150 (1978) 10

L. Francke, THE AMBIVALENCE OF ABORTION 30 (1978) 19

Furstenberg, *Burden and Benefits: The Impact of Early Childbearing on the Family*, 1980 J. SOCIAL ISSUES 36 (1980) 24

J. Gallagher, MEDICAL CARE FOR THE ADOLESCENT (3rd Ed. 1976) 21

Hanson, *Abortion in Teenagers*, 21 CLIN. OBST. AND GYN. 1175 (1978)..... 21

Henshaw, Binkin, Blaine and Smith, *A Portrait of American Women Who Obtain Abortions*, 17 FAMILY PLANNING PERSPECTIVES 90 (1985)..... 4, 5, 12

Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 SOCIAL CASE 551 (1978).... 11, 12, 14

E. Hurlock, ADOLESCENT DEVELOPMENT (4th Ed. 1973)..... 17, 21

I. Josselyn, ADOLESCENCE (1971)..... 21

Klerman, Bracken, Jeckel and Bracken, *The Delivery Abortion Decision Among Adolescents* in PREGNANCY AND ADOLESCENCE 219 (1982).... 14, 20

Mirachek, *Counseling Adolescents With Problem Pregnancies*, 42 AMERICAN PSYCHOLOGISTS 84 (1987) 15

Table of Authorities Continued

Page

R. Mnookin, IN THE INTERESTS OF CHILDREN (1985) 18

Olsen & Weed, *Effects of Family Planning Programs For Teenagers On Adolescent Birth and Pregnancy*, 20 FAMILY PLANNING PERSPECTIVES 153 (1986) 19

Perez-Reyes & Falk, *Follow Up After Therapeutic Abortion in Early Adolescence*, 28 ARCH. GEN. PSYCH. 120 (1973)..... 11, 12

Ramsey, *Representation of a Child in Protection Proceedings: The Determination of Decision Making Capacity*, 17 FAMILY LAW QUARTERLY 315 (1983)... 16

D. Reardon, ABORTED WOMEN—SILENT NO MORE (1987)..... 8, 9, 10

Russell, *Sexual Activity and Its Consequences in the Teenager*, 3 CLINICS IN OB. AND GYN. 683 (1974) 7

Russo, *Adolescent Abortion: The Epidemiological Content* in ADOLESCENT ABORTIONS: PSYCHOLOGICAL-LEGAL ISSUES 40 (G. Melton Ed. 1986)..... 5

A. Saltzenberger, EVERY WOMAN HAS THE RIGHT TO KNOW THE DANGER OF LEGAL ABORTION (1982) 9

Steinhuff, *Women Who Obtain Repeat Abortions: A Study Based On Record Lineage*, 11 FAMILY PLANNING PERSPECTIVES 30 (1979) 12

Teitze, *Repeat Abortions, Why More?*, 10 FAMILY PLANNING PERSPECTIVES 205 (1978) 12

Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 PEDIATRICS 670 (1981) 12

Torres, Forrest and Eisman, *Telling Parents: Clinic Policies and Adolescent's Use of Family Planning and Abortion Services*, 12 FAMILY PLANNING PERSPECTIVES 284 (1980)..... 12, 17, 21

Wadhera, *Legal Abortions Among Teens 1974 through 1978*, 122 CAN. MED. ASS. J. 1386 (1980)..... 7

Wallerstein, Kurtz and Bar-Din, *Psychological Sequelae of Therapeutic Abortion in Young, Unmarried Women*, 27 ARCH. GEN. PSYCH. 828 (1972) 10, 11, 15

Table of Authorities Continued

Page

Weed, *Curbing Births Not Pregnancies*, The Wall St. J., Oct. 14, 1986, at 36, col. 4 19

Weed & Olsen, *Effects of Family-Planning Programs on Teenage Pregnancy-Replication And Extension Rates*, 20 FAMILY PLANNING PERSPECTIVES 173 (1986) 19

J. Wilke, ABORTION QUESTIONS AND ANSWERS (Rev. 1988) 7, 8

J. Wilke & B. Wilke, HANDBOOK ON ABORTION (3rd Ed. 1979) 8, 9

Worthington, *Decision Making in Adolescent Pregnancy* in VALUES AND PUBLIC POLICY 119 (G. Regier Ed. 1988) 5, 14, 24

Worthington, *The Benefits of Legislation Requiring Parental Involvement Prior to Adolescent Abortion* in VALUES AND PUBLIC POLICY 221 (G. Regier Ed. 1988) 14, 15, 16, 24, 25

Wynn & Wynn, *Some Consequences of Induced Abortion to Children Born Subsequently*, 4 MARRIAGE AND FAMILY NEWSLETTER 8 (1973) 8

Zekman & Warrick, *The Abortion Profiteers*, Chicago Sun Times, Nov. 12, 1978 at 1, col. 1 ..... 8, 9

INTEREST OF *AMICI CURIAE**

Amici **Focus on the Family** and the **Family Research Council,** representing the concerns of more than 1.7 million American families, have broad experience and interest concerning the impact of abortion on minors and on the family.

Five of the *amici* are women who have suffered severe harm because, as minors, they were allowed—indeed, encouraged—to undergo abortions without the benefit of parental guidance. **Rachel Ely** is now permanently wheelchair-bound; **Myoshi Callahan** has endured severe physical problems, including a hysterectomy; **Teresa Wibblesman Fangman, Holly Trimble,** and **Linda Roselli** each suffered severe emotional anguish and psychological turmoil. These women offer their experiences to the Court to illustrate the very real, practical effect of severing the normal parent-child relationship in the abortion context.

One of the *amici*, **Ann Marie Lozinski,** is the parent of a young woman who suffered the ultimate harm: Debra Lozinski died after two-and-a-half months in a coma, as a direct result of an in-clinic abortion performed without adequate care, and without notice to her parents. Four years later, Debra's mother is still suffering from severe depression.

Amicus **Robert C. Wibblesman,** Teresa Fangman's father, offers a parent's perspective, unique because he has also had the opportunity to help another daughter, faced with an unplanned pregnancy, avoid the pain that Teresa suffered alone.

Many of the individual *amici* are associated with *amicus* **American Victims of Abortion,** which is a national organization of persons whose lives have been adversely affected by abortion.

All of the *amici* have particular knowledge and experience concerning the impact on minors of abortion without parental consultation, which will be helpful to the Court.

---

* A full description of the *Amici* appears in Appendix A. This brief is submitted with the written consent of both parties, filed with the Clerk of this Court. *Amici* are concerned with parental notification and consent issues raised in *Ohio* v. *Akron Center for Reproductive Health*, No. 88-805, and *Hodgson* v. *Minnesota*, Nos. 88-1309 and 88-1125, and thus are filing this brief in both cases.

SUMMARY OF THE ARGUMENT

Courts and state legislatures remain uncertain about whether parental consultation laws are constitutional, and if so, within what specific legal parameters. Presently, sixteen parental consultation laws have been enjoined. Only five such statutes have been found constitutional. A clear enunciation that reasonable parental notification and consent laws do not unconstitutionally limit the right to an abortion is needed to permit states to protect minors and their families. Because state legislatures are best suited to provide these protections, the Court should limit its review to whether a statute or regulation is supported by a rational relationship to legitimate state interests.

Many legitimate, if not compelling, state interests are involved in parental consultation laws, particularly when a pregnant teenager is making the difficult and traumatic abortion decision. The courts recognize at least three state interests for parental consultation laws: (1) the peculiar vulnerability of children; (2) minor's inability to make critical decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing. In light of the growing body of scientific evidence about the adverse physical and psychological effects of abortion, parents and the state have an additional and heightened interest in ensuring that the pregnant adolescent is protected from rash, ill-informed or pressured decisions on this traumatic question.

The initial state and parental interest in adolescent pregnancy and abortion is to reduce or eliminate medical and psychological problems of the pregnant minor. Negative medical consequences from abortion include hemorrhage, perforated uterus, subsequent fetal malformation, cervical trauma, ectopic pregnancies, infection, menstrual disturbances, infertility, Pelvic Inflammation Disease (PID), miscarriage and high-risk prematurity in subsequent pregnancies. Since adolescents generally have immature cervixes, researchers have concluded that adverse physical health effects are more common and severe in teenage abortions. Young women who have abortions have also been found to be more predisposed to adverse outcomes in future, planned pregnancies than their sexually mature adult counterparts.

Compared to adults, adolescents appear to also have more negative emotional and psychological responses following abortion. The immediage negative psychological responses include severe guilt, anxiety, depression and psychosis. The long-term adverse psychological effects, which include denial, depression, isolation, alienation, suicide attempts and a family of psychiatric symptoms called Post Abortion Stress (PAS), appear to be more problematic and more devastating for the adolescent aborter.

Parental consultation also enhances a legitimate state interest to help adolescents make better, well-informed decisions about their pregnancy. Parents who have knowledge of a pending abortion can help their daughter assess the medical and psychological risks involved. After consultation, if she still decides to abort, they can relate important medical and psychological information to the abortionist. If adverse complications result, the parents will be aware of the cause and can give important medical information to the subsequent treating physician.

Family involvement in the abortion decision promotes important state interests of family unity and parental control in three ways: (1) it permits the parents to deal with issues underlying adolescent pregnancy; (2) it helps avoid the compounding problems of alienation, isolation and depression, which secret abortions frequently entail; and (3) it provides emotional and psychological support for whatever decision the minors make.

Parental consultation laws clearly have a rational relationship to these legitimate state interests. In addition, consultation laws with a waiting period and a judicial bypass provision cannot be said to unduly burden the minor's abortion right because parents do not have arbitrary, absolute veto power over her decision. After sixteen years, the Court should return to the constitutional principles historically employed in reviewing state health and safety laws, adopt the rational basis standard of review in the parental consultation requirements and jettison the conflicting, intricate set of abortion-related rules that are unrelated to Constitutional doctrine.

ARGUMENT

I. PARENTAL CONSULTATION PROTECTS VULNERABLE ADOLESCENTS AND FAMILIES FROM HARM, IN FURTHERANCE OF LEGITIMATE STATE INTERESTS.

The Court has a prime opportunity to clear up the muddied waters surrounding parental notification and consent which has plagued state legislatures, courts, parents, doctors and pregnant minors for the sixteen years since abortion was legalized in *Roe* v. *Wade*, 410 U.S. 113 (1973). Thirty three states have enacted statutes requiring some form of parental consultation where a minor is considering an abortion. Twenty one states require parental consent and twelve states require parental notification before a minor can obtain an induced abortion. See Appendix B, The Confused State of Parental Consultation Laws. Sixteen parental consultation laws have been enjoined by court action. *Id.* Only thirteen presently in effect have not been challenged in federal court, and only five state statutes have been found to be constitutional. *Id.* Eight Supreme Court decisions have been rendered on this issue with conflicting results. *Id.* The last parental notification case to reach this Court ended in a four to four split; and the *per curiam* decision without opinion offered little guidance to state legislatures. *See Hartigan* v. *Zbaraz*, 763 F.2d 1532 (7th Cir. 1985) *aff'd mem.* 108 S. Ct. 479 (1987). The Sixth Circuit in *Akron Center for Reproductive Health* v. *Ohio*, 854 F.2d 852 (6th Cir. 1988) ("*Akron II*") declared that [*Hartigan*] leaves the principle of law presented by the recent case . . . unsettled." *Akron II*, 854 F.2d at 861.

The effect of unsettled parental consultation law is exacerbated by the unprecedented rise in teenage pregnancies and abortion. Teenage pregnancies, which are most often unwanted, together with teenage abortion, are a national tragedy. In 1981, approximatly 1.3 million teenage pregnancies occurred—a pregnancy rate of 134 per 1000. Henshaw, Binkin, Blaine and Smith, *A Portrait of American Women Who Obtain Abortions*, 17 FAMILY PLANNING PERSPECTIVES 90-96 (1985) (hereinafter "*Portrait*"). Approximately 28% of the 1.6 million abortions each year are performed on teenagers. Centers for Disease Control, U.S. Department of Health and Human Services, Abortion Surveillance (1985). Fifteen thousand pregnancies occurred in girls under age fourteen. *Portrait* at 92. The abortion rate among teenagers has risen sharply with a 60% increase being recorded for all teenagers between 1972 and 1976, and a 120% rise for adolescents under age fifteen. Worthington, *Decision Making in Adolescent Pregnancy* in VALUES AND PUBLIC POLICY 119, 124 (G. Regier Ed., 1988) (hereinafter "Worthington"). Forty five percent (45%) of teenage pregnancies end in abortion. In most cases parents are not even told by their teenagers or notified by doctors. *Portrait* at 93; *see also* Russo, *Adolescent Abortion: The Epidemiological Content* in ADOLESCENT ABORTION: PSYCHOLOGICAL-LEGAL ISSUES 40, 49 (G. Melton Ed., 1986).

Although the legal standards surrounding parental consultation regulations are unsettled, this Court has recognized the important state interests that such laws protect:

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. *Baird*, 443 U.S. 622, 634 (1979) ("Bellotti II"). These interests are expanded when viewed against the backdrop of potential harms to teenagers from abortion.

A. Parental Consultation Promotes Maternal Health In The Pregnant Adolescent By Reducing The Physical And Psychological Risks Of Abortion.

The decision to terminate pregnancy involves one of the most complex and difficult decisions of a woman's life. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 67 (1976) ("Danforth"). Medical and psychological risk factors are often overlooked or unknown, and her decision involves other multiple social, economic and moral factors which are further confused by the physiological and psychological changes pro-

duced by pregnancy. Minor women, in particular, are often ill-informed about abortion and its serious ramifications and unable to make mature, rational decisions in their own best interest.

This Court in *H. L.* v. *Matheson*, 450 U.S. 398 (1981) stated:

> The medical, emotional and psychological consequences of an abortion are serious and can be long lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

Id. at 411.

Numerous scientific studies by independent medical sources confirm the Court's point of view, concluding that induced abortion frequently results in significant, negative and often permanent physical, psychological and social effects on the pregnant woman and her family.

1. Physical Risks From Abortion.

The serious physical complications which have been associated with abortion specifically include: hemorrhaging, cervical trauma, infection, Pelvic Inflammatory Disease (PID), ectopic pregnancy, infertility and subsequent fetal malformations, miscarriages and high risk premature birth in later planned pregnancies and death. *See Amicus Brief* of Focus on the Family in *Turnock* v. *Ragsdale*, No. 88-790, Appendix, Table 1. Researchers who analyze data collected under the auspices of the Centers for Disease Control on Teen Abortion Morbidity and Mortality concluded that women under age eighteen who obtain abortions were more susceptible to physical injury than were older women: "[T]hese findings cause concern because cervical injury in initial, unplanned pregnancies may predispose young women to adverse outcomes in future planned pregnancy . . . [S]ome of the most catastrophic complications occur in teenagers." Cates, Schultz and Grimes, *Risk Associated With Teenage Abortion*, 309 NEW ENGLAND JOURNAL OF MEDICINE 621, 624 (1983). Hence, one abortion decision can impact the entire child bearing potential of a teenage patient.

One abortionist reported on his post-abortion follow up, ranging from two to twelve years, of fifty teenage mothers whose pregnancies he had aborted: "The cervix of the young teenager pregnant for the first time is invariably small and tightly closed and especially liable to damage on dilation." Russel, *Sexual Activity and Its Consequences in the Teenager*, 3 CLINICS IN OB AND GYN 683-698 (1974); *see also* J. Wilke, ABORTION QUESTIONS AND ANSWERS 108-109 (rev. 1988) (hereinafter "ABORTION QUESTIONS"). In fifty-three subsequent pregnancies, he found that six had another induced abortion, nineteen had spontaneous miscarriages, one delivered a stillborn baby at six months, and six babies died between birth and two years. Only twenty one babies survived. Two-thirds of the teenagers subsequently experienced miscarriage or high-risk premature birth of their second wanted pregnancies. *Id.*

From 1974 to 1978, a study was conducted on approximately 84,000 teen abortions performed in Canada which represented 30.9% of all legal abortions. The complications listed from that study were as follows: retained products of the conception (69%); laceration of the cervix (12%); hemorrhage (8%); infection (7%); perforation of the uterus and other complications (4%). The director of the Therapeutic Abortion Unit and the Health Division of Statistics, Canada, acknowledged that there is a high rate of complications (4.1 per 100) in adolescent abortions. Wadhera, *Legal Abortions Among Teens 1974 through 1978*, 122 CAN. MED. ASS. J. 1386-1389 (1980). One Canadian researcher noted:

> Physical and emotional damage from abortion is greater in a young girl. Adolescent abortion candidates are different from their sexually mature counterparts, and these differences contribute to high morbidity. They have immature cervixes and run the risk of difficulty, or potentially traumatic dilatation . . .

ABORTION QUESTIONS at 111-12 (1979) (quoting C. Cowell, *Problems of Adolescent Abortion*, Ortho Panel 14, Toronto General Hospital) (1975).

In 1977, over 100,000 abortion complications were reported in the United States, which is nearly a 10% morbidity rate for immediate and short term complications. D. Reardon, ABORTED WOMEN—SILENT NO MORE 93 (1987) (hereinafter "Reardon"). However, some medical experts believe that these reported morbidity rates from abortion are the "tip of the iceberg," given likely widespread, massive under reporting. *Id.* at 92, 106-109.[1]

2. Mortality Risks From Abortion.

A truly irreversible complication of teenage abortion is death of the mother. Unfortunately, tragic accounts of teenagers dying after an abortion, like the daughter of *amicus* Ann Marie Lozenski, are all too common. *See* Reardon at 109-113, and Appendix A. While statistics are difficult to obtain, it has been reported that in the United States alone, from 1972 to 1981, there were 175 maternal deaths caused by legal abortions, a figure which does not include ectopic pregnancy deaths. Like other post-abortive complications, however, deaths are also grossly underreported. According to one estimate, less than 10% of deaths from legal abortion are reported as such. HANDBOOK ON ABORTION at 80, 98-99.[2]

[1] The only information available on morbidity comes from voluntary reporting. Since abortion providers want to hide their failures and conceal the fact that legal abortion is not safe, underreporting of abortion complications is the rule rather than the exception. J. Wilke & B. Wilke, *HANDBOOK ON ABORTION* 78-80, 89 (3rd ed. 1979); *see also* Zekman & Warrick, *The Abortion Profiteers*, Chicago Sun Times, November 12, 1978 at 1, Col. 1. In Britain where reporting is much better than the United States, medical experts believe that less than 10% of abortion complications are actually reported to government health agencies. Wynn & Wynn, *Some Consequences of Induced Abortion to Children Born Subsequently*, 4 Marriage and Family Newsletter, 8-9 (1973). "Two meticulous studies in England reveal 35.7% and 36% respectively of aborted women suffer from abortion related physical complications. *Id.* at 17.

[2] Underreporting of abortion deaths and physical complications occur for primarily three reasons: (1) abortionists are seeking to protect their personal and professional reputations; (2) the existence of unfavorable records must be minimized so that abortionists can minimize the availability of damaging evidence in the event of malpractice suits; and (3) abortionists want to maintain the generally accepted myth that abortion is safe. D. Reardon, *ABORTED WOMEN SILENT NO MORE* 90 (1987).

However, even if abortionists were willing to report and the government required accurate statistics, under reporting would still occur for the following five reasons: (1) most out-patient clinics do not provide follow up examinations and thus, without a direct complaint, assume that there are no complications; (2) even if a post abortion examination is insisted upon, conditions which may develop into long range complications such as sterility or an incompetent uterus are not easily detectable without prolonged surveillance; (3) many women hide their identities when seeking abortion and may fail to return for a post abortion examination even when one is available; (4) over 60% of the women who need emergency treatment following an outpatient abortion go to a nearby hospital instead of going back to the abortionist; and (5) when women are treated for long term complications such as infertility, they may hide their past abortion experience or simply not realize that it is relevant. *Id.* at 91.

A 1974 random survey of 486 obstetricians (6% of the total 21,700 in the U.S. in 1979) about their experience with complications resulting from legal abortion revealed that: 91% treated patients for complications; 87% had to hospitalize one or more patients; and 6% reported one or more patients having died from a legal abortion. A. Saltzenberger, EVERY WOMAN HAS THE RIGHT TO KNOW THE DANGER OF LEGAL ABORTION 51 (1982) (hereinafter "EVERY WOMAN"). The Center for Disease Control admits that the reported rate of deaths due to legal abortion may be deliberately kept low through selective under reporting. *Id.*

Dr. Lester Hibbard, Chairman of Los Angeles County Medical Society, which is charged with keeping track of maternal deaths, reported that while only four abortion related deaths were officially reported in one year, he personally knew of at least four other unreported abortion-related deaths. HANDBOOK ON ABORTION at 80. Furthermore, he said that he was certain that the under-reported abortion deaths were only the "tip of the iceberg." *Id.* The Chicago Sun Times uncovered twelve unreported abortion deaths in only four abortion clinics. Zekman and Warrick, *The Abortion Profiteers*, Chicago Sun Times, Nov. 12, 1978, at 1, Col. 1.

Other countries' mortality rates from abortion strongly suggests that the United States seriously under reports abortion-related deaths. For example, Sweden's death rate for legal abortions is 39 per 100,000, Denmark's reported deaths are 30 per 100,000, Canada lists 36 per 100,000, and in one study in Britain, a fatality rate of 75 per 100,000 was found. By suspicious contrast, the United States reports less than 2 deaths per 100,000 legal abortions. Reardon at 112.[3]

3. Emotional And Psychological Harms From Abortion.

In addition to the mortality and physical risks of abortion, the risks to the emotional and psychological well being of adolescent mothers are profound. *See* Focus on the Family *Amicus Brief* in *Turnock* v. *Ragsdale*, (No. 88-790), Appendix, Table 2. "Compared with adults, adolescents appear to have somewhat more negative responses on the average following abortion." Adler & Dolcini, *Adolescent Abortion: Psychological Issues In Abortion For Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 84 (G. Melton Ed., 1986) (hereinafter "Adler & Dolcini"); Freeman, *Abortion: Subjective Attitudes and Feelings*, 10 FAMILY PLANNING PERSPECTIVES 150 (1978).

Relying on medical and psychological studies, the Court in *Matheson* observed that:

> The emotional and psychological effects of the pregnancy and abortion experience are markedly more severe in girls under eighteen than in adults. Wallerstein, Kurtz and Bardin, *Psychological Sequelae of Therapeutic Abortion in Young, Unmarried Women*, 27 ARCH. GEN. PSYCH. 828 (1972) (hereinafter "Wallerstein"); *see also* Babikian and Goldman, *A Study of Teenage Pregnancy*, 128 AM. J. PSYCH. 755 (1971) (hereinafter "*Study of Teenage Pregnancy*").

[3] The present claims for low abortion mortality rates in the United States should also be compared to experience prior to *Roe* v. *Wade* when states with permissive abortion laws were allowed to *require* reporting of legal abortion related deaths. Oregon reported 13.9 abortion deaths per 100,000 legal abortions compared to only 8.4 maternal deaths per 100,000 live births, while Maryland reported 40.5 deaths per 100,000 legal abortions compared to 23.1 maternal deaths per 100,000 live births. According to these pre-*Roe* statistics, the mortality rate for legal abortion was nearly twice as high as the overall maternal mortality rate, a statistic which has been confirmed in many foreign countries. Reardon at 111-112.

Matheson, 450 U.S. 411 n.20.

One study found that relatively more minors than older women suffered severe anxiety, acute depression, and long-term guilt following abortion. Cates, *Adolescent Abortion in the United States*, 1 J. ADOLESCENT HEALTH CARE 18 (1980), whle another study reported that nearly one third of the young women who had abortions showed moderate to severe decline in psycho-social functioning five to seven months after the abortion. Wallerstein at 830.[4] The research in that study concluded:

> [I]n the fourteen to seventeen year age span consequent symptom manifestations, even when only transient, tended to be more dramatic and more severe in this younger group . . . [o]verall it is clear that the pregnancy and abortion experience in the younger and less mature, is at considerable heightened risk, a point of potential major maturational skewing.

Wallerstein, at 832; *see also* Perez-Reyes & Falk, *Follow UP After Therapeutic Abortion in Early Adolescence*, 28 ARCH. GEN. PSYCH. 120, 124 (1973) (hereinafter "Perez-Reyes").

One of the particular difficulties for adolescents is the problem of dealing with the very real sense of loss after an abortion is performed. Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 SOCIAL CASE 551 (1978) (hereinafter "Horowitz"). In an extensive community based study in Denmark of 17,378 women carrying to term and 27,234 women aborting, the psychiatric hospitalization rate for teenage abor-

[4] These young women, at initial follow up, were suffering with a variety of specific symptoms of maladaptive behavior, including mild to moderate depressive episodes, a variety of new physical complaints for which medical attention had not been sought . . . difficulty in concentrating in school, withdrawal from previous social contacts, lowered self-esteem explicitly related to the pregnancy and abortion experience, a newly begun promiscuous pattern in relationships with men, and regression to more infantile modes of relationships with parents. These difficulties did not pre-date the pregnancy. Wallenstein, at 830, cited in *Matheson*, 450 U.S. at 412 n.20.

ters was 11.4 per 10,000 while only 6.2 per 10,000 for teenagers who carried the baby to term. David, Rausmussen and Holst, *Postpartum and Post Abortion Psychotic Reations*, 13 FAMILY PLANNING PERSPECTIVES 88-92 (1981). Heightened risk of teen suicide following abortion and severe cases of anniversary reaction have also been observed. Tishler, *Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction*, 68 PEDIATRICS 670 (1981).

Teenage abortion may also involve a severe double loss for the adolescent, who may compensate for her first abortion by becoming pregnant, and then may decide to have another abortion. *Portrait* at 92; *see also* Teitze, *Repeat Abortions, Why More?*, 10 FAMILY PLANNING PERSPECTIVES 205, 286 (1978).[5] Many researchers and clinicians strongly believe that parental participation will solve this cycle of problems. *See* Torres, Forrest and Eisman, *Telling Parents: Clinic Policies and Adolescents Use of Family Planning and Abortion Service*, 12 FAMILY PLANNING PERSPECTIVE, 284-289 (1980) (hereinafter "*Telling Parents*"); Butler & Fujita, *Abortion Screening and Counseling: A Brief Guide for Physicians*, 50 POST GRAD MED 208, 212 (1971); Horowitz at 551.

A pregnant teenager is frequently overwhelmed by her feelings surrounding the problem pregnancy and subsequent abortion. Appellate Record at 868, *Hodgson* v. *Minnesota*, 850 F.2d 1452 (8th Cir. 1988) (Nos. 86-5423 and 86-5434) (testimony of Dr. Vincent Rue). To the extent she does not share these feelings with her parents, she becomes more isolated and alienated which in turn triggers a host of other psychological sequelae like guilt, depression and anxiety, which increase the risk of replacement pregnancies and multiple abortions. *Id.* at 868-869. However, when the "secret" pregnancy and con-

[5] One study shows that 17% of women under eighteen who had abortions were pregnant again within a year. Steinhuff, *Women Who Obtain Repeat Abortions: A Study Based On Record Lineage*, 11 Family Planning 30, 37 (1979). Another study showed that 41% of adolescents who had therapeutic abortions had resumed sexual intercourse six months later, more than two thirds of whom were then doing so without contraceptives. Perez-Reyes at 123.

templated abortion become known to her parents, her most stable and respected support, the teenager immediately reduces the psychological risks associated with keeping the "secret" and gains emotional strength and positive ideas from the family unit. Parental consultation can thus serve as an important catalyst to work through her psychological crisis. *Id.* at 867.

Adolescent aborters who avoid facing the difficulties of the abortion decision experience more psychological problems than the non-avoiders. Cohen, Laurie, Roth and Susan, *Coping With Abortion*, 10 JOURNAL OF HUMAN STRESS 140, 142 (1984). Besides the natural sounding board and emotional support which the family provides in times of crisis, parental consultation can provide significant help to promote maternal health of the pregnant teenager. J. Burtchael, RACHEL WEEPING AND OTHER ESSAYS ON ABORTION 42 (1982) (hereinafter "RACHEL WEEPING"). For example, parents can provide the abortion providers or subsequent physician treating the complications from abortion with medical and psychological history which would be critical to reducing or avoiding altogether physical and psychological risks from teenage abortions. *Matheson*, 450 U.S. at 411.

B. Parental Consultation Substantially Benefits The Minor's Decision Making Process.

There is substantial evidence that adolescents change markedly as they progress through adolescence, and differ significantly from adults, in at least five ways, in how they make decisions on whether to abort or carry the baby to full term:

(1) Adolescents consider fewer and different factors in pregnancy decisions and in potential childrearing decisions;

(2) Adolescents consider future solutions and goals less than adults;

(3) Adolescents delay their decision more than adults;

(4) Adolescents differ from adults in consideration of future consequences in hypothetical dilemmas; and

(5) Adolescents have been found to differ from adults in their ability to understand aspects of moral decisions from the viewpoint of others.

Worthington at 134-135 (citations omitted).

The foregoing differences in decision making between adolescents and adults suggest that parental involvement helps adolescents, especially younger ones, make better decisions about how to react to her pregnancy in at least five ways.

First, parental notification requires the adolescent, through the waiting period provision of parental notification laws, to take 24 to 48 hours to consider the decision to abort, rather than respond immediately to the often demand-laden situation of finding that she is pregnant while at a clinic that does abortions. One study suggests that pregnant adolescents are particularly vulnerable to immediate situational cues in making pregnancy resolution decisions. Cobliner, *Pregnancy and Single Adolescent Girls: The Role of Cognitive Functions*, 3 JOURNAL OF YOUTH AND ADOLESCENTS 17-29 (1974).

Second, notifying parents allows them to give her balance and support in the decision making. While the initial response to learning about the pregnancy may be stressful for the parents, and they may consider their own wishes and fears in addition to their daughter's, parents will generally have more experience in making decisions under emotional strain and will be more likely to carefully consider a variety of options than will the adolescents. Worthington, *The Benefits of Legislation Requiring Parental Involvement Prior to Adolescent Abortion* in VALUES AND PUBLIC POLICY 221, 226-227 (G. Regier Ed. 1988) (hereinafter *Parental Involvement*).

While the decision to abort is difficult, even for an adult woman, teenage girls are particularly subject to ambivalence and confusion regarding the abortion decision. Horowitz at 557. One study found that almost one third of young women (31.8%) changed their minds once or twice about continuing the pregnancy or having the abortion, and 18% changed their minds even more frequently. Klerman, Bracken, Jeckel and Bracken, *The Delivery-Abortion Decision Among Adolescents*

in PREGNANCY AND ADOLESCENCE 219, 227 (1982) (hereinafter "*The Delivery-Abortion Decision*"); *see also* Wallerstein at 829 (reported that nearly 60% of young women studied reported conflict regarding the abortion decision). Nearly 20% stated that a central emotional issue revolved primarily around their deception of their families and the burden of secrecy. *Id.*

Parents will supply other points of view and provide other alternatives, such as adoption, marriage to the putative father, and raising the child at home. Their impact can help broaden her understanding of the ramifications of her decision. *Parental Involvement* at 227. As this Court has recognized:

> Abortion may not be the best choice for the minor . . . Alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibility of motherhood with the assured support of family may be feasible and relevant to the minor's best interests.

Bellotti II, 443 U.S. at 642-43.

Third, parents are also able to correct any misapprehensions that their daughter might have and to challenge her erroneous beliefs. Mirachek, *Counseling Adolescents with Problem Pregnancies*, 42 AMERICAN PSYCHOLOGISTS 84-88 (1987). One frequent erroneous belief that would be corrected is that parents will reject the adolescent because of her pregnancy. In fact, parents usually react less negatively than adolescents anticipate. There is substantial evidence that most parents will support their daughters during an adolescent pregnancy. Barglow, Bornstein, Etsome, Wright and Visodsky, *Some Psychiatric Aspects of Illegitimate Pregnancy During Early Adolescence*, 37 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 266, 267 (1967).

After a preliminary period of disequilibrium (anger, disappointment, disgust), there appears to be a more stable problem solving and acceptance process when both the mother and daughter take steps toward resolving these problems in the pregnancy. *Parental Involvement* at 230. In numerous studies, over two-thirds of the families reported that members strongly

support each other, participate with the pregnant adolescent, and demonstrate attachment to the new child prior to birth. *Id.* In one study, young women felt that 67% of their mothers and 74% of their fathers would have negative reactions toward abortion. Among those minor women who did finally inform their parents of their decision to have an abortion, reported reaction to the news expressed by both parents were overwhelmingly positive. Few negative responses were reported. Clary, *Minor Women Obtaining Abortion: The Study of Parental Notification in Metropolitan Areas*, 72 AM. J. PUB. H. 283-284 (1982) (hereinafter "Clary").

Fourth, parents supply the real life experience in autonomy and problem solving which adolescents often lack—young women rely on less analytic approaches to the problem such as following the normative behavior of their peers in basing their decisions on romantic, unrealistic scripts. Ramsey, *Representation of a Child in Protection Proceedings: The Determination of Decision Making Capacity*, 17 FAMILY LAW QUARTERLY 315, 344-345 (1983) (hereinafter "Ramsey"):

> The ability to reason abstractly and foresee consequences which is so important making a good decision of such magnitude, [i.e., pregnancy resolution] is lacking in most teenagers.

Eisen, Zellman, Liebonitz, Chow and Evans, *Factors Discriminating Pregnancy Resolution Decisions of Unmarried Adolescents*, 108 GEN. PSYCH. MON. 69, 94 (1983). "Minors often lack the experienced perspective and judgment to avoid choices that could be detrimental to them." Clary at 284.

Fifth, parental involvement tends to moderate the emotional upheavals of adolescents which often impact heavily upon their ability to make sound judgments. "Teenagers may tend to be egocentric and to make irrational and emotional decisions about themselves and others. A particular fourteen year old may have been more capable of making a certain decision when she was younger, before the emotional upheavals of adolescence interfered with her judgments." Ramsey at 315.

This Court has recognized the significance of parents in the minor's decision making process:

> There can be little doubt that the state furthers a consitutionally permissible end by encouraging an unmarried, pregnant minor to seek the help and advice of her parents in making the very important decsion whether or not bear a child. That is a grave decision and a girl of tender years under emotional stress may be ill equipped to make it without advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at the abortion clinic.

Danforth, 428 U.S. at 91 (Stewart, J., concurring). *See Bellotti II*, 443 U.S. at 637. A consistent thread in these cases and others is a recognition of the profound significance to the minor's well being of parental participation in the abortion decision.

C. Parental Consultation Helps Protect Vulnerable, Immature Minors From Exploitation.

Pregnant teenage girls are "particularly vulnerable" to abortion clinics which offer immediate answers to an unwanted pregnancy, and to the influence of their peers and boyfriends. *See Bellotti II*, 443 U.S. at 634. "There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion." *Matheson*, 450 U.S. at 407. In a 1980 survey of abortion clinics, it was found that less than half require parental notice even for teenagers fifteen years of age or younger; and even fewer require parental notification before performing abortions on minors aged sixteen and above. *Telling Parents* at 285 (Table 1). Almost half (45%) of the 1170 teenage abortion patients interviewed admitted that their parents had no knowledge of their intended abortion. *Id.* at 289 (Table 5). Over 90% of these teenagers were living with their parents, with only 4% living with relatives or friends. *Id.* at 287.

Numerous studies reveal, however, that adolescents have a particular need for adult guidance in areas like abortion in which they have no childhood experience to guide them, E. Hurlock, ADOLESCENT DEVELOPMENT 250 (4th ed. 1973), and which create severe emotional stress and psychological pressure "to avoid or escape the problem." *Bellotti II*, 443 U.S. at 635. Benson & Stack, *Help or Hindrance: Parental*

Impact on Pregnant Teenagers' Resolution Decisions, 31 FAMILY RELATIONS 271, 279 (1982); R. Mnookin, IN THE INTEREST OF CHILDREN 158, 237-239 (1985).

The majority of abortions now are performed by strangers in unfamiliar surroundings, where minors are alone, furtive and frightened visitors subjected to assembly line abortion techniques to give them their "quick fix." *See Danforth*, 428 U.S. at 91, 92 n.2 (Stevens, J., concurring); Blum, *Impact of Parental Notification Law*, 77 AM. J. PUBLIC HEALTH 619 (1987). Dr. Edward Allred, whose chain of abortion clinics performs 60,000 abortions per year, grossing twelve million dollars annually, has stated:

> Very commonly we hear patients say they feel like they're on an assembly line. We tell them they're right. It is an assembly line . . . We're trying to be as cost effective as possible and speed is important . . . [W]e try to use the physician for his technical skill and reduce the one-on-one relationships with the patient. We usually see the patient for the first time on the operating table and then not again . . ."

"Doctors Abortion Business is Lucrative," The San Diego Union, Oct. 12, 1988, at 3A, Col. 5.

The abortionist has a direct conflict of interest—profit—when counseling a vulnerable, frightened, pregnant teenager whether to have an abortion.

The typical abortion "counselor" also has such a personal, psycho-social stake in abortion that she often cannot give meaningful, objective counsel, even if she was instructed to. Abortion counselors have promotional jobs in which they exploit the natural, centrifugal pressures that make communication between adolescents and parents difficult, and are willing to weaken whatever remains of the parent-child link of honest interaction to promote abortion.[6] RACHEL WEEPING at 41-44. According to past counselors, "at the abortion clinic you aren't really expected to present alternatives to abortion." *Id.* at 43. "Counselors are just to give the appearance of help . . . They think of themselves as company for the women . . . The counseling was more of an assurance process." Weed, *Curbing Births Not Pregnancies*, The Wall St. J. Oct. 14, 1986, at 42, Col. 4. (citing L. Francke, THE AMBIVALENCE OF ABORTION 25, 30 (1978).

[6] Family planning programs "are more efficient at convincing teens to avoid birth than to avoid pregnancy." Weed, *Curbing Births Not Pregnancies*, The Wall St. J., Oct. 14, 1986, at 36, Col. 4 (hereinafter Weed). Despite a massive, government-financed campaign that has increased the provision of family planning services to teenagers by 600% in twelve years (in 1980, 30% of all teens were involved in family a planning program), and despite predictions by family planners that the rate of pregnancy among teenagers would drop by 200—300 *pregnancies* for every 1000 teenagers involved in family-planning programs, Olsen & Weed, *Effects Of Family Planning Programs For Teenagers On Adolescent Birth and Pregnancy*, 20 FAMILY PLANNING PERSPECTIVES 153, 157-61 (1986) [hereinafter Olsen & Weed], recent research found "a net increase of about 100 pregnancies" for every 1000 teenagers using family planning services. *Id.* at 160, 151; Weed & Olsen, *Effects of Family-Planing Programs on Teenage Pregnancy—Replication And Extension Rates*, 20 FAMILY PLANNING PERSPECTIVES 173, 190 (1986) [hereinafter Weed & Olsen]. Instead of reductions of more than 150 *abortions* per 1000 teenagers using family planning services, predicted by family planners, Weed & Olsen found that the rate of abortion increased by more than 100 per 1000 teenage family planning clients. Weed at 36; Olsen & Weed, *supra* a 161-645, 67; Weed & Olsen, at 190. "Family planning is associated with higher, not lower, abortion rates." *Id.*

Many similar stories are reflected by the following teenager who obtained a "safe," legal abortion with no immediate, physical complications:

> When I was 17 I found myself in a crisis pregnancy . . . When I went to the local family planning clinic, I sought guidance and wanted to know what I could do about my situation. I wanted a helping hand. When I walked into the clinic, I trusted the nurses and doctors, and thought they were concerned about my health enough to help me make a decision, not make my decision for me.
>
> Only one solution was strongly recommended that day. When I questioned the development of my baby, I was told it wasn't a baby yet, and that it looked like a tadpole. Since that day I have learned differently . . . *I was told that abortion was simple and safe and that I could go and live the rest of my life and have children* when I was in a position to provide for them. I heard no scientific facts that day, only biased opinions. I was not told what abortion itself could do to me in the years to come, only that it was

> "safe and simple." I was not told that I would *abuse myself with alcohol, try to kill myself, develop an eating disorder, and have terrible dreams*. Worst of all, I was not told that I might never have another child. It has been 14 years since my "safe and simple" abortion and *I will never be able to have another child*.

Letter from Sue Liljenberg to Sen. Gordon Humphrey June 6, 1986 (emphasis supplied). *Amici* Focus on the Family, Family Research Council and American Victims of Abortion have received or heard of thousands of similar or worse stories of exploitation; and thus, Justice Stewart's conclusion in his concurring opinion in *Danforth* may be an understatement: "[I]t seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." *Danforth*, 428 U.S. at 91.[7]

Without the required parental notification/consent laws, pregnant adolescents who are ashamed, fearful and confused will not generally consult their parents even in the best of families as illustrated by the real life experiences of *amici* (*see* Appendix A). In one recent study of pregnant teenagers considering abortion, 71% informed a best friend, while only 37% informed mothers and 26% informed fathers. The Delivery-Abortion Decision Among Adolescents, at 219; *see also Telling Parents* at 289, Table 5. As Justice Stevens recognizes:

> If there is no parental [notice] requirement many minors will submit to the abortion procedure without even informing their parents. An assumption that the parental reaction will be hostile, disparaging or violent no doubt persuades many children to bypass parental counsel which

[7] Justice Stewart in his concurring opinion in *Danforth* further described the "counselling" exprience at abortion clinics as follows:

> "The counselling . . . occurs entirely on the day the abortion is to be performed . . . it last for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . The physican takes no part in this counselling process. . . . Counselling is typically limited [only] to a description of abortion procedures, possible complications, and birth control techniques . . .

Danforth, 428 U.S. at 91-92 n.2, quoting Brief for Appellants in *Bellotti I*, O.T. 1975, No. 75-78, pp. 43-44.

> would in fact be loving, supportive and indeed, for some, indispensable. It is unrealistic, in my judgment to assume that every parent child relationship is either (a) so perfect that communication and accord will take place routinely; or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest.

Danforth, 428 U.S. at 103-104 (Stevens, J., concurring in part and dissenting in part); *see also Matheson*, 450 U.S. at 419-20 (Powell, J., concurring) and *Matheson*, 450 U.S. at 424 (Stevens, J., concurring).

Research strongly emphasizes that adolescents' decisions regarding abortion or childbirth are significantly affected by counsel they receive from others—if not abortion clinic staff, then teenage peers or boyfriend. *See* E. Hurlock, ADOLESCENT DEVELOPMENT 75-77 (4th Ed. 1973); J. Gallagher, *MEDICAL CARE FOR THE ADOLESCENT* 243 (3rd Ed. 1976); I. Josselyn, *ADOLESCENCE* 42-43 (1971); Brittain, *Adolescent Choices and Parent-Peer Cross Pressures*, 28 AM. SOC. REV. 385 (1963). Peers are not only the most frequent source of sex information to adolescents, but they frequently are the source of misinformation about abortion. Hanson, *Abortion in Teenagers*, 21 CLIN. OBST. AND GYN. 1175, 1180 (1978). The teenager vulnerability is underscored by the studies which reveal that in over 78% of teenager abortion cases, girls reported that they had been strongly influenced by someone who encouraged abortion. Adler & Dolcini at 74.

The bottom line is that vulnerable adolescents are exploited either consciously by abortion providers or unknowingly by the teenage peers who are equally uninformed, misinformed or emotionally and experientially unable to render rational, objective advice on abortion or childbirth. Thus, parental consultation provides the people who are most interested in the ultimate well being of pregnant adolescents the opportunity to protect them against false, misleading, prejudicial or harmful advice from their abortion "counselor" and their equally uninformed peers.

D. Parental Consultation Promotes Legitimate Parental Authority And Family Unity.

1. Parental Control.

The parent-child relationship is generally outside the reach of government regulation. Accordingly, the state can only interfere with parental control of their children in exceptional cases where it is necessary to protect the health or safety of the child. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (Prince); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). The Court has long recognized the importance of parental control, especially in the teenage abortion context. For example, the plurality in *Bellotti II* recognized:

> [W]e cannot ignore that central to many of these theories, and deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children. Indeed, 'constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

Bellotti II, 443 U.S. at 638-639. *Prince* v. *Massachusetts* also recognizes the primacy of parental control over their children:

> "It is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The legislature could properly conclude that parents and others . . . who have the primary responsibility for children's well being are entitled to the support of law designed to aid discharge of that responsibility."
>
> *Prince*, 321 U.S. at 166.

An additional and more important justification for state deference to parental control over children is that:

> [T]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with a high duty, to recognize and prepare him for additional obligations. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). 'The duty . . . must be read to include the inculcation of moral standards, religious beliefs and elements of good citizenship.' *Wisconsin* v. *Yoder*, 406 U.S. 205, 233 (1972).

Bellotti II 443 U.S. at 637-638.

Some legal scholars and justices have suggested that there may be a *constitutional right to parental notification and consent*.[8] Whether or not there is such a constitutional right, a state clearly has a legitimate, if not compelling, interest to encourage and promote parental authority. Notification and consent laws foster these parental rights while recognizing the historical, legal limitations of its young citizens:

> Because he may not foresee the consequence of his decisions, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases or even attend exhibitions of constitutionallay protected adult motion pictures. Persons below a certain age may not marry without parental consent and they may not vote. . . . But even if it is the most important kind of decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.

Danforth, 428 U.S. at 102-103.

Because "the most significant consequences of the abortion decision are not medical in character," *Danforth*, 428 U.S. at 103, the State unquestionably has an interest in ensuring that a teenager receive the best advice and consultation which clearly includes that from her parents. *Bellotti II*, 450 U.S. at 423.

2. Family Involvement.

Unless a family is involved, adolescent pregnancy can contribute to family estrangement and increased parent-child

---

[8] The Court's opinions discussed in the text above—*Pierce*, *Yoder*, *Prince*, and *Ginsberg*—all have contributed to a line of decisions suggesting the existence of a *constitutional parental right against undue, adverse interference by the State*. *Bellotti II* 443 U.S. at 639 n.18. *See also Amicus Brief* of Concerned Woman of America in *Ohio* v. *Akron Center For Reproductive Health*, No. 88-805.

schism. *Parental Involvement* at 232. For example, researchers generally list six reasons for family involvement with adolescent pregnancies and the "abortion versus childbirth" decision:

1. The family's need to deal with its pervasive sense of failure precipitated by the pregnancy . . .

2. Family members' needs to clarify their different views about the pregnancy and the unborn baby . . .

3. The need for the adolescent and her parents to resolve any conflict existing prior to the pregnancy, especially those resulting from the pregnancy situation . . .

4. The importance of maintaining and/or improving communication in a crisis situation for the adolescent and her family . . .

5. Parents' need to maintain their relationship while they parent their daughter through the crisis of pregnancy . . .

6. Parents' and adolescent's need to resolve developmental independency-dependency issues.

Parental Involvement at 234 (citations omitted).

Failure to involve her family will exacerbate and hide the root causes for the pregnancy, intensify family disunity and increase the minors' psycho-social problems of isolation, guilt, fear and depression. *Id.* Without parental involvement legislation, those girls who opt for abortions out of a mistaken perception of their parents' reactions deprive themselves of their parents' support during their crisis—the most powerful and permanent social and family support they have—and will either: (a) erect a wall of guilt and secrecy between themselves and their parents; or (b) later reveal to their parents that they not only got pregnant but did not trust or honor their parents and made an unilateral abortion decision. Worthington at 231.

One scholar concluded that adolescent pregnancy can often result in "building family morale, intensifying family exchanges and [if childbirth is chosen] filling the empty nest." Furstenberg, *Burdens and Benefits: The Impact of Early*

Childbearing on the Family, 1980 J. SOCIAL ISSUES 36, (1980). Even if parents and daughter do not end up with the same views towards abortion versus childbirth after consultation, most parents will provide emotional and psychological support during and after their daughter's decision pertaining to the crisis pregnancy. *Parental Involvement* at 230.

In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by enshrining in law the starkly individualistic view that a child in the making, which can be a future shared relationship of the family, is wholly and completely a 'private' matter for the teenage girl to determine. Etozioni, *The Husband's Rights in Abortion*, 12 TRIAL 56, 58 (1976).

Family involvement in decisions about abortion or bearing a child to term thus promotes increased family unity in at least four ways. First, it will permit the family to deal with some of the underlying issues to adolescent pregnancy, i.e., power struggle, rebellion, substance abuse, depression, and immaturity. Second, in families where the girl might have opted for a secret abortion, the compounding of problems (broken relationship with parents, lack of communication, distrust, alienation and isolation) can be avoided. Third, shared experiences where a mutual, well thought out decision is made by both the daughter and parents promote emotional and psychological support for whatever decision is made, whether abortion, adoption or childbirth. Finally, the parents' knowledge of an impending abortion allows the parents to communicate important medical information about the adolescent to the abortion doctor during the required waiting period, or in the case of later complications from the abortion, to the subsequent treating physician.

II. STATE NOTIFICATION AND CONSENT LAWS ARE RATIONALLY RELATED TO LEGITIMATE INTERESTS AND DO NOT "UNDLY BURDEN" A MINOR'S RIGHT TO HAVE AN ABORTION.

The federal courts' deference to state legislatures on the parental consultation question is a function of the standard of

review adopted: strict scrutiny, rational basis or some intermediate standard. "A woman's ability to choose an abortion is a species of 'liberty.'" *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790 (1986) (White, J., dissenting) ("*Thornburgh*") *see also Roe* v. *Wade*, 410 U.S. at 113 (Rehnquest, J., disssenting). The presence of such a liberty interest, however, ordinarily means only that state regulation affecting that liberty interest must be procedurally fair and must bear a *rational relation* to valid state objectives. *See Williamson* v. *Lee Optial Co.*, 348 U.S. 483, 486 (1955).

State regulation will only be subjected to the higher standard of strict scrutiny, if it *substantially interferes* with a fundamental constitutional right. *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 462 (O'Connor, J., dissenting) ("*Akron I*").

Numerous other cases have adjudicated state abortion laws on the *rational basis* standard. In *Carey* v. *Population Services International*, 431 U.S. 678, 693, 696 (1977) for example, the statute was measured by whether it provided "a *rational means* for accomplishment of some *significant state policy*." In *Maher* v. *Roe*, 432 U.S. 474 (1977), *Poekler* v. *Doe*, 432 U.S. 519, 421 (1977); and *Harris* v. *McRae*, 448 U.S. 297, 325 (1980), the Court again required only a showing that Congress' authorization of "reimbursement for generally, medically necessary services generally but not for certain medically necessary abortions was *rationally* related to the legitimate government goal of encouraging childbirth." *Webster* v. *Reproductive Health Services*, 57 U.S.L.W. 5023, 5028 (U.S. June 27, 1989) (emphasis added).

Three members of the *Webster* plurality referred to the "rational basis test" and "promotion of States' interest standard" throughout the opinion, and concluded:

> It is true that the tests in question increase the expense of abortion and regulate the discretion of the physician . . . But we are satisfied that the requirement of these tests *permissibly furthers* State's interest in protecting human life and we therefore believe the statutes to be constitutional . . . The Missouri testing requirement here is *reasonably designed* to ensure . . . an end which all concede is *legitimate* . . .

Webster, 57 U.S.L.W. at 5031 (emphasis added).

While strict scrutiny and rational basis tests have generally been judicial reference points in review of state laws, the intermediate standard of "undue burden" has also arisen in the abortion context. *Akron I*, 462 U.S. at 461 and 461 n.8 (O'Connor, J., dissenting). Justice O'Connor's two-tier approach to reviewing state abortion laws acknowledges that even if the state provisions do burden the right to seek an abortion, the Court must then consider "whether this burden *reasonably relates* to legitimate state interests." *Id.* at 471 n.15 (O'Connor, J., dissenting); *see Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). If the regulation "unduly burdens" the protected interest, Justice O'Connor would require states to demonstrate a compelling interest in the legislation. This "second tier" undue burden has only been found in situations involving "absolute obstacles or severe limitations" on the abortion decision such, as in *Danforth*, 428 U.S. at 79, where prohibition of saline amniocentesis was completely prohibited for abortions after twelve weeks; and *Bellotti II*, 443 U.S. at 622 where parental consent without a judicial bypass procedure was considered an arbitrary, total parental veto over the minor's abortion decision. *See Akron I*, 462 U.S. at 464 (O'Connor, J. dissenting). According to this test, if an *undue burden* is found in the threshold inquiry, the Court should then decide whether a *compelling state interest* justifies the undue burden. *Id.* at 463.

The appropriate standard to review state notification and consent laws should be whether the laws are *reasonably related* to promote or further *legitimate state interests*. The countervailing protected right to abortion is "qualified," *Roe*, 410 U.S. at 154, and thus, where the state interests directly impact its ability to protects its citizens, this Court should defer to state legislative authority. In the parental consultation context, the Court has recognized many legitimate and compelling state interests: (1) to protect the mental and physical

well being of pregnant minors; (2) to promote informed, rational decision making and family unit; and (3) to protect potential human life—all of which notification and consent laws promote and permissibly further.

Even if the undue burden test is applied, notification laws with a judicial bypass procedure as in the present case should still be upheld. Unlike *Akron I*, *Danforth* or *Bellotti II*, the parental notifications here do not place "a complete prohibition on abortion in certain circumstances," *Akron I*, 462 U.s. at 429 n.11. Nor does it place an absolute and possibly arbitrary parental veto over the abortion decision. *Danforth* 428 U.S. at 74 and *Bellotti II*, 43 U.S. at 642-644. Since the laws do not unduly burden the minors' right to have an abortion, the compelling interests of the state do not have to be examined.

III. FEDERAL COURTS MUST GIVE GREAT JUDICIAL DEFERENCE TO STATE ABORTION LEGISLATION, PARTICULARLY IN MATTERS INVOLVING PARENT-CHILD RELATIONS.

In the last three abortion cases, the Court appears to recognize the dangers of judicial law making:

> The rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as our does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been *a web of legal rules that have become increasingly intricate, resembling a code of regulation rather than a body of constitutional doctrine* . . .

Webster, 57 U.S.L.W. at 5023 (Rehnquist, C.J. joined by White, J. and Kennedy, J.); *See Akron I*, 462 U.S. at 468-472 (O'Connor, J., dissenting); *Thornburgh*, 476 U.S. at 782-833 (Burger, C.J., White, J., and O'Connor, J., dissenting).

This Court has sailed from *Roe* into uncharted waters for sixteen years by constantly superseding legislative judgment

and "making Constitutional law in this area a virtual Procrustean bed." *Webster*, 57 U.S.L.W. at 5030.

The Court must keep in mind that:

> the appropriate forum for . . . resolution [of extremely sensitive issues like abortion] in a democracy is the legislature. We should not forget that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Akron I, 462 U.S. at 465 (O'Connor, J., dissenting). (citations omitted). *See Maher*, 432 U.S. at 479-480.

Dissenters in *Thornburgh*, *Akron I* and at least three justices in *Webster* appear poised to return this Court to adjudicating state abortion laws and regulations based on the correct judicial review standard of "rational basis" and to giving state legislatures greater leeway to effectuate legitimate state interests. *Thornburgh*, 476 U.S. at 796-797 (White, J., dissenting); *see Oregon* v. *Michell*, 400 U.S. 112, 206-207 (1970) (Harlan, J., concurring); *id.* at 247-48 (Brennan, J., concurring). If accomplished, state laws routinely struck down by this Court, "would be sustained." *Webster*, 57 U.S.L.W. at 5030; *Thornburgh* at 802 (White, J., dissenting); *id.* at 783 (Burger, C.J., dissenting).

Withour reference to the constitutional right to parental notification implied in *Pierce*, *Yoder*, *Prince* and *Hinsberg*, and suggested in *Bellotti II*, 443 U.S. at 639 n.18, it is clear that judicial authorities should give greater deference to state legislatures to effectuate important state interests such as *parental prerogatives* to raise their children, to participate in their medical, moral and religious decisions and to unify their families. These are not issues in which federal courts have any particular expertise or historical authority:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children . . . [H]istorically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. *J.R.*, 442 U.S. 584, 602 (1979). *See further*, *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1974); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

In parental notification and consent cases, the Court has recognized these principles. In *Matheson*, the Court upheld parental notification because "the Constitution does not compel a state to fine tune its statutes so as to encourage or facilitate abortions. 450 U.S. at 413; *see also Akron I*, 462 U.S. at 469 (O'Connor, J., dissenting).

Bellotti I and II, *Danforth*, *Matheson* and *Ashcroft* demonstrate the legitimacy of parental consultation and waiting periods to protect immature, unemancipated teenagers having abortions. Non-abortion surgical procedures involving minors require no less. *Thornburgh*, 476 U.S. at 785 (Burger, J., dissenting) (no surgeon would perform an amputation or even an appendectomy on a fourteen old girl without the consent of a parent).

The Court in this case should exercise traditional judicial deference in the parental rights and abortion context and steer this misguided ship back into port by following channel lights which flash broad, constitutional principles for parental notification. Enunciating more intricate and complex rules for parental consultation will only continue this ill-fated voyage. The Court should return to *traditional* constitutional principles where *judicial deference* to state legislatures is practiced and state abortion laws are appropriately reviewed by their *rational relationship to legitimate state interests.*

CONCLUSION

The Court should apply the rational basis test to the state parental notification and consent law in this case and the state law should be upheld.

Respectfully submitted,

H. ROBERT SHOWERS
(Counsel of Record)
RICHARD M. CAMPANELLI
GAMMON & GRANGE
1925 K Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 862-2000
Attorneys for Amici Curiae

APPENDIX

APPENDIX A

DESCRIPTION OF *AMICI*

Amicus **Focus on the Family** is a Christian, nonprofit organization that is committed to strengthening the emotional, psychological and spiritual health of families in the United States and throughout the world. Its daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1300 stations. Its monthly magazine has a circulation of 1.7 million. It receives an average of more than 8000 letters daily, many of which describe the causes and results of past trauma, including the abortion experience.

Amicus **Family Research Council,** a division of Focus on the Family, is a voice for the pro-family movement in Washington, D.C., and provides policy analysis and research support for pro-family and religious groups across America. As such, it studies matters affecting the family, including the effects of abortion.

The central issue in this case—parental notification and consent for minors undergoing abortions—represents a unique intersection of the concerns of Focus on the Family and the Family Research Council. The issue of parental consultation goes to the heart of the parent-child relationship, and the proper involvement of the state in protecting that relationship from undue interference or preemption. Both Focus on the Family and the Family Research Council have significant and substantial knowledge and experience in this area that can assist this Court.

Amicus **Rachel Ely** was a seventeen year old unmarried high school student when she learned that she was pregnant. Her high school counselor recommended that she have an abortion, arranged for State funding for the abortion, and recommended a particular abortion clinic. No other alternatives were discussed. Rachel was afraid to tell her parents that she had become pregnant. Because Rachel was not aware

of any alternatives, she consented to the abortion. Had Rachel's parents known their daughter was pregnant, they would have provided her with the alternatives of keeping her child or placing the child for adoption.

After her abortion, Rachel received no discharge instructions from her physician. Several days later she developed some flu-like symptoms in her chest, which she did not associate with her abortion because she believed that any symptoms she might have as a result of a complication from an abortion would be in her pelvic area. She went to her family doctor when these symptoms became worse. She did not tell the doctor about the abortion because she did not think the symptoms were related.

Sometime later, Rachel became very sick, and her father took her to a local hospital because of her persistent flu-like symptoms. The next morning Rachel was found in her hospital bed in a comatose condition. Subsequently, it was discovered that she had developed bacterial endocarditis—a condition directly attributable to a post-abortion surgical infection. The bacterial endocarditis had caused blood clots to develop and become lodged in the vascular system of her brain, causing a stroke. When Rachel recovered from her coma, she was left a permanently wheelchair-bound hemiplegic.

Had Rachel's parents been notified of the abortion, they would have questioned the possible relationship between the abortion and Rachel's symptoms. With simple antibiotic therapy, her devastating life-long disabilities would not have occurred.

Amicus **Myoshi Callahan** was fifteen when she had an abortion without her parents' consent. To use Myoshi's words, deciding to have an abortion was like a skydiver's "free fall." Her boyfriend and she decided—in view of the fact that they'd planned on getting maried anyway—that the "solution" to the situation was to get marrried "now instead of later." However, when his parents learned of her condition their reaction was

one of total, incensed rejection. They insisted that the only way the situation could be resolved was for her to have an abortion.

Earlier, when Myoshi had informed her mother that she was pregnant, she was aware that her mother was terribly disappointed in her. She wasn't angry, she didn't reject her, but Myoshi knew that the overriding reaction was disappointment. To her young mind, having the baby would only add to her mother's disappointment, and in view of her boyfriend's parents' reaction to her pregnancy, she "free fell" into deciding on an abortion without notifying her parents.

At the clinic, she received no counselling whatsoever. As she says, what does one know at fifteen? Her "choice," according to them, was abortion. Unfamiliar with the strategy of the clinic, afraid, and to her mind, alone, she had the abortion.

As a result of the procedure, Myoshi's periods became (and continued to be) abnormally severe, and she eventually had to have a hysterectomy. Emotionally and physically, she has suffered and continues to suffer. She has since told both parents, who grieved with her—grieved not only at the lost life, but because Myoshi went through the ordeal alone, an ordeal that would have been prevented had their consent been mandatory.

Myoshi is convinced that lack of parental notification and consent abrogates a parent's rights. "After all," she says, "how better to demonstrate responsibility and love than by giving them the benefit of their (mature) advice, and in my case, withholding their consent." She has no doubt whatsoever that had their consultation for an abortion been mandatory, she would never have had an abortion.

Amici **Teresa Wibblesman Fangman, Holly Trimble,** and **Linda Roselli** are women who procured abortions as minors without their parents' knowledge. To a large extent, their abortion decisions were uninformed. In retrospect, they believe that prior notice of their abortions to their parents would have significantly altered their experiences dealing with

their problem pregnancies. The *amici* are aware of the parental notice requirement at issue in this case, and they offer their experiences to the Court to illustrate the need many young girls have for that protection in making abortion decision.

Teresa Wibblesman was sixteen years old when she learned she was pregnant. She had been raised in a Catholic home and attended parochial schools. All she knew about abortion was that it would "take care of" the problem. No one at the family planning center, where her pregnancy was diagnosed, offered her any counseling except a referral to an abortion clinic. She made her decision to abort primarily because she was afraid to tell her parents of her pregnancy; she did not want them to know she had disappointed them. Her boyfriend took her from her Ohio home to a Louisville, Kentucky abortion clinic. At the clinic she signed consent forms which were placed in front of her without explanation. She does not remember reading the forms. The only counseling she received at the clinic was a brief description of the abortion procedure using a plastic anatomy model, given to a group of seventeen girls at once.

Teresa's abortion proceeded smoothly and she suffered no known physical complications. The abortion exacted an emotional toll, however. Teresa blocked the abortion from her mind but her self-worth had plummeted. She slipped into promiscuity and drug and alcohol abuse. She began to play what she calls "car games"—closing her eyes while driving over bridges, or accelerating on the freeway and closing her eyes until fear forced her to open them again.

Five years after Teresa's abortion, her fifteen-year old sister was impregnated on a "date rape." Teresa's sister, rather than obtaining a secret abortion, went to her parents with her problem. Together, they decided that the child would be carried to term and placed for adoption. Seeing her sister's trust in her parents and their warm support for her in her crisis produced feelings of jealousy in Teresa, causing her to wish she had handled her pregnancy the same way.

Nearly six years after her abortion, Teresa consciously acknowledged that she felt tremendous guilt over the abortion. Although she was still unmarried, she determined a time when she would be fertile and deliberately became pregnant on a "one-night stand." She made adoption arrangements in Louisville. Her little girl was born on the anniversary of her abortion. Teresa took her to Louisville for adoption to "replace" the child she had aborted there.

Teresa is convinced that if she had known at the time of her abortion decision what she now knows about her parents' supportive reaction to a problem pregnancy, she would not have chosen to abort. Thus, a parental notice requirement would, in Teresa's case, have saved her from the anguish which followed a decision that turned out to have been wrong for her.

Holly Trimble was also sixteen years old when she became pregnant. She was personally opposed to abortion, but she was afraid her parents would be hurt if they knew of her pregnancy. Her boyfriend's older brother and his girlfriend persuaded her that obtaining a secret abortion was the best thing for her to do. Holly recalls that she was not in good condition to make a decision; the pregnancy made her feel ill, and she was vomiting every day. Although she was ten weeks pregnant, she believed at the time that her fetus was just a "little egg." Prior to her abortion, she asked a matronly counselor at a state family planning office if women felt badly after abortions. "No, they're usually relieved because they can go on with their lives," she was told. "Sometimes a woman is bothered if she feels the fetus move before her abortion and she thinks it's alive; but she shouldn't because it's really not." She asked the physician about possible physical complications and was told by him that an abortion was much safer than carrying the child to term.

Within a week of her abortion, Holly did begin to feel badly about it. Because the main purpose of her abortion was to hide her pregnancy from her parents, she could not talk to them about her turmoil. When *Life* magazine ran pictures of ten--

week-old fetuses, Holly saw them and became horrified at what she had done. She felt intense guilt whenever she saw a baby. Eventually she sought help from a priest and her conscience was temporarily assauged. However, she abused drugs for several years and developed an eating disorder which lasted a decade.

Nine years later, Holly had married and become pregnant. She had learned more about fetal development and was acutely aware of the new life she was carrying within her body. That awareness stirred up memories and remorse over her earlier. Her depression became so severe that she sought professional help. Her psychiatrist finally hospitalized her in the psychiatric ward of a local hospital three months after the birth of her son. Eventually she was referred to another psychiatrist who placed her on anti-depressant medication for several months. Only after careful counseling did she improve to the point where she was able to go through another pregnancy and post-partum period without debilitating depression.

Holly still looks back at her abortion decision with great regret. She believes that if she had not felt it necessary to shield her parents from knowledge of her pregnancy, she would not have obtained her bortion. She also is certain that, if she had been exposed to information about fetal development at the time of her decision, she would have chosen to carry her child to term.

Linda Roselli was fifteen when she had an abortion without the consent of her parents. She went to a Planned Parenthood clinic to have a pregnancy test. With hindsight, she says now that she was a very "unenlightened" fifteen-year-old and, based on what she had watched on television, "suspected" that she might be pregnant. The people at Planned Parenthood told her she was losing her baby and arranged her next appointment. Linda returned thinking that they were going to help her through what she thought was to be a premature birth. She felt sure her mother would help her look after the baby, once it was born.

On the morning of the abortion they dilated her, put in a "seaweed," and told her to come back in the afternoon. When she returned to the clinic in the afternoon, Linda told them that "something was wrong." She was still under the impression that what was happening was all part of having a premature baby. She refused to take the drug (she believes it was Valium) they gave her. They ignored her tears and pleas for her mother. She was then strapped to the table, a needle was inserted into her stomach, and they hooked her up to a machine that, she recalls, made a noise like a vacuum cleaner. While this was happening, the nurse held her head down, telling her "not to look." When the noise stopped, she did look. She saw the large jar, and realized that they had performed an abortion, and that her baby was dead.

Yet the fact that her baby had been aborted did not "register" in her mind, and she kept crying and screaming and asking what they had done to her baby. When she insisted that all she had wanted was a pregnancy test and (on being told that she was losing her baby) help in delivering a "premature" baby, they produced the papers she had signed—unfortunately without questioning the people at the clinic, or reading the papers for herself.

Linda's mother did not know of her abortion at the time. Linda has since learned that if she had sought her mother's permission, it would not have been given and the abortion would not have been done. She knows now that her mother would instead have helped her raise her baby.

Emotionally, Linda has suffered greatly. It took her several years to learn to live with the guilt she felt. She says she "felt unclean." It seemed to her as though she would always be sad, and that the whole world knew, and considered her to be "a pig." For many years, she would not go out with boys; she says she was afraid of men. For many years—in fact, until approximately five or six months ago—Linda would go to a Planned Parenthood clinic rather than go to their family doctor because she felt ashamed and embarrassed.

To use Linda's words, "These people at the clinics don't really care. Never once did they offer any counselling, and never once did they suggest helping me to keep the baby. Parents *must* give their consent.

Ann Maire Lozinski, Debra's mother, had absolutely no idea that her daughter was pregnant, and therefore no knowledge that Debra had decided to have an abortion. On April 11, 1985, while Debra was on Easter vacation, she went to the clinic, accompanied by her girlfriend. There, the abortion was performed without adequate care. They did not monitor Debra during the procedure. No airway was inserted, and during the surgery Debra swallowed her tongue. The attendants at the clinic were unable to restore her breathing and consciousness to normal. Debra's mother was called at work by the Director of the clinic, who informed her that her daughter was at the clinic for "minor surgery," and that she (Debra) was having "respiratory problems." They rushed Debra to the hospital, where she lay in a coma for two-and-a-half months. Debra died on June 21, 1985.

The emotional toll on the family has been immeasurable. Since that time, Mrs. Lozinski has gone downhill emotionally. She has had professional counselling, but is still depressed. She and Debra had an extremely close relationship, and she is convined that Debra's reason for deciding on an abortion was to avoid hurting her mother. Had it been mandatory for Debra to obtain parental consultation in order to have an abortion, Mrs. Lozinski is certain they would have worked it out and that neither Debra nor the baby would have been lost. The trauma of Debra's abortion and death have been, if not insurmountable, then unforgettable. Debra's nineteen-year-old brother is "very bitter." And as Debra's mother says, "the law will not allow children at school to be given an aspirin without parental consent, yet a clinic is allowed to perform an abortion on a minor without even letting the parents know, leave alone getting their consent." She is positive that had she known Debra had gone to the clinic for an abortion, they would never have

given their consent and Debra and the baby would be alive today.

Mrs. Lozinski unequivocally believes that this should be made the law of the land. Primarily it would save lives, but it would avoid, in her words "the heartaches that never goes away."

Amicus **Robert C. Wibblesman** is the father of *amicus* Teresa Wibblesman Fangman. He recalls, with deep regret, the "terrible guilt she had to carry all by herself," for the six years from the time of her abortion until he eventually learned what had happened. Recalling that period, Mr. Wibblesman says:

> I knew that she was having psychological problems . . . [b]ut I thought this was a carry over from the early death of her Mother. How wrong I was. How tough it was for her to carry the inevitable guilt of finally realizing that "I killed my baby." She carried that guilt all by herself.

Mr. Wibblesman is convined that if his consultation with his daughter had been required, "all of this could have been avoided." His experience supports that conclusion. As related in Teresa's story, Mr. Wibblesman had a second daughter who also became pregnant. Fortunately, she confided in her father and stepmother, and they provided care and support for her throughout the pregnancy. This second daughter's experience was not without pain. As Mr. Wibblesman describes it, he is "sure she still has the hurt of knowing that there is a child out there somewhere whom she loves. But she certainly doesn't have the guilt trip that Terri had to carry by herself all these years." Thus, Mr. Wibblesman can testify to the drastically different results that can occur, depending on whether or not parents are involved in this most critical decision for adolescent women.

Amicus **American Victims of Abortion** (AVA) is a national organization of persons whose lives have been adversely affected by abortions—their own or a family member's. The

objective of AVA is to provide a forum for these individuals to educate legislatures and the public about the tragic consequences of abortion for some women. Based on the experiences of AVA members who obtained abortions as minors, AVA supports legislation, such as the parental consultation statutes at issue in this case, which may protect young women from making uninformed abortion decisions.

APPENDIX B

THE CONFUSED STATE OF PARENTAL CONSULTATION LAW

1. The following twenty one states require parental consent before a minor can obtain an abortion: Alabama, Ala. Code § 26-21-3 (Supp. 1988); Alaska, Alaska Stat. § 18.16.010 (1987); Arizona, Ariz. Rev. Stat. Ann. § 36-2151 (Supp. 1987; Arkansas, Ark. Stat. Ann. § 41-2555 (Supp. 1985); California, Cal. Health & Safety Code § 25958 (Supp. 1988); Delaware, Del. Code Ann. tit. 13, § 708 (1981); Florida, Fla. Stat. Ann. § 390.001(4)(a) (West Supp. 1985); Indiana, Ind. Code Ann. § 35-1-58.5-2.5 (Burns, Supp. 1988); Kentucky, Ky. Rev. Stat. Ann. § 311-732 (1983); Louisiana, La. Rev. Stat. Ann. § 40.1299.35.5 (West, Supp. 1988); Massachusetts, Mass. Ann. Laws. Ch. 12 § 125 (Law Co-op. 1985); Mississippi, Miss. Code Ann. § 41-41-53 (1988); Missouri, Mo. Stat. § 188.028 (Vernon, Supp. 1988); North Dakota, N.D. Cent. Code § 14.02.1-03.1 (Supp. 1987); Oklahoma, Okla. Stat. Ann. tit. 63, § 1-738 (West 1984); Pennsylvania, Pa. Stat. Ann. tit 1, § 3206 (Purdon1983); Rhode Island, R.I. Gen. Laws § 23-47-6 (1985); South Dakota, S.D. Codified Laws Ann. § 34-223A-7 (1986); South Carolina S.C. Code Ann. § 44-41-30 (Law Co-op. 1985); Tennessee, Tenn. Code Ann. § 39-4-202 (1982); Washington, Wash. Rev. Code § 9.02.070 (1985). *See* Appellant's Jurisdictional Statement (J.S.) at 14, in *Ohio* v. *Akron Center For Reproductive Health*, No. 88-805 (U.S.) (Akron II).

2. The following twelve states require parental notification in the event a minor chooses to have an abortion: Georgia, Ga. Code Ann. § 24A-4401 (Supp. 1988); Idaho, Idaho Code § 18-609(6) (1988); Illinois, Ill. Ann. Stat. ch. 38, § 81-64 (Smith-Hurd Supp. 1988); Maine, Me. Rev. Stat. Ann. tit. 22 § 1595 (1980 & Supp. 1988); Maryland, Md. Health-Gen. Code Ann. § 20-103 (1987); Minnesota, Minn. Stat. Ann. § 144.343(3) (Supp. 1988); Montana, Mont. Code. Ann. § 50-20-105 (1987); Nebraska, Neb. Rev. Stat. § 28-347 (1985); Nevada, Nev. Rev. Stat. § 442.255 (1986 & Supp.

1988); Ohio, Ohio Rev. Code. Ann. § 2919.12 (Page Supp. 1985); Utah, Utah Code Ann. § 76-7-304 (1978); West Virginia, W. Va. Code § 16-2F-3 (1985). *See Akon* II, Appellant's J.S. at 14.

3. Sixteen states have had their parental consultation law stayed or enjoined. Arkansas (*Smith* v. *Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980); Florida (*Scheinberg* v. *Smith*, 659 F.2d 476 (5th Cir. 1981), and *Jacksonville Clergy Consultation Serv.* v. *Martinez*, No. 88-809—CIV-J-16, 1988. U.S. Dis. Lexis 11088 (M.D. Fla., October 6, 1988); Georgia (*Planned Parenthood Ass'n of Atlanta Area, Inc.* v. *Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988); Illinois, (*Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985) *aff'd* mem. 108 S. Ct. 479 (1987); Indiana (*Gary-Northwest Women's Serv. Inc.* v. *Bowen*, 421 F. Supp. 734 (N.D. Ind. 1976, *aff'd*, 429 U.S. 1067 (1977); Kentucky (*Eubanks* v. *Collins*, 604 F. Supp. 141 (W.D. Ky. 1984); Maine (*Women's Community Health Center* v. *Cohen*, 477 F. Supp. 542 (D. Me. 1979); Mississippi (*Barnes* v. *Mississippi, No. J86-0458W* (stayed)); Nebraska (*Orr* v. *Knowles*, No. C.V.-81-0-301 1983 WL. 1570 (D. Neb. Sept. 19, 1983)); Nevada (*Glick* v. *McKay*, 616 F. Supp. 322 (Nev. 1985)); Ohio (*Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988) (*Akron* II)); Pennsylvania (*Planned Parenthood of Southeastern Pennsylvania* v. *Case*, 686 F. Supp. 1089 (D. S.C. 1977)); South Carolina (*Floyd* v. *Aders*, 440 F. Supp. 535 (D.S.C. 1977)); Tennessee (*Planned Parenthood of Nashville* v. *Alexander* No. 79-843-II (Tenn. Chauncery Ct. Oct. 24, 1979)); Utah (*L. R.* v. *Hanson*, No. C80-0078 J (D. Utah Feb. 8, 1980) (Utah statute unconstitutional as it applies to mature emancipated minors)); and Washington (*State* v. *Koome*, 84 Wash.2d 901, 530 F.2d 260 (1975). *See Akron II*, Appellant's J.S. at 15.

4. Only five state's parental consultation laws have passed constitutional muster. Louisiana consent state (*Margaret S.* v. *Treen*, 597 F. Supp. 636 (T.D. La. 1984); Massachusetts consent statute (*Planned Parenthood League* v. *Bellotti*, 641 F.2d 1006 (1st Cir. 1981); Missouri consent statute

(*Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476 (1983); Minnesota notice statute (*Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) *(en banc);* Utah notice statute (*H. L.* v. *Matheson, 450 U.S. 398 (1981) (constitutional as it applied to "immature" minors). See* Akron II, Appellant's J.S. at 15.

5. The following eight decisions on parental consultation have been rendereed by the U.S. Supreme Court with conflicting results. *Planned Parenthood* v. *Danforth*, 428 U.S. 82 (1976) (no blanket parental consent requirement); *Bellotti* v. *Baird I*, 428 U.S. 132 (1976) (Abstained and certified nine questions to State Supreme Court); *Bellotti* v. *Baird II*, 443 U.S. 622 (1979) (declined to equate notification requirements with consent requirements, but required a judicial bypass alternative in parental consent laws); *H. L.* v. *Matheson*, 450 U.S. 398 (1981) (Utah notification law upheld without judicial bypass procedure); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983) (Missouri consent law upheld with judicial bypass procedure); *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron* I—Ohio consent law with limited judicial bypass procedure held unconstitutional); *Thornburgh* v. *American College of Obsetetricians and Gynecologists*, 476 U.S. 747 (1986) (Pennsylvania consent law with judicial bypass procedure remanded); *Hartigan* v. *Zbaraz*, 763 F.2d 1532 (7th Cir. 1985) *aff'd mem 108 S. Ct. 479 (1987) (aff'd* without opinion *per curiam*) (Illinois notification law with judicial bypass procedure held unconstitutional by Court's split decision)

(9) (7)

Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-790, 88-1309

IN THE

Supreme Court of the United States

October Term 1989

No. 88-790

BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Cross-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF APPELLANTS IN *TURNOCK* AND CROSS-PETITIONERS IN *HODGSON*

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BRAMES, McCORMICK, BOPP & ABEL
191 Harding Avenue
Post Office Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amicus Curiae

August 31, 1989

QUESTION PRESENTED HEREIN

Is the decision of this Court in *Roe v. Wade* sufficiently implicated in the cases at bar, *Turnock v. Ragsdale* and *Minnesota v. Hodgson*, for *Roe v. Wade* to be reconsidered?

TABLE OF CONTENTS

Page:

Question Presented Herein i

Table Of Contents ii

Table of Authorities v

Interest Of Amicus 2

Summary Of Argument 3

Argument 4

Introduction 4

I. A Logical, Coherent Analysis Governing The Constitutional Necessity For This Court To Decide A Constitutional Issue Is Discernible From Precedent 5

A. Four Elements Govern the Consitutional Necessity of Deciding A Constititutional Issue Under this Court's Precedents 5

1. This Court has a duty to interpret the Constitution 5

2. This Court's duty to interpret the Constitution is limited by Article III of the Constitution . 7

3. This Court's duty to interpret the Constitution is limited by its jurisdictional statutes 8

4. This Court's duty to interpret the Constitution is limited by prudential considerations 9

B. These Four Elements Form a Logical, Sequential Analysis to be Employed in Analyzing the Necessity of Deciding a Constitutional Issue 10

C. Consideration of Some Specific Questions Concerning Reconsideration Reveal that Reconsideration of *Roe v. Wade* Is Appropriate in this Case 11

II. The Failure Of This Court To Agree Upon And Follow Such An Analysis Concerning Reconsideration Has Introduced Chaos Into The Law And Into This Court 15

A. That this Court Has Not Agreed Upon an Analysis for Reconsideratilon Is Evident from this Past Term 15

B. *Roe v. Wade* Demonstrates the Overreaching Possible with an Inadequate Analysis and the Resultant Overruling Required 17

C. *Webster* Demonstrates the Underreaching Possible with an Inadequate Analysis and the Resultant Chaos Attending Such Action 19

1. Is the *Roe* trimester scheme overruled *sub silentio?* 21

2. Is the abortion right now a liberty interest? . 22

3. Is *Akron* overruled *sub silentio* by rehabilitation of the unduly burdensome test? 23

III. Employing The Proper Analysis To The Issue Of Reconsideration Herein Reveals That *Roe v. Wade* Should Be Reconsidered In These Cases 24

A. This Court Should Go Through the Full Analysis to Determine What Issues Should be Decided and on What Grounds 24

B. The Issue of Reconsideration Itself Is Not One Which This Court May Avoid if It Chooses to Decide These Cases and Issue a Written Opinion

Because *Roe* and its Right and Analysis are Clearly Implicated 25

1. Compelling state interests in maternal health and unborn life, which underlie these statutes, are asserted throughout pregnancy 26

2. The right to effecutate the abortion decision is implicated 27

3. The right to consult one's physician in making the abortion decision is forbidden 27

Conclusion 29

TABLE OF AUTHORITIES

Cases *Pages*

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)..... 12, 16, 19, 21-24

Ashwander v. TVA, 297 U.S. 288 (1936) 6-10

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 8-9

Booth v. Maryland, 482 U.S. 496 (1987) 12-13, 17

City of Richmond v. J. A. Croson Co., 109 S.Ct. 706 (1989) 13

Cohens v. Virginia, 6 Wheat 264 (1821) 7, 15

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 14

Daniels v. Williams, 474 U.S. 327 (1986) 14

Doe v. Bolton, 410 U.S. 179 (1973) 2

Illinois v. Gates, 462 U.S. 213 (1983) 14

Mapp v. Ohio, 367 U.S. 643 (1961) 14

Marbury v. Madison, 1 Cranch 137 (1803) 5-7, 14

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) .. 14

Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989) 12, 15

Perez v. Campbell, 402 U.S. 637 (1971) 14

Perry v. Leeke, 109 S.Ct. 609 (1989) 13

Pointer v. Texas, 380 U.S. 400 (1965) 14

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 5

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Runyon v. McCrary, 427 U.S. 160 (1976) 12

South Carolina v. Gathers, 109 S.Ct. 2207 (1989) 12, 16

Thornburg v. American College of Obstetrician and Gynecologists, 106 S.Ct. 2169 (1986). 12, 21-23

Thornburg v. American College of Obstetricians and Gynecologist, 737 F.2d 283 (1984) 9

Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) ..... *passim*

Constitution and Statutes

28 U.S.C. § 1257 9

28 U.S.C. § 1331 8

28 U.S.C. § 1343(3) 8

Ill. Rev. Stat. ch. 111 ½ para. 205 730 (a) (c) (b) 27

Ill. Rev. Stat. ch. 111 ½, para. 205.730 (b) (3) 27

U.S. Const. art. III, § 1 8

U.S. Const. art. III, § 2 7

Other Authorities

Blum, Resnick & Stark, *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AJPH 619 (1987) 26

Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 181 B.Y.U. J. Pub. L. 181 (1989) 19

G. Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964) 6

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) 21

Jefferson to Justice William Johnson, June 12, 1823, I S. Car. His. & Gen. Mag. 1 (1900) 14

Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1 14

Wechsler, "Toward Neutral Principles of Constitutional Law," in *Principles, Politics, and Fundamental Law* (1961) 6

IN THE

Supreme Court of the United States

October Term 1989

No. 88-790

BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals
for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Cross-Respondents*.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF APPELLANTS IN *TURNOCK* AND CROSS-PETITIONERS IN *HODGSON*

INTEREST OF AMICUS[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within these guidelines. The Illinois and Minnesota legislation at issue herein is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. and its Illinois and Minnesota affiliates, Illinois Federation for the Right to Life and Minnesota Citizens Concerned for Life. By means of this brief, the National Right to Life Committee, Inc. seeks to advance these interests by supporting the Minnesota regulations at issue herein.

---

[1] This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

In *Webster v. Reproductive Health Services*, members of the majority differed on whether and to what extent *Roe v. Wade* should be reconsidered. From the decisions of this Court, a logical, coherent, and sequential analysis may be constructed to govern when it is necessary to decide a constitutional issue, in fulfillment of this Court's constitutional duty to decide a case properly before it. Failure to follow this analysis has resulted in anomalous results, evident in the decisions of this Court in the last term, and confusion in the law, evident in the wake of *Webster*.

Applying this analysis, it is clear that reconsideration of precedent is required whenever a case is brought on the basis of the right and/or analysis created in that precedent. The right declared and the analysis to be employed in constitutional review are but means of applying the Constitution. The ultimate question in constitutional review is what the Constitution requires. This is always at issue in constitutional review, making the case declaring a right and/or analysis always at issue in such cases. Thus, the Court must always establish the standard of review, either implicitly or explicitly, in determining the constitutionality of a statute.

Furthermore, a court is required to give a reasoned, legal justification for its decision. This must resolve those constitutional issues embraced by an analysis of the case. This requires resolution of the issues associated with the standard of review. Thus, a precedent which establishes a constitutional right or sets forth the analysis to be employed in determining the constitutionality of a statute under that right must be reconsidered whenever the constitutionality of a statute is challenged on the basis of that right or employing that analysis. Therefore, reconsideration of *Roe v. Wade* may not be avoided in the cases at bar.

Moreover, although sufficient implication of *Roe* for reconsideration of that case is inherent in its seminal status, the

cases at bar implicate *Roe's* core analysis more fully than did *Webster.* Additionally, the confusion created by *Webster* itself implicates the heart of Roe's analysis, making reconsideration based upon the effect of that decision alone a constitutional necessity. Therefore, *Roe v. Wade* should be reconsidered in the cases at bar.

ARGUMENT

INTRODUCTION

The decision of this Court in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), settled the small portion of abortion jurisprudence encompassed by the Missouri statutes at issue in that case. But *Webster* settled these matters in a way which unsettled the remainder of abortion law.

Issues now unresolved go to the very core of this Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973). Were *Roe* and/or its later progeny overruled sub silentio in *Webster?* Is a woman's interest in obtaining an abortion a fundamental right, a limited fundamental right, or a liberty interest? Will abortion legislation now be reviewed under the traditional compelling interest standard or is an unduly burdensome analysis the de facto standard? What is an undue burden? Is the trimester scheme overruled or yet viable? Must abortion regulations be narrowly tailored to effectuate the underlying state interest or only reasonably related to the interest?

This confusion arose from the inability of the members of this Court to agree on the analysis to be employed in determining when constitutional necessity requires the reconsideration of precedent. The majority which decided Webster disagreed over whether and to what extent *Roe v. Wade* should be reconsidered. A particular focus of the debate was the "necessity" principle employed by this Court to "avoid [] passing upon a large part of all the constitutional questions pressed upon it for decision . . . , notwithstanding conceded jurisdiction, until *necessity* compels it in the performance of *constitutional duty.*"

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 569 (1947)(emphasis added).

This Court has never set forth, in one place, the full analysis by which to determine when the necessity exists which compels this Court to fulfill its constitutional duty to decide a constitutional issue. By reviewing the duties and limitations imposed upon this Court by the Constitution, its jurisdictional statutes, and prudence, one may discern a clear pattern. This brief sets out this pattern, logically organizing the duties and limitations of this Court into a coherent analysis. This analysis is then applied to determine whether reconsideration of *Roe v. Wade* is constitutionally necessary in the cases at bar.

I. A LOGICAL, COHERENT ANALYSIS GOVERNING THE CONSTITUTIONAL NECESSITY FOR THIS COURT TO DECIDE A CONSTITUTIONAL ISSUE IS DISCERNIBLE FROM PRECEDENT.

A. FOUR ELEMENTS GOVERN THE CONSTITUTIONAL NECESSITY OF DECIDING A CONSTITUTIONAL ISSUE UNDER THIS COURT'S PRECEDENTS.

Four elements govern whether, in a particular case, the decision of a constitutional issue is necessary in the performance of constitutional duty: (1) a constitutional duty to say what the law is, (2) a constitutional limitation of decision opportunities to cases and controversies, (3) a statutory limitation on subject matter jurisdiction, and (4) prudential principles imposed by this Court upon itself for sound jurisprudential reasons.

1. THIS COURT HAS A DUTY TO INTERPRET THE CONSTITUTION.

"It is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803)(emphasis added). So declared this Court in the famous case of *Marbury v. Madison*, in which it deter-

mined the Constitution to be the supreme law of the land, governing even enactments of Congress. *Id.* at 177-79. This Court also decided in *Marbury* that it had authority to review actions of other elements of government to determine whether they comported with this Court's declaration of "what the law is" with respect to the Constitution. *Id.*

This Court could most comprehensively fulfill its duty to declare what the law is by publishing its own commentary on the law, in the manner of William Blackstone or Lord Coke. Of course, such a project would be of immense and prohibitive proportions, and no commentary could cover every conceivable issue.

More significantly, however, this Court is prohibited from roaming about the constitutional field in such a manner by its constitutional charter. There are limits placed upon its power and duty to say what the law is, which are set forth in detail below.

However, these limitations must not be employed to avoid deciding matters which this Court has a duty to decide. Professor Gunther has styled as a neo-Brandeisian fallacy the misuse of the "necessity" principles set forth by Justice Brandeis in his concurrence to *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring), to support a view that this Court has a general discretion not to adjudicate. *See generally* G. Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964)(commenting on the content and uses of the *Ashwander* rules). *Cf.* Wechsler, "Toward Neutral Principles of Constitutional Law," in *Principles, Politics, and Fundamental Law (1961).*

The duty to decide, when constitutionally required, is illustrated by Justice Marshall in Marbury, where he felt compelled, in giving a legal justification for his decision, to comment on matters not necessary to the decision of the case but necessary to a legal justification of the case. He wrote:

> The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

Marbury, 1 Cranch at 154. To this comment must be added another of Justice Marshall's remarks in the case of *Cohens v. Virginia*, 6 Wheat 264, 404 (1821):

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty.[2]

2. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY ARTICLE III OF THE CONSTITUTION.

The Constitution of the United States allows this Court to interpret the Constitution only in relation to "Cases . . . arising under this Constitution." U.S. Const. art. III, § 2.

From this limitation arise certain rules, which Justice Brandeis set forth in his concurring opinion to *Ashwander v. TVA*, 297 U.S. at 346-48 (1936)(Brandeis, J., concurring). These rules apply even where jurisdiction is conceded under the controlling jurisdictional statutes, *id.* at 346, for they are constitutionally mandated by Article III.

Justice Brandeis set forth these rules as follows:

First, "[t]he Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding. *Id.* at 346.

---

[2] This brief does not enter into the debate over this Court's discretion to decline the exercise of jurisdiction. It merely addresses the necessity of deciding all elements of a case which are required in giving a legal justification for this Court's decision in a case which is decided by this Court. Your amicus does not believe that the standard of review is an issue which may properly be avoided. It is different in kind from construing a statute to avoid constitutional difficulty or deciding a case on procedural grounds to avoid a constitutional issue.

Second, "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" nor will it "'decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Id.* at 346-47 (citations omitted).[3]

Third, "[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." Id. at 347.

Fourth, "[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." Id. at 348.

3. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY ITS JURISDICTIONAL STATUTES.

Pursuant to its authority to "ordain and establish" federal courts, U.S. Const. art. III, § 1, Congress has enacted jurisdictional statutes which require a "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" or a claim "arising under the Constitution, laws, or treaties of the United States" for federal district court jurisdiction. 28 U.S.C. §§ 343(3) and 1331. Without satisfaction of these prerequisites, the cases at bar should not have come before this Court by way of the lower federal courts.[4] Similarly,

---

[3] As noted *infra*, the question of establishing the appropriate standard of review is a necessary decision to this Court's constitutional review of a case and not a discretionary matter which may be avoided if convenient.

[4] In addition to establishing the proper standard of review, this Court must also examine its jurisdiction. As noted in text, this Court only has jurisdiction over these cases if there is yet a constitutional right to abortion.

In *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), this Court declared that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts

(footnote continued)

had these cases come up through state courts, this Court could only have heard them if the statutes at issue were "repugnant to the Constitution" or if a constitutional right were claimed. 28 U.S.C. § 1257.

4. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY PRUDENTIAL CONSIDERATIONS.

Self-imposed, prudential principles have been developed by this court, based upon policy considerations. These rules were summarized in Justice Brandeis' *Ashwander* concurrence as follows:

First, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring)(citations omitted).

Second, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.*

Third, "'[w]hen the validity of an act of the Congress[5] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* at 348 (citation omitted).

Footnote 4 continued
in a cause under review,' even though the parties are prepared to concede it." *Id.* at 541 (citation omitted). The question of jurisdiction is a "fundamental" one, which "the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Bender*, 475 U.S. at 547. Thus, in determining whether subject matter jurisdiction lies in the present case, this Court must carefully consider *Roe*, the case upon which federal jurisdiction rests.

[5] This principle has been extended to acts of state legislatures, as well. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 737 F.2d 283, 294 (1984).

B. THESE FOUR ELEMENTS FORM A LOGICAL, SEQUENTIAL ANALYSIS TO BE EMPLOYED IN ANALYZING THE NECESSITY OF DECIDING A CONSTITUTIONAL ISSUE.

These duties and rules may be arranged in logical, sequential order. The result is conceptually similar to a series of increasingly fine filters; the analysis filters cases, then issues, and then grounds of decision at subsequent levels until only those which are properly to be decided remain. The phases of the analysis are as follows:

1. *Is there a case or controversy?* Logic compels that initial consideration be given to the requirements of the Constitution, which authorized creation of this Court and granted it powers within the jurisdiction to be prescribed by Congress. Justice Brandeis' four rules dealing with Article III, set forth above, are properly asked at this point. These questions determine whether a concrete, adversarial context exists for the resolution of constitutional issues. They prevent abstract decisions on hypothetical points.

2. *Is there jurisdiction?* Logic likewise compels that the jurisdictional statutes be next examined. Congress further defined the jurisdiction of this Court and created the lower courts and limited their jurisdiction by these statutes. These statutes require, in part relevant herein, that a suit must be initiated based upon the violation of a constitutional right.

If there is an Article III case and jurisdiction exists, then the case itself is properly before this Court, whether it arrives by grant of a writ of certiorari or by appeal.

3. *Are there prudential reasons for avoiding certain aspects of the case?* At this point, the three prudential rules of Justice Brandeis' *Ashwander* principles must be considered. Is there some statutory or procedural basis for decision by which a constitutional decision may be avoided? May a statute be construed in a manner favoring constitutionality? If a constitutional decision must be made, what are the narrowest possible grounds upon which it may be properly made?

This last question must be asked in light of this Court's duty both to say what the law is by interpreting the Constitution when required and by its judicial duty to give the legal basis for its decision in a reasoned manner. Reasoned exposition of all elements of the analysis which are logically required in order to give an explanation of that legal basis of the decision must be deemed necessary to the decision.

The proper filtering analysis decides first which cases must be heard, then — employing prudential considerations — what issues must be heard, and finally what grounds must logically be given to support the decision. Prudence requires that the fewest possible issues be resolved on the lowest level of grounds required. The required grounds are all those necessary to logically justify the decision. This analytically includes the standard — the constitutional analysis — to be employed. Without such a determination, the decision has not been legally and logically justified.

C. CONSIDERATION OF SOME SPECIFIC QUESTIONS CONCERNING RECONSIDERATION REVEAL THAT RECONSIDERATION OF *ROE v. WADE* IS APPROPRIATE IN THIS CASE.

Finally, some specific questions with regard to reconsideration have arisen in the opinions of this Court. These questions have already been settled and require brief exposition at this point.

First, *must the parties ask for reconsideration?* No. Necessity of reconsideration of a constitutional issue is not determined by whether the parties have requested reconsidera-

tion.[6] Just last term, in *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (1989), this Court reconsidered *Runyon v. McCrary*, 427 U.S. 160 (1976), without any request from the parties. *Patterson*, 109 S.Ct. at 2380 (Brennan, J., dissenting)("I find it disturbing that the Court has in this case chosen to reconsider, without any request from the parties . . . .").

Second, *is it sufficient for reconsideration if the right created by a prior case is the basis of the claim in a later case?* Yes. This is the basis upon which the Court reconsidered the *Patterson* case. In *Patterson*, the plaintiff brought an action based upon the statutory right created by an interpretation of 42 U.S.C. § 1981 in *Runyon*, 427 U.S. 169, i.e., that § 1981 encompasses a private contract between an employer and employee. It is a more difficult task where a prior case is not as directly implicated as to provide the right upon which the suit is founded. This is evident in *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), decided by this Court last term. In *Gathers*, Justices O'Connor and Kennedy and Chief Justice Rehnquist, in dissent, decided that the holding of the prior case of *Booth v. Maryland*, 482 U.S. 496 (1987), was not sufficiently implicated for reconsideration of that case. *Id.* at 2212 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.). This was so because *Gathers* involved prosecutorial comments about a criminal victim's character in closing argument, not in the submission of evidence which *Booth* forbade. Thus, *Booth* was not sufficiently implicated for Justices O'Connor and Kennedy and Chief Justice Rehnquist to reconsider that case. *Id.* at 2211.

[6] *In Thornburgh v. American College of Obstetricians and Gynecologists*, Justice O'Connor implied that she would not reach the issue of reconsideration of *Roe v. Wade* because the parties had not asked the Court to do so. 106 S.Ct. at 2213. However, in *Akron v. Akron Center for Reproductive Health*, she personally reached the issue of *Roe's* constitutional correctness and declared much of it unconstitutional, despite the fact that the parties had not asked the Court to reconsider *Roe*, a point which she expressly noted. 462 U.S. at 458, 452. Further, in *Webster*, she declared her willingness to reconsider Roe in a proper case.

Justice Scalia would have overruled *Booth*, *id.* at 2217-18, as, apparently, would have Justice White. *Id.* at 2211.

Third, *may this Court decide a case on broader principles than reasonably required by the precise facts of the case before it in appropriate circumstances?* No, but it must resolve a sufficient number of constitutional issues to give a reasoned, legal justification for its decision. This properly includes a decision concerning the standard of review, i.e., in this case, whether or not the analysis of *Roe v. Wade* is still good law. It may also include resolution of other matters not required by a simple judgment of affirmation or reversal which are, however, necessary to give a legal justification for the decision rendered. This question is often erroneously framed as whether a decision may be made on a broader than necessary basis. When "necessary" is properly understood to encompass those matters necessary to giving the required legal justification for a decision, the confusion is resolved. The rule, then, is that no Court should declare a rule of constitutional law broader than required by the precise facts of the case, but that this concept includes matters, such as resolving the appropriate standard of review (even if that requires reconsideration of precedent), necessary to giving a reasoned, legal justification for the decision.[7]

[7] Many examples exist where this Court has decided issues it felt necessary to giving a legal justification for its decision but has been criticized for reaching issues not necessary under the facts of the case. Because all matters necessary to a legal justification of an opinion are required but decision of other matters is not permitted, the question of what matters ought to be addressed in an individual case is one subject to differing judgment. In *City of Richmond*, 109 S.Ct. 706 (1989), Justice O'Connor, writing for the Court, authored an opinion which went beyond the facts to state a set of governing principles — presumably to give legislative bodies guidance in developing the law. *Id.* at 735. This was observed by Justice Marshall, writing for the dissent. *Id.* at 752 (Marshall, J., dissenting)("the majority has gone beyond the facts of this case to announce a set of principles"). In another case from last term, *Perry v. Leeke*, 109 S.Ct. 609 (1989), this Court reached an issue which Justice Kennedy did not feel was necessary to the decision. *Id.* at 602

(footnote continued)

This principle explains Justice Marshall's decision in *Marbury* to comment on matters required for giving a legal justification for the Court's decision. He expressed both his sensitivity to avoiding overbroad decisions and the need to resolve those constitutional issues required for a legal justification of his opinion. In discussing the issue of whether a mandamus could go to the Secretary of State, he wrote, "It may not be proper to mention this position; but I am compelled to do it." *Marbury*, 1 Cranch at 149. He was compelled to do it because of this Court's duty to provide a reasoned, legal justification for its ruling. He commented, "These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration." *Id.* at 156.[8]

Footnote 7 continued
("In view of our ruling, it is quite unnecessary to discuss whether prejudice must be shown when the right to counsel is denied. I would not address that issue . . . ."). Other cases where the Court has been accused of deciding more broadly than the precise facts required are *Daniels v. Williams*, 474 U.S. 327 (1986); *Illinois v. Gates*, 462 U.S. 213 (1983); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Pointer v. Texas*, 380 U.S. 400 (1965); and *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court has even expressly acknowledged its broader than strictly required holding in some cases, such as *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), and *Perez v. Campbell*, 402 U.S. 637 (1971).

Acknowledging that resolution of all issues necessary to a reasoned legal justification of this Court's decision is required but that going beyond that is forbidden resolves the tension between the practice of this Court in the cases above and its rule against overly broad decisions.

[8] Much debate has raged over Justice Marshall's decision, *see e.g.*, Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, including the criticism that, given its conclusion, the Court should have said only that it lacked jurisdiction. Much of what was said in the early part of the opinion, regarding the propriety of issuing mandamus against an executive's illegal acts, might be characterized as *obiter dictum*. Indeed, Thomas Jefferson, the contemporary President and a key player in the *Marbury* drama, insisted throughout his life that most of *Marbury* was "merely an obiter dissertation of the Chief Justice." *Jefferson to Justice William Johnson, June*

(footnote continued)

I. THE FAILURE OF THIS COURT TO AGREE UPON AND FOLLOW SUCH AN ANALYSIS CONCERNING RECONSIDERATION HAS INTRODUCED CHAOS INTO THE LAW AND INTO THIS COURT.

The disagreement on this Court over the analysis to be applied with regard to reconsideration of precedent is evident in three cases from last term where reconsideration was considered and treated in three different ways. The chaotic results which flow from this failure to agree on an analysis are illustrated by two abortion cases, *Roe v. Wade* and *Webster v. Reproductive Health Services*. The former overreached, causing this Court in *Akron* to overrule part of that decision. The latter underreached, creating chaos in abortion law. Either approach is wrong, both for sound jurisprudential reasons and because of the illicit results.

A. THAT THIS COURT HAS NOT AGREED UPON AN ANALYSIS FOR RECONSIDERATION IS EVIDENT FROM THIS PAST TERM.

In this past term, this Court considered three key cases in which reconsideration was proposed. The inconsistent manner in which these were handled reveals the lack of an agreed analysis for reconsideration.

In the first case, *Patterson v. McClean Credit Union*, 109 S.Ct. 2363, this Court plenarily reconsidered *Runyon v. McCrary*, 427 U.S. 160. There was no disagreement among the majority over whether reconsideration should occur, although, as noted *supra*, neither party asked for reconsideration and the sole implication of the prior decision was that it created the right under which the action was brought.

Footnote 8 continued
12, 1823, I S. Car. His. & Gen. Mag. 1, 9-10 (1900). Justice Marshall himself later called some of his statements about Article III in *Marbury* unduly broad and partially rejected them in *Cohens v. Virginia*, 6 Wheat 264 (1821). Nonetheless, the fact that he may have erred by going somewhat beyond what was required to give a legal justification for his decision does not vitiate the principle. His error, if any, was of degree and not of principle.

In the second case, *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, the members of the majority could not agree that reconsideration was proper even though *Roe v. Wade* created the right under which the action was brought. And such reconsideration as was called for was not plenary, with the exception of that proposed by Justice Scalia. The plurality declared that only the trimester scheme was implicated and Justice O'Connor thought that nothing of Roe was implicated.[9]

As argued in this brief, however, distinguishing the degrees of implication of a seminal case — one which creates the right or analysis under which the cause of action arose — is unnecessary. Such a case is always fully implicated in a cause which invokes that right or analysis. Such distinguishing of degrees of implication was not engaged in in *Patterson*, nor is it appropriate under the principle that the decision of all matters necessary to a reasoned justification of the Court's decision — including establishment of the standard of review — is constitutionally necessary. The result of the failure of this Court to employ a consistent analysis with regard to reconsideration resulted in turmoil and confusion in abortion jurisprudence, as more fully set forth *infra*. It further resulted in the failure of a majority of this Court to address a decision, *Roe*, which five Justices have declared to be constitutionally flawed.

In the third case, *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), the very decision-making process of the potential working majority in that case was disrupted by its inability to agree on an analysis regarding reconsideration. It is apparent from the opinions in Gathers that five Justices of this Court believe that *Booth v. Maryland*, 482 U.S. 496 (1987) — the case which created the right of criminals not to have evidence of their

[9] It must be noted that Justice O'Connor viewed the Missouri statute as not inconsistent with *Roe* or its progeny because it did not "unduly burden" the abortion right. However, this unduly burdensome or "absolute obstacle" test, championed in *Akron* by Justice O'Connor, and under which she would have upheld the ordinances at issue in *Akron*, was expressly rejected by this Court as violative of *Roe v. Wade*. *Akron*, 462 U.S. at 420 n.1.

victim's character introduced at trial — was wrongly decided. The result, however, was the extension of the reach of *Booth v. Maryland* to prosecutorial statements about the victim's character.

While judicial restraint is admirable and required by sound, constitutional jurisprudence, it is improperly applied to avoid considering the precedent which creates the foundational right upon which a cause is brought. Consideration of that foundational right, and the case creating it, is essential in giving a reasoned, legal justification for this Court's decision in any case based upon that right. The havoc wrought by this Court's failure to consistently apply the sort of analysis proposed herein is further illustrated in two cases, *Roe* and *Webster*.

B. *ROE v. WADE* DEMONSTRATES THE OVERREACHING POSSIBLE WITH AN INADEQUATE ANALYSIS AND THE RESULTANT OVERRULING REQUIRED.

Roe demonstrates both the matters necessary to deciding a constitutional issue and the perils in deciding those that are not necessary.[10] The *Roe* majority correctly began by establishing the proper standard of review, to which it devoted the majority of the opinion. Given its judgment that the Texas criminal abortion statute — excepting only cases of risk to maternal life — was unconstitutional, the Court needed to decide the issues necessary to give a reasoned, legal justification of its decision. To merely strike down the Texas statute, without explanation, would not have fulfilled this Court's constitutional duty to declare what the Constitution means when deciding the case.[11]

[10] This, of course, in no way concedes any correctness as to the substantive holdings of the *Roe* Court.

would not have fulfilled this Court's constitutional duty to declare what the Constitution means when deciding the case.[11]

Necessary to a reasoned, legal justification of this Court's decision in *Roe* was its holding that there is a fundamental right to abortion. Likewise, a holding that no compelling interests extended throughout pregnancy was vital to the analysis. *Roe* also demonstrated proper restraint in not deciding the issues of paternal rights and parental rights (of parents with minors seeking abortion). *Roe*, 410 U.S. at 165 n.67. Deciding these issues, which were not presented by the facts, would have decided constitutional questions in advance of the necessity of doing so. In Article III terms, no case existed with respect to these matters, and, therefore, this Court was without constitutional authority to decide them.

Unnecessary to a reasoned, legal justification of the decision in *Roe* was creation of the trimester scheme. Also unnecessary were the inherently legislative declarations, such as the statement that a hospitalization requirement for post-first-trimester abortions was constitutionally permissible. The Court reached these issues in advance of the necessity of deciding them, violating Article III, and it decided matters more broadly than required by the facts, violating prudence. The *Roe* majority ought to have awaited another case involving a viability line to reach a discussion of viability. It should have decided the maternal health line in a case properly presenting that issue, such as a case requiring hospitalization for abortions after a certain point.

---

[11] Of course, this Court has the power to summarily affirm or reverse decisions in appropriate circumstances. However, constant reliance on such a practice would not comport with this Court's duty to decide. Practically, such a practice would also unduly prolong the trial and error, see-saw interaction between this Court and the legislatures in their attempt to pass constitutional legislation. Such considerations, however, do not justify overreaching beyond what is necessary to give a reasoned, legal justification of a decision.

The imprudence of such premature decision-making was demonstrated in the progeny of *Roe*, especially in the case of *Akron v. Akron Center for Reproductive Health*. 462 U.S. 416 (1983). In *Akron*, the majority found it necessary both to alter the trimester scheme, precipitously created in *Roe*, and to reject a post-first trimester hospitalization requirement, prematurely approved in *Roe*. *Akron*, 462 U.S. at 435-47.[12]

Thus, *Roe* well illustrates how a court may begin correctly and then go astray by overreaching. A proper analysis would preclude such overreaching.

C. *WEBSTER* DEMONSTRATES THE UNDERREACHING POSSIBLE WITH AN INADEQUATE ANALYSIS AND THE RESULTANT CHAOS ATTENDING SUCH ACTION.

By contrast with *Roe*, the *Webster* amalgam of opinions did not even begin correctly. Neglected was the essential first step in constitutional analysis, the determination of the standard of review — the constitutional analysis — to be employed in reviewing the statutes at issue. The core issue in any constitutional challenge to a statute is whether the statute comports with the Constitution — not whether it complies with a prior decision of this Court. Deciding whether a statute conforms to the requirements of some precedent is but a shorthand way of asking whether constitutional requirements are met. Therefore, it is essential to the analysis to determine what the Constitution requires. In a matter already decided, this question is answered by citation to precedent, the principles of which are applied to the new fact situation. But in each subsequent case, the question of what the Constitution requires must be asked. It may be simply answered by reaffirmation of the precedent, either express or implicit, but it must be

---

[12] *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 181 B.Y.U. J. Pub. L. 181, 202-07 (1989)(discussing this disregard of stare decisis at length).

answered. The Constitution is at issue in constitutional adjudication.

Therefore, in *Webster*, the constitutionality of *Roe v. Wade*, *was* before this Court. It could not properly be avoided. The standard of review, by which the Constitution is applied to determine the constitutionality of a statute, must be decided. It is not of a nature permitting avoidance until some more convenient time or some greater implication. If a case is brought to declare a statute unconstitutional on the basis of the decision establishing the right and setting forth the analysis, then that case is implicated. Once implicated, it must be applied, modified, or overruled; its reconsideration is then proper. A state need not reenact the Texas statute struck down in *Roe* before this Court may properly reconsider *Roe*.

Deciding the standard of review as a necessary first step in constitutional analysis is something one may not avoid by prudential principles. It is inherent in constitutional review. It is the very essence of constitutional review, serving as the link between the statutes reviewed and the Constitution. It is not of the same nature as a constitutional challenge to a statute which may be avoided by a permissible construction of the statute. Nor is it of the same nature as a constitutional challenge to a statute which may be avoided by deciding a matter on a statutory, procedural, or independent state law basis. The issue of the correct standard of review arises *precisely when the Court has been unable to avoid a constitutional question and must determine whether a statute is constitutional*. It is *inherently necessary* to decide in the discharge of this Court's constitutional duty and may not properly be avoided.

Therefore, *Webster* underreached — the Court did not fulfill its duty to say what the law is in justifying its decision. The resulting chaos demonstrates clearly why strict adherence to a sound analysis with regard to deciding constitutional matters, and especially the standard of review, is essential to sound constitutional adjudication. Indeed, the chaos created by *Webster* alone is sufficient to call this Court to say what the law is in the cases at bar.

The confusion resulting from *Webster* may be seen in the varying interpretations given to the opinion, which run along a spectrum from a *sub silentio* reversal of *Roe*, to a *sub silentio* reversal of the trimester scheme and this Court's most recent pronouncements in *Akron* and *Thornburgh*, to a mere funding case with few other implications. In light of such diversity of possibilities, how may the legislatures act? What is permitted?

One may of course say that nothing was overruled in *Webster*, for the Court used no such language. However, the notion of *sub silentio* reversal is a commonplace in the law. And is the meaning of a case circumscribed by its proper holding? The legitimate holding of *Roe* — if legitimacy be limited to that permitted by the narrowest holding based upon the specific facts — was but the tip of the iceberg which comprised the full meaning of *Roe* for abortion jurisprudence.

Justice Oliver Wendell Holmes declared that the state of the law is nothing more than a prediction of what a court will do at a given time with a given set of facts. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). Employing this analysis of legal realism, the meaning of *Webster* may be determined by examining the statements of various Justices, both in *Webster* and before, to determine what elements of abortion jurisprudence yet enjoy majority support. The result of such analysis raises significant questions.

1. IS THE *ROE* TRIMESTER SCHEME OVERRULED *SUB SILENTIO?*

It appears from the opinions in *Webster* that majority support for the trimester scheme of *Roe* has disappeared. Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissents to *Akron* and *Thornburgh*. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)("I . . . remain of the views expressed in my dissent in *Akron*. The State has

compelling interests in ensuring maternal health and in protecting potential human life . . . throughout pregnancy."). With Chief Justice Rehnquist and Justices White, Scalia[13], and Kennedy saying the same thing in *Webster*, it is readily apparent that a majority of this Court has now recognized these two interests as existing throughout pregnancy, indicating the demise of the trimester scheme. *Webster*, 109 S.Ct. at 3057.

But this Court has not stated this demise in express language. Will legislatures feel free to act upon it? By comparison with the small area of the law this Court settled in *Webster*, the areas it unsettled are immense, going to the core of *Roe v. Wade*.

2. IS THE ABORTION RIGHT NOW A LIBERTY INTEREST?

Similarly, the very nature of a woman's interest in choosing abortion is now unclear. In *Roe*, this Court determined that a woman has a fundamental right to choose abortion, employing a substantive due process analysis. The *Webster* plurality declared that a woman has only a "liberty interest" in abortion under the Due Process Clause of the Fourteenth Amendment. *Webster*, 109 S.Ct. at 3058. Justice O'Connor, with her advocacy of the rational basis standard of review in most cases, agrees that there is no general, fundamental right to abortion. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, where there is an undue burden, she might find a fundamental right, evidenced by her requiring a compelling state interest to justify regulation of abortion in such cases. *Id*. Thus, there is now a majority of the Court which no longer believes that there is a general fundamental right to abortion. But what is the law? What does the Constitution require?

---

[13] As Justice Scalia would reverse *Roe*, it is assumed that, to the extent a fundamental right to abortion is given continued recognition, he would agree that there are offsetting compelling interests in maternal health and unborn life.

3. IS *AKRON* OVERRULED *SUB SILENTIO* BY REHABILITATION OF THE UNDULY BURDENSOME TEST?

In *Akron*, this Court found the unduly burdensome test to be an unconstitutional form of analysis, forbidden by the dictates of *Roe v. Wade* itself. *Akron*, 462 U.S. at 420 n.1. Logically then, any invocation of, or reliance upon, the unduly burdensome test would be in direct derogation of *Roe*. However, in *Webster*, Justice O'Connor readily relied upon this analysis to uphold the statutes at issue in *Webster* and to declare that all of the Missouri statute could be upheld under prior decisions of this Court, at the same time arguing that no prior abortion decision of this Court was sufficiently implicated for purposes of reconsideration. *Webster*, 109 S.Ct. at 3060. At a very minimum, however, the resurrection of the unduly burdensome test implicated *Akron*, directly rejecting a key holding of that decision.

Is the unduly burdensome test — as the lowest common denominator of the current majority on abortion issues — the proper analysis to be employed by lower courts and legislatures? If *Akron* is indeed overruled *sub silentio*, is legislation such as that found in *Akron* and in *Thornburgh* now constitutional?

A further problem arises if Justice O'Connor's lowest-common-denominator analysis is now the *de facto* analysis for review of abortion legislation. It has been generally thought since *Roe* that the fundamental rights analysis required the showing (1) that the state has a compelling interest and (2) that the legislation enacted is narrowly tailored to effect only the compelling interest. *Roe*, 410 U.S. at 155. But Justice O'Connor wrote in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be 'narrowly tailored' to express only the relevant state interest. In Roe, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the Roe analy-

sis. In its decision today, the Court fully endorsed the Roe requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle' be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting)(citations omitted and case names not italicized in original). Which standard must abortion legislation now meet — must it be narrowly tailored or rationally related to a compelling interest?

In sum, *Webster* has thrown abortion jurisprudence into disarray. The very core analysis of *Roe* has been placed in question: as to the nature of the interest, as to the standard of review, as to the temporal extent of the states' compelling interests, and as to the second prong of the *Roe* analysis for legislation burdening (unduly or not?) a fundamental right — if indeed, there is yet a fundamental right. And if the unduly burdensome test controls, what does unduly mean? This chaos alone compels this Court to perform its constitutional duty, which it avoided in *Webster* but which exists in these cases, to say what the law is.

III. EMPLOYING THE PROPER ANALYSIS TO THE ISSUE OF RECONSIDERATION HEREIN REVEALS THAT *ROE v. WADE* SHOULD BE RECONSIDERED IN THESE CASES.

A. THIS COURT SHOULD GO THROUGH THE FULL ANALYSIS TO DETERMINE WHAT ISSUES SHOULD BE DECIDED AND ON WHAT GROUNDS.

It is beyond the scope of this brief — which addresses reconsideration of *Roe v. Wade* — to apply the analysis herein in all of its respects to the statutes at bar. This Court should take this opportunity to employ a systematic approach to determine what issues should be decided and on what grounds. However,

if this Court decides to consider the constitutionality of any part of the statutes at issue herein, i.e., it finds that it cannot avoid them by decisions on other than a Constitutional basis, then it should reconsider *Roe*, which is the nexus between the Constitution and the statutes. *Roe v. Wade*, as both the source of both the right and analysis to be employed in constitutional review is clearly implicated for purposes of reconsideration.

B. THE ISSUE OF RECONSIDERATION ITSELF IS NOT ONE WHICH THIS COURT MAY AVOID IF IT CHOOSES TO DECIDE THESE CASES AND ISSUE A WRITTEN OPINION BECAUSE *ROE* AND ITS RIGHT AND ANALYSIS ARE CLEARLY IMPLICATED.

In giving a reasoned, legal justification for any decision reached in these cases, the Court must set forth the proper constitutional analysis to be employed. This requires reconsideration of *Roe v. Wade*. It is inherent in the analysis as discussed at length above.

Moreover, although further "implication" is not required, it is certainly present in these cases. These cases more directly implicate *Roe*, in terms of involving more of its analysis and affecting more periods of pregnancy, than did *Webster*. Unlike *Webster*, which largely involved funding matters (already settled in principle by this Court) and regulation after viability (where compelling state interests exist even under *Roe)*, the cases at bar implicate three key elements of *Roe*, the compelling interests in unborn life and maternal health throughout pregnancy, the right to effectuate the abortion decision, and the right to make the abortion decision in consultation with one's physician. The statutes at issue in these cases, therefore, directly impinge upon the right to abortion created in *Roe* to an even greater extent than in *Webster*.

1. COMPELLING STATE INTERESTS IN MATERNAL HEALTH AND UNBORN LIFE, WHICH UNDERLIE THESE STATUTES, ARE ASSERTED THROUGHOUT PREGNANCY.

Underlying the Minnesota parental notice statute at issue in *Hodgson* are compelling state interests in unborn human life and in protecting traditional family authority and vulnerable minors. Indeed, the Minnesota parental notice statute has had the demonstrated effect of reducing the adolescent abortion rate — dramatically furthering the State's compelling interest in protecting unborn human life.[14] Yet this statute applies throughout pregnancy, not just after viability.

Furthermore, underlying the Illinois clinic statute at issue in *Turnock* are the State's compelling interests in maternal health and in unborn life. These likewise apply throughout pregnancy. The State's compelling in protecting maternal health is the

---

[14] Statistics from the Minnesota Department of Health indicate that in Minnesota during 1975-80, before the parental notice statute went into affect, minors showed the following annual patterns:

1. Pregnancies increased from 4142 to 4360 = an increase of 5%.

2. Births decreased from 2494 to 2033 = a decrease of 19%.

3. Abortions increased from 1648 to 2327 = an increase of 41%.

In the period from 1981-86, following enactment of the statute the following patterns emerged:

1. Pregnancies decreased from 4360 to 3171 = a decrease of 27%.

2. Births decreased from 2033 to 1626 = a decrease of 20%.

3. Abortions decreased from 2327 to 1545 = a decrease of 34%.

Data from Minnesota Department of Health (adjusted for population fluctuation).

There is no evidence that this dramatic drop in the abortion rate resulted from teens leaving the state to obtain abortions. Blum, Resnick & Stark, *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AJPH 619, 620 (1987).

principle justification of this regulatory scheme. The State's interest in protecting unborn life, however, is also advanced by the provision requiring counseling concerning alternatives to abortion. Ill. Rev. Stat. ch. 111 1/2, para. 205.730(b)(3). This counseling is intended, in part, and has the effect, to cause women to more seriously consider alternatives to abortion, thereby decreasing the number of abortions. Unborn lives are thereby saved.

Thus, for purposes of reconsideration, the holdings of *Roe* that the state's compelling interests in maternal health only arise after the first trimester and in unborn life after viability are squarely contradicted. In contrast, *Webster* involved only the State's compelling interest in unborn life after viability.

2. THE RIGHT TO EFFECTUATE THE ABORTION DECISION IS IMPLICATED.

The right to effectuate the abortion decision is also guaranteed by the decisions of this Court. *Roe*, 410 U.S. at 163. Under the Illinois statute at issue in *Turnock*, first trimester abortion clinics are thoroughly regulated. This again implicates a key holding of *Roe* that regulation of the abortion decision and its effectuation must be left to the woman and her physician in the first trimester. After that, regulation is only permitted for protection of the woman's health. In this case, it is asserted that such regulations are not indicated for the protection of maternal health, and, in any event, these regulations extend into the forbidden zone of the first trimester. For purposes of reconsideration, *Roe* is sufficiently implicated.

3. THE RIGHT TO CONSULT ONE'S PHYSICIAN IN MAKING THE ABORTION DECISION IS FORBIDDEN.

Finally, a direct and absolute bar to one of *Roe's* key elements is present in the Illinois provision (at issue in *Turnock*) which prevents anyone with a monetary interest in the performance of the abortion decision from counseling a woman concerning her abortion decision. Ill. Rev. Stat. ch. 111 1/2, para.

205.730(b)(2)(D). As interpreted by the lower courts, this provision directly conflicts with *Roe*'s provision that a woman is free to make her abortion decision "in consultation with her physician," *Roe*, 410 U.S. at 163, because it forbids this consultation. A key holding of *Roe* is therefore implicated, which justifies reconsideration of that case.

In sum, this Court ought to reconsider *Roe v. Wade* if it decides any constitutional issue in this case; because establishing the standard of review and confirming the right under which the case is brought are essential to the analysis of constitutionality; because explication of the standard of review is necessary to providing a reasoned, legal justification for the judgment; and because key aspects of *Roe* are implicated by the statutes themselves.

CONCLUSION

For the reasons given herein, this Court should reconsider *Roe v. Wade* in its consideration of the cases at bar. Upon reconsideration, this Court should determine that the doctrine of stare decisis does not preclude the reversal of *Roe v. Wade*,[15] *that, under the correct test for fundamentality,*[16] *there is no fundamental right to abortion in the history and tradition of our nation,*[17] *and that, therefore, Roe v. Wade* should be reversed.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BRAMES, McCORMICK, BOPP & ABEL
191 Harding Avenue
Post Office Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amicus Curiae

August 31, 1989

---

[15] *See* Brief Amici Curiae of the Hon. Christopher H. Smith, Alan B. Mollohan, Vin Weber, Robert K. Dornan, Earl Hutto, John La Falce, Virginia Smith, Bill Emerson, Henry H. Hyde, and Gordon J. Humphrey, Members of the Congress of United States, in Support of Appellants in *Turnock* and Cross-Petitioners in *Hodgson*.

[16] *See* Brief Amicus Curiae of Free Speech Advocates in Support of Appellants in *Turnock v. Ragsdale*.

[17] *See* Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Appellants in *Turnock* and in Support of Cross-Petitioners in *Hodgson*.

Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-790, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

No. 88-790

BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Cross-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ACADEMY OF MEDICAL ETHICS IN SUPPORT OF APPELLANTS IN *TURNOCK* AND CROSS-PETITIONERS IN *HODGSON*

Joseph W. Dellapenna
Professor of Law
Villanova University
Villanova, PA 19085
(215) 645-7075
Attorney for *Amicus Curiae*
American Academy of Medical Ethics

August 31, 1989

Graphics Ltd., Indianapolis, IN 46206

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. *Roe v. Wade*, Based upon Erroneous Notions of the Historical Status of Abortion under the Common Law, Broke Sharply with Long Established Traditions and Values of the Common Law and our Constitution 2

A. In England, from the Beginning of the Common Law, Courts and Other Respected Authorities Consistently Condemned Abortion 6

B. From Earliest Times, English Law Prohibited Parents from Killing Unwanted Children, and Parliament and the Courts Took Strong Steps, Gradually Strengthened through the Centuries, to Punish Violations of Those Prohibitions 11

C. Early in the Colonial Period, These Laws Were Received with Full Rigor in the United States . 17

D. When Abortion Became More Common than Infanticide with the Development of Technical Means for Aborting a Woman with a Lessened Danger to Her Life, English and American Law Came to Emphasize Abortion as the Primary Evil 19

II. *Roe v. Wade* Should be Overruled and the Resolution of the Competing Claims of Mothers and Their Offspring Should Be Returned to the Legislative Branches of Government 23

A. Changes in Medical Technology Are Central to a Proper Resolution of the Controversies over Abortion 23

B. Legislatures Are Best Placed to Explore Appropriate Regulatory Responses to Changing Reproductive Technologies 26

C. If *Roe v. Wade* Is to Continue to Survive in Some Form, the Court Must Continually Reexamine, as It Did in *Webster v. Reproductive Health Services*, the Application of the *Roe* Criteria in Light of New Medical Technology 28

CONCLUSION 30

APPENDIX A: WHAT REALLY HAPPENED IN *REX v. de BOURTON?* 1a

APPENDIX B: OTHER REPRESENTATIVE COMMON LAW CASES ON ABORTION 1b

Agnes' Appeal (1200) 1b

Gundwine's Appeal (1247) 1b

Juliana's Appeal (1256?) 2b

Rex v. Anonymous (1348) 2b

Rex v. Lichefeld (1505) 3b

Cockaine v. Witnam (1577) 5b

Regina v. Turnour (1581) 6b

Regina v. Sims (1601) 6b

Regina v. Webb (1602) 7b

Proprietary v. Mitchell (1652) 8b

Rex v. Beare (1732) 11b

Rex v. Tinkler (1781) 15b

TABLE OF AUTHORITIES

American Cases: *Pages:*

Addington v. Texas, 441 U.S. 418 (1979) 28

Bellotti v. Baird, 428 U.S. 132 (1976) 27

Bowers v. Hardwick, 478 U.S. 186 (1986) 3

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 27, 28

City of Richmond v. J.A. Croson Co., 109 S. Ct. 706(1989) 26

Colautti v. Franklin, 439 U.S. 379 (1979) 26, 27

Colony v. Allen, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.) 17

Colony v. Powell (Va. 1635), 7 Am. L. Rec. 43 (1954) ... 18

Commonwealth v. Bangs, 9 Mass. 387 (1812) 22

Commonwealth v. Parker, 50 Mass. (9 Met.) 263 (1845) 22

Doe v. Bolton, 410 U.S. 179 (1973) 25, 26, 27

Dougherty v. People, 1 Colo. 514 (1872) 22

Harris v. McRae, 448 U.S. 297 (1980) 27

In re the Stillbirth of Agnita Hendricks' Bastard Child (Del. 1679), Ct. Rec. of New Castle on Del. 1676-1681 at 274-275 (1904) 17

Lamb v. State, 67 Md. 524, 10 A. 208 (1887) 22

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 3

Meyer v. Nebraska, 262 U.S. 390 (1923) 3

Mills v. Commonwealth, 13 Pa. 630 (1850) 22

Mitchell v. Commonwealth, 78 Ky. 204 (1879) 22

New State Ice Co. v. Liebman, 285 U.S. 262 (1932) 28

People v. Sessions, 58 Mich. 594, 26 N.W. 291 (1886) ... 22

Planned Parenthood Assn. v. Ashcroft, 462 U.S. 476 (1983) 27

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) 27, 28

Proprietary v. Brooks, 10 Md. Archives 464-465, 486-488 (1656) 17

Proprietary v. Lambrozo, 53 Md. Archives 387-391 (1663) 17

Proprietary v. Mitchell, 10 Md. Archives 171-186 (1652) [quoted in Appendix B] 17

Proprietary v. Robins, 41 Md. Archives 20 (1658) 17

Robins v. Robins, 41 Md. Archives 85 (1658) 17

Roe v. Wade, 410 U.S. 113 (1973) ..2, 3, 11, 19, 23, 24, 26, 27

Simopolous v. Virginia, 462 U.S. 506 (1983) 26, 27

State v. Crook, 16 Utah 212, 51 P. 1091 (1898) 22

State v. Gedicke, 43 N.J.L. 86 (1881) 22

State v. Howard, 32 Vt. 380 (1859) 22

State v. Moore, 25 Iowa 128 (1868) 22

State v. Murphy, 27 N.J.L. 112 (1858) 21

Thornburgh v. American College of Obstetricians, 476 U.S. 747 (1986) 26, 27

United States v. Carolene Prod. Co., 304 U.S. 144 (1938) 27

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 28

United States Constitution

Fourteenth Amendment 3

American Statutes and Ordinances

Charters & Gen'l L. of the Colony & Prov. of Mass. Day 293 (Dane, Prescott & Story. . . (1814) 18

Ill. Rev. Code sec. 46 (1827) 25

Me. Rev. Stat., ch. 160, secs. 13, 14 (1840) 25

Ordinance of the City of New York, 3 Min. of the Common Council of N.Y. 122 (1716) 18

English Cases:

Agnes' Appeal (1200), 1 Selden Soc'y 39 (no. 82) (1887) [translated in Appendix B] 4

Aubyn's Appeal, The London Eyre of 1244 at 50-51 (no. 124) (London Rec. Soc'y 1970) 6

Avener's Appeak (1244), The London Eyre of 1244 at 36 (no. 84) (London Rec. Soc'y 1970) 6

Beale v. Beale, 24 Eng. Rep. 373 (K.B. 1713) 10

Burel's Appeal (1202), 1 Selden Soc'y 11 (no. 26) (1887) 7

Cecily's Appeal (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981) 6

Cockaine v. Witnam (Q.B. 1577), Cro. Eliz. 49, pl. 4 (1586) [quoted in Appendix B] 8

Commonwealth v. Foxall (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50 (S. Ratcliff & H. Johnson eds. 1937) 10

Commonwealth v. Simpson (1659), 6 N. Riding Q. Sess. Rec. 23 (J. Atkinson ed. 1888) 10

Gras's Appeal (1276?), The London Eyre of 1276 at 73-74 (no. 261) (London Rec. Soc'y 1976) 6

Gundewine's Appeal (1247), Just. 1/274, m14d [translated in Appendix B] 6

Juliana's Appeal (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healey ed. 1897) 4

Millar v. Turner, 1 Vesey 86 (K.B. 1748) 10

Modi's Appeal j(1221), 59 Selden Soc'y 560-561 (no. 1336) (1940) 7

Orscherd's Appeal (1249?), Just. 1/174, m.40d 6, 11

Paiards's Appeal (1249?), Just. 1/174, m.40d 6

Philippa's Appeal (1276?), The London Eyre of 1276 at 51 (no. 187) (London Rec. Soc'y 1976) 7, 11

Phina's Appeal (1246), Just. 1/778, m.57 6

Porte's Appeal (1249), Just. 1/175, m.38 4

R. v. Adkyns (1600), Calendar of Assize Rec., Essex Indictments, Eliz. I at 510 (no. 3054) (J. Cockburn ed. 1975) 11

R. v. Anonymous, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) [K.B. 1348], a.k.a. *the Abortionist's Case*] [translated in Appendix B] 7

R. v. Anonymous, M. Hale, *History of Pleas of the Crown* 429 (1685) 10

R. v. Anonymous (1803), 3 J. Chitty, *Criminal Law* 798-801 (1816) 20

R. v. Beare, 2 The Gentleman's Magazine 931 (Aug. 1732) [quoted in Appendix B] 3,20

R. v. Botevylayn (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306 at 105, 126, 131 (nos. 576, 800, 854) (R. Pugh ed. 1978) 4

R. v. Cokkes (1415), 7 Calendar of Inquisitions Misc. (Ch.) Preserved in the Pub. Rec. Off. 1399-1422 at 296 (no. 523) (1968) 6

R. v. de Bourton, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327) [a.k.a. *the Twinslayers' Case*] [translated in Appendix A] 7

R. v. Hodges (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615 at 345 (1936) 10

R. v. le Petiprestre (1244), The London Eyre of 1244 at 48 (no. 116) (London Rec. Soc'y 1970) 4

R. v. Lichefeld, K.B. 27/974, Rex m. 4 (1505) [translated in Appendix B] 8

R. v. Meadow (1590), Calendar of Assize Rec., Sussex Indictments, Eliz. I at 233 (no. 1212) (J. Cockburn ed. 1975) 11

R. v. Parker, 73 Eng. Rep. 410 (1580) 16

R. v. Poope (1589), Calendar of Assize Rec., Kent Indictments, Eliz. I at 289 (no. 1751) (J. Cockburn ed. 1975) 11

R. v. Portere (K.B. 1400), The Shropshire Peace Role 1400-1414 at 57-58 (no. 24) (E. Kimball ed. 1959) .. 3, 11

R. v. Robynson, Q/SR 110/68 (Coroner's Inquest 1589) . 8

R. v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601) [quoted in Appendix B] 4, 9

R. v. Tinckler (1781), 1 E. East, *Pleas of the Crown* 354 (1806) [quoted in Appendix B] 20

R. v. Turnour, Assize 35/23/29 (Essex 1581), Calendar of Assize Rec., Essex Indictments, Eliz. I at 212 (no. 1225) (J. Cockburn ed. 1978) [translated in Appendix B] 8, 9

R. v. Webb (Q.B. 1602), Calendar of Assize Records, Surray Indictments, Eliz. I at 512 (no. 3146) (J.S. Cockburn ed. 1980) [quoted in Appendix B] 3, 4, 10, 13

R. v. Wodlake, K.B. 9/513/m.23 (1530), K.B. 29/162/m11d (1531) 8

R. v. Wycherley, 173 Eng. Rep. 486 (N.P. 1838) 25

R. v. Wynspere, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434 at 12 ..... 8, 13

Sauter's Appeal (1221), Pleas of the Crown for Gloucester Cnty. 1221 at 16 (no. 69) (F. Maitland ed. 1884) 4

Serlo's Appeal, The London Eyre of 1276 at 62-64 (nos. 157-158) (London Rec. Soc'y 1976) 4

Sibil's Appeal (1203), 1 Selden Soc'y 32 (no. 73) (1887) . 4

Sorel's Appeal (1276?), The London Eyre of 1276 at 61 (no. 222) (London Rec. Soc'y 1976) 6

Swayn's Appeal (1249), Just. 1/359, m. 36 6

English Statutes:

Leges Henri Primi, c. LXX.14 (L.J. Downer ed. 1972) . 4

5 Eliz. I, c.15 (1573) 9

"An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James 1, ch. 27, sec. 3 (1624) 16

Lord Ellenborough's Act, 43 Geo. III, c. 59 (1803) .. 4, 17, 21

The Offenses against the Persons Act, 7 Will. 4 & 1 Vict., c. 85 (1837) 21, 25

Secondary Authorities:

Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595) 14

D. Bakan, *The Slaughter of the Innocents* (1971) 16

J. Baker, *An Introduction to English Legal History* (2d ed. 1979) 3

J. Bates & E. Zawadski, *Criminal Abortion* (1964) 12, 13, 14, 21

O. Bartley, *A Treatise on Forensic Medicine* (1815) 21

Before the Bawdy Court (P. Hair ed. 1972) 6

A. Bickel *The Least Dangerous Branch* (1962) 26

A. Bickel, *The Morality of Consent* (1975) 23

W. Blackstone, *Commentaries* (1765-1769) 10

Boke of the Justyces of the Peas (1515), 94 Seldon Soc'y 306 (1979) 9

J. Boswell, *The Kindness of Strangers: the Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* 16

H. Bracton, *On the Laws and Customs of England* (S. Thorne ed. 1968) 8, 24

Brandt, *The Ways and Means of American Medicine*, Hastings Cntr. Rep., June 1983, at 41 19

Britton (F. Morgen ed. 1901) 8

B. Brookes, *Abortion in England 1900-1967* (1988) 28

R. Burn, *The Justice of the Peace and the Parish Officer* (3d ed. 1756) 10

J. Burns, *The Anatomy of the Gravid Uturus* (1799) ... 21

D. Callahan, *Abortion: Law, Choice and Morality* (1970) 24

A. Castiglioni, *A History of Medicine* (2d ed. 1947) 15

E. Coke, *Third Institute* (1644) 10

Compleat Herbal (G. Swindells ed. 1787) 14

A. Cox, *The Role of the Supreme Court in American Government* (1976) 27

Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979) 4, 6, 7, 10, 13, 16, 18, 21, 24

G. Devereux, *A Study of Abortion in Primitive Societies* (1955) 12, 13, 15

J. Donnison, *Midwives and Medical Men* (1988) 16, 28

R. Dworkin, *Taking Rights Seriously* (1976) 27

E. East, *A Treatise on the Pleas of the Crown* (1803) 10, 20, 21

A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* (1982) 12

Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920 (1973) . 27

M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* (3d ed. 1712) 14

Fleta (Seldon Soc'y ed. 1955) 8

Forbes, *Early Forensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981) 10

T. Forbes, *The Midwife and the Witch* (1966) 14, 16

Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: the Genesis of the Statutory Prohibition of Abortion*, 5 J. Leg. His. 20 (1984) 7

M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* (1949) 18

F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785) 14

J. Guillemeau, *The Nursing of Children* (1612) 16

M. Hale, *History of the Pleas of the Crown* (1685) 6, 10

M. Hale, *Pleas of the Crown* (1682) 10

W. Hawkins, *Treatise on the Pleas of the Crown* (1716) . 10

Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379 (1975) 6, 16

N. Himes, *Medical History of Contraception* (1936) .. 13, 14

A History of Science (R. Taton ed. 1965) 24

P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1984) 16, 18

W. Holdsworth, *A History of English Law* (1938) 6, 7, 9, 21

R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979) 9

M. Kenny, *Abortion: the Whole Story* (1986) 15, 19

J. Keown, *Abortion, Doctors and the Law* (1988) 3, 4 6, 7, 8, 10, 17, 21, 22, 28

L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth Century New England* (1980) 17

Kleiman, *When Abortion Becomes Birth*, N.Y. Times, Feb. 15, 1984 at B1, col. 1 29

L. Lader, *Abortion II* (1973) 29

L. W. Lambard, *Of the Office of the Justice of the Peace* (1st ed. 1581) 9, 16

Langer, *Infanticide: A Historical Survey*, 2 Hist. Childhood Q. 353 (1974) 16

P. Laslett, *The World We Have Lost* (1966) 13

G. Male, *An Epitome of Judicial or Forensic Medicine* (1816) 21

S. Massengill, *A Sketch of Medicine and Pharmacy* (2d ed. 1942) 18

A. McLaren, *Reproductive Rituals* (1984) 12, 14, 15

Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constituionality*, 14 N.Y.L.F. 411 (1968) (cited as Means I) 5, 19, 20

Means, *The Phoenix of Abortional Freedom: Is a Penumbral Right of Ninth-Amendment about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L.F. 335 (1971) (cited as Means II) 5, 11, 19

C. Meekings, *Studies in 13th Century Justice and Administration* (1981) 6

A. Meyer, *The Rise of Embryology* (1939) 24

Mirror of Justices (Selden Soc'y 1895) 16

J. Mohr, *Abortion in America* (1978) 5, 12, 14, 19, 23, 24, 28

B. Nathanson, *The Abortion Papers* (1983) 25

B. Nathanson, *Aborting America* (1979) 25

J. Needham, *A History of Embryology* (1959) 24

J. Noonan, *Contraception* (1965) 13, 14

M. Piers, *Infanticide: Past and Present* (1974) 16

J. Pechey, *Compleat Herbal of Physical Plants* (1707) . 14

Philadelphia Inquirer, Sept. 29, 1983 at 14A, col. 2 29

F. Pollock & F. Maitland, *The History of English Law before the time of Edward I* (2d ed. 1898) 7, 9, 16

M. Potts, P. Diggory & J. Peel, *Abortion* (1977) 20, 24

G. Quaife, *Wanton Wenches and Wayward Wives* (1979) 12

Quay, *Justifiable Abortion—Medical and Legal Foundations* (Pt. II), 49 Geo. L.J. 395 (1961) 4

Reports of Sir John Spelman (J. Baker ed.), 94 Selden Soc'y 306 (1978) 8

Rhazes, *Liber ad Almansorem* (1497) 14

Rolph, *A Backward Glance at the Age of 'Obscenity'*, 32 Encounter 23 (June 1969) 16

W. Russell, *A Treatise on Crimes and Misdemeanors* (1819) 10

M. Sanger, *Motherhood in Bondage* (1928) 24

C. Scholten, *Childbearing in American Society 1650-1850* (1985) 18

E. Shorter, *A History of Women's Bodies* (1982) 12, 13, 14, 15, 20, 24

C. Smith-Rosenberg, *Disorderly Conduct* (1985) 12

P. Starr, *The Social Transformation of American Medicine* (1982) 19, 28

W. Staunford, *Pleas of the Crown* (1557) 9, 16

J. Stephen, *A History of the Criminal Law of England* (1883) 9

F. Taussig, *Abortion Spontaneous and Induced* (1936) 12, 13, 14, 15

A. Taylor, *Manual of Medical Jurisprudence* (1842) ... 21

J. Thrupp, *The Anglo-Saxon Home* (1862) 16

M. Walsh, *Doctors Wanted: No Women Need Apply* (1977) 19, 28

J. Weeks, *Sex, Politics and Society* (1981) 14

Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973) 27

G. Williams, *Textbook of Criminal Law* (2d ed. 1983) .. 29

Winfield, *The Unborn Child*, 4 U. Tor. L.J. 278 (1942) . 8

J. Winthrop, *History of New England 1630-1649* (Hosmer ed. 1908) 18

Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985) 4

INTEREST OF THE *AMICUS CURIAE*

This brief is filed under Supreme Court Rule 36, with the consent of the parties, on behalf of the American Academy of Medical Ethics as *amicus curiae* in support of Appellants in *Turnock* and Cross-Petitioners in *Hodgson*. The Academy is an educational and lobbying organization with approximately 20,000 physician members, incorporated in 1986 to respond to the challenges to established medical ethics emerging in recent decades. The Academy follows the Hippocratic Oath in opposing abortion except to save the life of the mother. The Academy sees an unborn child as a patient deserving protection and the full advocacy of attending physicians. The Academy asks the Court to overrule *Roe v. Wade* or, as in *Webster v. Reproductive Health Services*, to reconsider its application in light of current medical technology.

SUMMARY OF THE ARGUMENT

The majority in *Roe v. Wade* appraised the values implicated in that case by an extended discussion of the history of abortion, reaching erroneous conclusions about the status of abortion under the common law and breaking sharply with the traditional values embodied in the common law and our Constitution. Although conviction for abortion was rare in England before the Eighteenth Century, abortion, along with other killing of unwanted children, was condemned by respected authorities from the beginning of the common law—as illustrated by the strong steps through the centuries, by Parliament and the courts, to punish infanticide. The laws respecting abortion and infanticide applied with full rigor in the United States throughout the colonial era. When new medical technologies lessened the danger to the mother from abortion, abortion became more common than infanticide, and legal institutions turned their attention to abortion.

Abortion has always been socially controlled in the interest

of both the child and the mother, interests that have continually changed as new medical technologies developed. Changes in the technology of abortion altered the maternal interest in obtaining the procedure, while developing reproductive technologies reinforced increasing certainty that a conceptus is a "person" from the earliest stages of gestation. The moral and legal implications of such technical developments are not merely medical questions; such implications raise questions of social policy and values.

Legislatures are better placed than courts to devise appropriate regulatory responses to rapidly changing human reproductive technologies because legislatures are better able to assemble the information necessary to assess the import of the changing data in balancing of the interests created or reinforced by those technologies. Courts are ill-suited to sit as boards of review for the implications of changing medical technologies. In the present state of flux, the model of states as laboratories for social policies is especially apt.

For the foregoing reasons, *Roe v. Wade* should be overruled. If *Roe v. Wade* is to continue to survive in some form, the Court will find itself, as in *Webster v. Reproductive Health Services*, caught up in a continual reexamination of the application of the *Roe* criteria in light of the constantly changing medical technology.

ARGUMENT

I. *Roe v. Wade*, Based upon Erroneous Notions of the Historical Status of Abortion under the Common Law, Broke Sharply with Long Established Traditions and Values of the Common Law and our Constitution

More than half of the majority opinion in *Roe v. Wade*, 410 U.S. 113, 129-152, 156-162 (1973), was given to a history of abortion, using this history to inform the values at stake in the controversy before the Court. This approach is hardly surprising as the Court has long interpreted the open-textured language of the Constitution through resort to underlying legal

and social traditions forming the background against which the Constitution was written. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The liberty guaranteed by the due process clause of the Fourteenth Amendment particularly includes "those privileges long recognized in common law as essential to the orderly pursuit of happiness" by free people. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). That liberty is fundamental if it is "deeply rooted in this Nation's history and traditions." *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). Thus, historical errors, and flawed inferences drawn from those errors, would seriously undermine the entire edifice built on *Roe v. Wade*.

The majority in *Roe v. Wade* concluded that "it now appear[s] doubtful that abortion was ever established as a common law crime", 410 U.S. at 136, and that abortion statutes in the United States were not generally adopted until after the Civil War (i.e., after the Fourteenth Amendment was adopted). *Id.* at 139. Both conclusions are wrong.

While research has not uncovered any record of actual punishment[1] for abortion in England before 1732 *if* the abortion was voluntarily undertaken by a woman without serious injury to herself *or* without a live birth before the death of the child, indictments and appeals of felony[2] have been found back at least to 1200 for abortion without either aggravating factor.[3]

---

[1] Often the only records extant are terse notes of an indictment which do not indicate what happened at trial. Many of these records do note a finding of "not guilty" rather than a dismissal of the proceeding. *See* note 9 *infra*.

[2] Many of the indicments and appeals in this brief have not been published in the United States. The most important unpublished cases are *R. v. Webb* (Q.B. 1602), *infra*, and *R. v. Beare* (Q.B. 1732), *infra*. I am grateful to Dr. John Keown, of the University of Leicester, for providing me with the text of these and some other early cases. *See generally* J. Keown, *Abortion, Doctors and the Law* (1988). I am also indebted to Mr. Philip Rafferty of Los Angeles, who made available his research and that of Dr. J.H. Baker, of St. Catherine's College, Cambridge University. Dr. Baker's book, *An Introduction to English Legal History* (2d ed. 1979), is a leading text for the study of the topic.

[3] *See, e.g., R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414

(footnote continued)

Later, a woman was indicted for self-abortion; apparently, she was saved from punishment only by a general pardon. *R. v. Webb* (Q.B. 1602), Calendar of Assize Rec., Surray Indictments, Eliz. I at 512 (no. 3146) (J. Cockburn ed. 1980).[4] Less than 12 months earlier, a court had held a man for murder when an abortus died after being born alive. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601). Secondary authorities on the common law and judicial dicta also frequently condemned abortion.

Against that background, beginning with "Lord Ellenborough's Act" in 1803, 43 Geo. III, c. 59, criminal statutes expressly prohibiting abortion spread rapidly throughout the common law world. In the United States, 70% of the states (with 85% of the American population) had such statutes by 1861. By 1895 abortion was clearly a serious crime in every state.[5]

Footnote 3 continued

at 57-58 (no. 24) (E. Kimball ed. 1959); *R. v. Botevylayn* (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306 at 105, 126, 131 (nos. 576, 800, 854) (R. Pugh ed. 1978); *Juliana's Appeal* (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healey ed. 1897); *Porte's Appeal* (1249), Just. 1/175, m.38; *Sauter's Appeal* (1221), Pleas of the Crown for Gloucester Cnty. 1221 at 16 (no. 69) (F. Maitland ed. 1884); *R. v. le Petiprestre* (1244), The London Eyre of 1244 at 48 (no. 116) (London Rec. Soc'y 1970); *Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes' Appeal* (1200), 1 Selden Soc'y, *supra* at 39 (no. 82). Abortion was covered by even earlier compilations of the common law, which required payment of a full *wergeld* (a money payment to relatives of a slain person to settle the claims for homicide) if the child were "living", and a half-*wergeld* if not "living". *Leges Henri Primi* c. LXX.14 (L.J. Downer ed. 1972). [This was a 12th Century compilation of sources on Anglo-Saxon law as modified by the early Norman kings.] Several of the cases noted here were settled by money payments, perhaps as *wergeld*.

[4] Whether the pardon came before or after conviction is unclear, although the editor of the records infers that Webb was convicted before she was pardoned, Keown, *supra* note 2, at 173 n.23.

[5] *See generally* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 389-407 (1979); Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961); Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means.[6] Means' history of abortion was neither objective nor accurate. Nor have these inadequacies been resolved by James Mohr's somewhat different history of abortion.[7] Mohr and his followers would shift the focus from an increasingly clear history of the law of abortion to the far less certain issue of the "true" social attitudes concerning abortion. Mohr's approach simply discounts records of attitudes he disagrees with either in favor of other, similar records of attitudes he finds useful, or even in favor of presumed unrecorded opinions of historically mute classes.

Such purportedly sociological approaches to history never stoop to explain why, if the publicly expressed attitudes of formal social institutions did not represent the true values of the society, those institutions chose to express themselves in such unrepresentative terms, or why these terms continue through major changes of social and political structure. This approach does permit one to infer almost at will what the true attitudes were, but it overlooks that the Constitution is a legal document. Ultimately, legal traditions must inform the Constitution; the social, medical, and moral context is useful only to illuminate those legal traditions, and not as an independent source of claims of right. Rather, the unbroken legal tradition, extending over more than seven centuries of social life, condemning abortion and other aggression against unwanted children, is the distillation of the moral sense of the community.

[6] Means, *The Phoenix of Abortional Freedom: Is a Penumbral Right of Ninth-Amendment about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) (hereafter cited as Means II); Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) (hereafter cited as Means I). The majority cited Means seven times during its depiction of the history of abortion—without noting that he was then the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

[7] J. Mohr, *Abortion in America* (1978).

A. In England, from the Beginning of the Common Law, Courts and Other Respected Authorities Consistently Condemned Abortion

Indictments of abortionists at common law were far more common than was thought in 1973.[8] Common law indictments and appeals of felony for abortion are recorded as early as 1200. While the terse records do not indicate any punishment, the many clear records of judgments of "not guilty" demonstrate that the indictments and appeals were valid under the common law.[9]

---

[8] Abortion was also punished by the ecclesiastical courts of the time. *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); Keown, *supra* note 2 at 5; Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-381 (1975). That a crime was punished in ecclesiastical courts does not establish that it was not punishable at the common law. Keown, *supra*; Helmholz, *supra* at 386. Nor does ecclesiastical interest indicate that such prosecutions must be seen as religiously based: many modern legal topics that today are unquestionably secular, such as wills, slander, and enforcement of simple contracts, originated in the ecclesiastical courts. 1 W. Holdsworth, *A History of English Law* 65-77, 455-457, 580-632 (1938); 3 Holdsworth at 408-428, 441-454, 534-536; 5 Holdsworth at 167-169, 197-218, 291-299; 8 Holdsworth at 301-307, 324-417; 15 Holdsworth at 198-208; Dellapenna, *supra* note 5, at 382-387. Also, in English legal theory both temporal and ecclesiastical courts derived their authority from the Crown, and thus both together represented the "law of England". 1 M. Hale, *History of the Pleas of the Crown*, preface (1685).

[9] *See R. v. Cokkes* (1415), 7 Calendar of Inquisitions Misc. (Ch.) Preserved in the Pub. Rec. Off. 1399-1422 at 296 (no. 523) (1968); *Gras's Appeal* (1276?), The London Eyre of 1276 at 73-74 (no. 261) (London Rec. Soc'y 1976); *Sorel's Appeal* (1276?), Eyre of 1276 at 61 (no. 222); *Serlo's Appeal*, Eyre of 1276 at 62-64 (nos. 157-158); *Cecily's Appeal* (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981); *Swayn's Appeal* (1249), Just. 1/359, m.36; *Paiards's Appeal* (1249?), Just. 1/174, m.40d; *Orscherd's Appeal* (1249?), Just. 1/174, m.40d; *Gundewine's Appeal* (1247), Just. 1/274, m14d; *Phina's Appeal* (1246), Just. 1/778, m.57, summarized in Meekings, *supra* at 267; *Aubyn's Appeal*, The London Eyre of 1244 at 50-51 (no. 124) (London Rec. Soc'y 1970); *Avener's Appeal* (1244), Eyre of 1244 at 36

(footnote continued)

Means wrongly asserted that there were only two cases before 1600 dealing with abortion, and that the courts in both cases indicated doubt about whether abortion was a crime: *R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327) [*see* Appendix A] (dubbed by Means as *the Twinslayers' Case*); and *R. v. Anonymous*, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) (K.B. 1348) [*see* Appendix B] (dubbed by Means as *the Abortionist's Case).* Means (and the *Roe* majority) relied on a faulty rendering of *R. v. de Bourton* for his analysis. Even if these problems are overlooked, Means' highly partisan analysis contained serious errors as even supporters of his ultimate conclusions have acknowledged.[10]

Even if the faulty text of *R. v. de Bourton* is taken as definitive, at most it, like *R. v. Anonymous*, shows a court declining to prosecute through uncertainty over whether a case was properly before the court, not because of the non-criminality of abortion.[11] In *R. v. de Bourton*, the defendant apparently had been released on bail to answer for another charge, and actually was given a special pardon before trial. In *R. v. Anonymous*, the defendant escaped conviction because the indictment failed to state a baptismal name for the deceased,[12]

Footnote 9 continued

(no. 84); *Modi's Appeal* (1221), 59 Selden Soc'y 560-561 (no. 1336) (1940); *Burel's Appeal* (1202), 1 Selden Soc'y 11 (no. 26) (1887). At least once the proceeding was aborted by the ancient form of benefit of clergy, which precluded trial. *Philippa's Appeal* (1276?), Eyre of 1276 at 51 (no. 187).

[10] *See, e.g.*, Gavigan, *The Criminal Sanction as it Relates to Human Reproduction: the Genesis of the Statutory Prohibition of Abortion*, 5 J. Leg. His. 20, 22-29 (1984).

[11] *See generally* Dellapenna, *supra* note 5, at 368-370; Keown, *supra* note 2, at 4.

[12] This ignores the fact that "murder", at least until 1340, meant a fine imposed on a district when no one could prove a deceased's identity as an Englishman. 1 Holdsworth, *supra* note 8, at 65-77, 580-632; 1 F. Pollock & F. Maitland, *The History of English Law before the Time of Edward I* 67-68, 545 (2d ed, 1898); 2 Pollock & Maitland at 480-486.

and because it was impossible to know if the defendant killed the child—grounds that are procedural and evidentiary, not substantive, grounds.[13] Influential contemporary commentators on the common law also declared abortion of a woman "quick with child" to be a criminal homicide.[14]

After 1500, cases became more common. First, a coroner's inquest ruled that death by abortion was "felonious suicide"; the man involved was released, as an accessory then could not be tried without the principal. *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505) [*see* Appendix B].[15] Later, a man died before trial for giving a potion to a girl to induce an abortion. *R. v. Wodlake*, K.B. 9/513/m.23 (1530), K.B. 29/162/m11d (1531).[16] Yet later, a woman was convicted of abortion by witchcraft. *R. v. Turnour*, Assize 35/23/29 (Essex 1581) [*see* Appendix B].[17] Yet another court held that accusing a woman of offering abortifacients to another supported an actin for slander and were sufficient grounds for a court to require a bond for good behavior. *Cockaine v. Witnam* (1577), Cro. Eliz. 49 (1586).

Curiously, two Sixteenth Century authorities on common law criminal pleadings denied that abortion was a felony. 1 W.

[13] *Cf.* Winfield, *The Unborn Child*, 4 U. Tor. L.J. 278, 280 (1942).

[14] 2 H. Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); 1 *Fleta* 60-61 (Selden Soc'y ed. 1955). *Britton* 95-96 (F. Morgen ed. 1901) disagreed—because of the lack of a baptismal name for the victim.

[15] *See also R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589); *R. v. Wynspere*, (Coroner's Inquest 1503), Pub. Rec.Off., ref: Ancient Indictments 434, 12. *See* Keown, *supra* note 2, at 6.

[16] *See also* 2 *Reports of Sir John Spelman* 306 (J. Baker ed.), 94 Selden Soc'y 306 (1978).

[17] Some have said that Turnour was executed for abortion, but as she was convicted of several acts of witchcraft, only one of which was abortion, the record is unclear as to why she was executed; even if abortion were why she died, the crime was witchcraft, and not criminal abortion or homicide as such. *See* Calendar of Assize Rec., Essex Indictments, Eliz. I at 212 (no. 1225) (J. Cockburn ed. 1978).

Staunford, *Pleas of the Crown* ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the Peace* 217-218 (1st ed. 1581). Yet an early formbook, with four editions between 1506 and 1544, included a form indictment for abortion by physical assault on the mother. *Boke of the Justyces of the Peas* c. vi, fol. iii (1515). Perhaps Staunford and Lambard only reflected uncertainty from the poorly reported decisions; or perhaps they meant that abortion was a crime less than a felony; or perhaps they meant that abortion properly belonged before a court other than the Queen's Bench. Three centuries later, Sir John Stephen concluded that they meant that abortion was properly brought only before ecclesiastical courts. 1 J. Stephen, *A History of the Criminal Law of England* 54 (1883). If so, they were wrong.

Some part of the Sixteenth Century legal activity regarding abortion did represent a secularization of matters formerly left to the ecclesiastical domain. Ecclesiastical activity directed at abortion declined during the Reformation,[18] and common law courts took full responsibility for abortion,[19] in a process culminating in a series of decisions in the Seventeenth Century that clearly establish, if the cases already noted did not, that abortion was a serious crime.

In 1601, two Queen's Bench Justices held an abortion which kills a child after a live birth is murder, *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601) [*see* Appendix B],[20] stating that the birth and

[18] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979).

[19] Witchcraft became an indictable crime by the statute of 5 Eliz. I, c.15 (1573); within eight years, we find *R. v. Tournour, supra*.

[20] There were a number of possible precedents for the decision, but *R. v. Sims* seems finally to have settled the matter. *Sims* itself was an action in trespass, which at the time still was a hybrid action combining both criminal and civil elements. For the evolution of medieval trespass into both modern crimes and modern torts, *see* 2 Holdsworth, *supra* note 8, at 364-365; 3 Holdsworth at 317-318, 609-611; 4 Holdsworth at 512-515; 2 Pollock & Maitland, *supra* note 12, at 510-524.

subsequent death of the child permitted proof of the cause of death.[21] In 1602, in *R. v. Webb*, Calendar of Assize Rec., Surray Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980) [*see* Appendix B], a woman apparently was convicted and pardoned[22] for self-abortion with rat poison. Finally, in 1670 Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide. *R. v. Anonymous*, M. Hale, *History of Pleas of the Crown* 429-430 (1685).[23]

R. v. Sims was argued before the court by Attorney-General Sir Edward Coke (the "Father of the Common Law"). In his *Third Institute* 50-51 (1644), Coke generalized a principle from the case that abortion after quickening was "a great misprision [a serious misdemeanor], and no murder" if the child died in the womb, and a murder if the child died after birth. Coke's position thereafter was accepted virtually without question.[24]

---

[21] For the primitive state of forensic medicine nearly three centuries later, *see* Forbes, *Early Forensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981).

[22] *See* note 4 *supra*.

[23] For other Seventeenth Century indictments without record of the outcome, *see Commonwealth v. Simpson* (1659), 6 N. Riding Q. Sess. Rec. 23 (J. Atkinson ed. 1888); *Commonwealth v. Foxall* (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50 (S. Ratcliff & H. Johnson eds. 1937); *R. v. Hodges* (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615 at 345 (1936).

[24] 1 W. Blackstone, *Commentaries* 129-130 (1765); 4 Blackstone 198 (1769); R. Burn, *The Justice of the Peace and the Parish Officer* 380 (3d ed. 1756); 1 E. East, *A Treatise on the Pleas of the Crown* 227-230 (1803); M. Hale, *Pleas of the Crown* 53 (1682); 2 W. Hawkins, *Treatise on the Pleas of the Crown* 80 (1716); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 617-618, 796 (1819). Two books are attributed to Hale. The one cited here echoed Coke's views; a later book, Hale, *supra* note 8, at 433, denied that an abortion-induced death of a child born alive is a homicide. Which view truly represents Hale's opinion is not known. Courts cited Coke with approval in a variety of contexts, and did not follow the second Hale dictum. *See Millar v. Turner*, 1 Vessey 86 (K.B. 1748); *Beale v. Beale*, 24 Eng. Rep. 373 (K.B. 1713); Keown, *supra* note 2, at 10-11. *See generally* Dellapenna, *supra* note 5, at 379-389.

Coke cited only the inconclusive precedents of *R. v. de Bourton*, *supra*, and *R. v. Anonymous*, *supra*, for his views.[25] Hale cited no precedents at all for his holding.[26] Means dismissed Coke's statement on abortion as a "masterpiece of perversion",[27] yet found Hale's decision on the death of the mother to be "an act of Restoration gallantry".[28] Means did not indicate how to recognize the difference.

By the early Eighteenth Century, the criminality of abortion under the common law appears well established. Courts had given increasingly clear holdings that some abortions were crimes; there was no decision indicating that any form of abortion was lawful. Secondary authorities, especially after 1600, equally supported the criminality of abortion. Yet few cases recorded punishment for any abortion, and none recorded punishment for a voluntary abortion without *either* death for the mother *or* death subsequent to live birth for the child.

B. From Earliest Times, English Law Prohibited Parents from Killing Unwanted Children, and Parliament and the Courts Took Strong Steps, Gradually Strengthened through the Centuries, to Punish Violations of These Prohibitions

The great majority of the cases thus far noted involved crude physical batterings of the mother—often to her serious injury

---

[25] *Cf. R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414 57-58 (no. 24) (E. Kimball ed. 1959).

[26] Hale might have cited, *R. v. Adkyns* (1600), Calendar of Assize Rec., Essex Indictments, Eliz. I at 510 (no. 3054) (J. Cockburn ed. 1975); *R. v. Meadow* (1590), Calendar of Assize Rec., Sussex Indictments, Eliz. I at 233 (no. 1212) (J. Cockburn ed. 1975); *R. v. Poope* (1589), Calendar of Assize Rec., Kent Indictments, Eliz. I at 289 (no. 1751) (J. Cockburn ed. 1975). *See also Philippa's Appeal* (1276?), London Eyre of 1276 at 51 (no. 187) (London Rec. Soc'y 1976) (defendant escaped trial due to benefit of clergy); *Orscherd's Appeal* (1249?), Just. 1/174, m.40d (not guilty).

[27] Means II, *supra* note 6, at 359. His view apparently was accepted by the majority in *Roe v. Wade*, 410 U.S. at 135 n.26.

[28] Means II, *supra* note 6, at 363.

or death (injury techniques).[29] The remaining abortions were induced by "noxious potions"—potions that appear to have been nearly as deadly as the batterings (ingestion techniques).[30] From these facts, one might infer that the law was directed at protecting the mother's life or health—if one assumes, as Means, Mohr,[31] and numerous others do, that abortion was always freely available through reasonably safe means.

Both the ingestion and injury techniques found in the legal cases could be effective only with great pain and substantial risk of death or permanent injury; undergoing either cannot have been popular.[32] In fact, voluntary abortions are almost

[29] Injury techniques ranged from ineffective simple bodily manoeuvres up to savage assaults, such as cutting her open and removing the infant.

[30] Appeals or indictments for abortion by potion might have been rarer than for abortion by assault because a potion often was part of a magic ritual punishable as witchcraft even if ineffective, but only by an ecclesiastical court before Elizabeth I. Among medically primitive cultures, anthropologists have found injury techniques to be most common, if only because of the greater certainty of success. G. Devereux, *A Study of Abortion in Primitive Societies* 30-35, 171-358 (1955). *See also* J. Bates & E. Zawadski, *Criminal Abortion* 87-88 (1964); A. McLaren, *Reproductive Rituals* 100-108 (1984); F. Taussig, *Abortion Spontaneous and Induced* 41-45 (1936).

[31] Mohr, *supra* note 7, at 6-19, listed methods he assumed to be safe and effective, which was unfounded—even he acknowledged the poisonous nature of some of his "abortifacients". *Id.* at 71-73. E. Shorter, *A History of Women's Bodies* 177-191 (1982), also assumed that workable techniques existed, although he admitted that his own catalogue included only the useless or the fatal. Other historians have made the same assumption on even less evidence, A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* 67 (1982); McLaren, *supra* note 30, at 5-7, 107, 111-114; G. Quaife, *Wanton Wenches and Wayward Wives* 118-120 (1979); C. Smith-Rosenberg, *Disorderly Conduct* 228 (1985). Compare the text and notes at notes 34-38 *infra*.

[32] *Even Shorter, supra* note 31, at 177, concluded that until after 1880 only truly desperate women would risk abortion. Quaife, *supra* note 31, at 26, describes injury techniques in connection with his analysis of violence, and not with his analysis of abortion, while he concedes that women were rarely anxious to use ingestion techniques. *Supra* at 118.

absent from reported cases before 1732[33] for a simple reason: techniques of the time were tantamount to suicide.[34] Thus abortion which was not a crime against the mother was rare.[35]

The unpopularity of injury techniques hardly needs demonstration. While we cannot know all potions available in medieval England, surveys of the medical literature there and in other medically primitive societies demonstrate that the potions ingested to induce an abortion were either ineffective (except for any suggestive powers to which a woman might be susceptible) or highly dangerous.[36] Savin oil was the "abortifacient" most widely reported in medieval English sources. Modern research demonstrates that it works by undermining a

[33] The only apparently voluntary abortions reported were *R. v. Wynspere*, *supra* note 12, and *R. v. Webb*, *supra* note 22. In some cases, assertions that a potion was given by trick, etc., might have been dissimulation by the mother; this seems unlikely in the numerous cases of aborton by savage physical attack.

[34] Devereux, *supra* note 30, at 149-150. *See generally* Dellapenna, *supra* note 5, at 372-376, 393-395.

[35] One attempt at a study of the incidence of abortion in the early modern period, based on searching church records (which do not distinguish between spontaneous and induced abortions), P. Laslett, *The World We Have Lost* 123 (1966), found abortions in Seventeenth Century England to amount to 6-7% of total births. As in the Twentieth Century spontaneous abortions range from 7.5-11% with our more advanced medical technology, *id.* at 266, the Seventeenth Century figures reveal few, if any, induced abortions.

[36] Bates & Zawadski, *supra* note 30, at 14-23, 85-91; Devereux, *supra* note 30, at 36-43, 249, 279; N. Himes, *Medical History of Contraception* 139-151 (1936); J. Noonan, *Contraception* 222-230 (1965); Shorter, *supra* note 31, at 179-188; Taussig, *supra* note 30, at 31-45, 352-357; Dellapenna, *supra* note 5, at 373-376. Examples of ineffective "abortifacients" available in England include goat dung, raw eggs, hops, "ungrateful strong smells", and wine. Drugs the ingestion of which in massively dangerous quantities could bring on a abortion included caster oil, ergot of rye, hellebore, pennyroyal, rue, savin oil (juniper), tansy tea, thyme, and yarrow. Finally, a sufficiently desperate woman could ingest (or be made to ingest) a substance lethal even in small quantities, such as aloes, arsenic, "ratsbane" (rat poison), snake venom, and various metallic salts.

woman's health generally so she could not sustain pregnancy, all too often to the point of death.[37] The dangers of these "abortifacient potions" were so great that in early English slang the term "poisoned" meant pregnant![38]

One cannot entirely rule out the possibility of a safe and effective drug escaping notice in the legal, medical, and popular literature of the day. Yet the Arabic medical texts which, upon translation into Latin, were standard medical references in the later middle ages described nothing more safe and effective than the potions listed here.[39] Nor do later works in English add anything significant.[40] Given the general limited inventiveness of pre-scientific societies, one also must not be surprised at the lack of variation in abortion techniques over six centuries.

---

[37] One modern study found that savin oil did induce an abortion in 10 of 21 women who consumed it: nine of the 10 "successful" ones died, as did four of the "unsuccessful" ones. Taussig, *supra* note 30, at 353. In fact, most modern poisons were discovered through vain searches for a safe dosage of "abortifacients". Bates & Zawadski, *supra* note 30, at 88. For a graphic description of a savin death, *see* Forbes, *supra* note 21. *See generally* Shorter, *supra* note 31, at 186-188.

[38] F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785); McLaren, *supra* note 30, at 102. Yet another historian, who optimistically presumes that knowledge of safe and effective abortifacients was widespread, also notes that lead-poisoning was "epidemic" because of the use of the abortifacients. J. Weeks, *Sex, Politics and Society* 72 (1981). Even Mohr, *supra* note 7, at 71-73, notes that savin poisoning was widespread from abortion.

[39] Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595); Rhazes, *Liber ad Almansorem* (1497). *See also* Himes, *supra* note 36, at 139-151.

[40] 1 *Compleat Herbal* 69-71, 94-95 (G. Swindells ed. 1787); M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* 563 (3d ed. 1712); J. Pechey, *Compleat Herbal of Physical Plants* 13 (1707). These and other texts describe "abortifacient" effects in language markedly different from the descriptions of other pharmacological effects. "Abortifacient" effects are always introduced with phrases suchas "it is said", suggesting either uncertainty about the efficacy of the potion or unwillingness to be thought to favor the practice. McLaren, *supra* note 30, at 102-104, 123; Noonan, *supra* note 36, at 201-207, 217.

Singularly lacking from the literature is any mention of "intrusion techniques"—techniques using an intrusion through the cervix into the uterus to induce abortion.[41] Given the primitive knowledge of a woman's reproductive anatomy,[42] intrusive intervention can rarely have been successful. The closest one finds to an intrusion technique are occasional mentions of a "pessary"—the insertion of a vaginal suppository, usually laced with "abortifacient drugs", that did not penetrate the cervix. Without such penetration, however, pessaries do not seem to have been effective.[43]

Many still persist in believing that medically primitive cultures, including medieval England and colonial America, had mysterious abortion techniques that were safe, effective, and perhaps relatively painless. If so, why would simple, safe, and effective folk medicines abruptly disappear in the Nineteenth Century to be replaced by the highly dangerous intrusion techniques that supposedly then made abortion so dangerous as to justify the widespread adoption of statutes proscribing abortion? The true explanation was expressed by Mary Kenny: before the Nineteenth Century, "[t]he traditional forms of abortion had been infanticide and abandonment."[44]

---

[41] Even Shorter, *supra* note 31, at 188-191, concedes that instrumental (intrusion) abortions were not a realistic possibility before the Nineteenth Century. *See also* Devereux, *supra* note 30, at 28, 36-37.

[42] Consider contemporary views of how such potions functioned. Not only were potions often given in a belief that a woman had blocked menses rather than pregnancy, but the potions were sometimes given to prevent a woman's uterus from rising to her throat to choke her! Shorter, *supra* note 31, at 180, 286-287.

[43] Devereux, *supra* note 30, at 37; McLaren, *supra* note 30, at 101-102; Taussig, *supra* note 30, at 355-356. The ineffectiveness of pessaries did not prevent doctors from swearing a Hippocratic Oath not to administer them, at least as the oath was before it was amended after *Roe v. Wade*. A. Castiglioni, *A History of Medicine* 148 (2d ed. 1947).

[44] M. Kenny, *Abortion: the Whole Story* 181 (1986).

Infanticide was a crime under the early common law;[45] Parliament reacted to its frequent occurrence[46] by enacting ever stronger statutes prohibiting the practice. The royal courts also actively punished those found guilty of the crime.[47] All this occurred when both the incidence of true abortion and legal activity regarding it were still rare.

The stringency of the law of infanticide is shown by *R. v. Parker*, 73 Eng. Rep. 410 (1580), where even benefit of clergy was denied and a clergyman was executed for the crime. The earliest regulations of midwives (1512) were to prevent the killing of infants.[48] The tightening of the law against infanticide culminated in "An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James 1, ch. 27, sec. 3 (1624), which conclusively presumed murder from concealment of the death of a child in order to conceal its birth.

---

[45] Infanticide was a crime in Anglo-Saxon law. J. Thrupp, *The Anglo-Saxon Home* 85 (1862). At least one early book (ca. 1300) states that infanticide within one year of birth was cognizable only by ecclesiastical courts. *Mirror of Justices* 139 (Selden Soc'y 1895). 2 Pollock & Maitland, *supra* note 4, at 478 n.1, dismissed this book as worthless. Staunford, *supra*, at ch. 13, and Lambarde, *supra*, at 217-218, cited a 1315 conviction as indicating that infanticide was a common law felony (in the same passages where they apparently denied that abortion was a common law felony).

[46] Dead babies were a common sight in London streets well into the Nineteenth Century. Rolph, *A Backward Glance at the Age of 'Obscenity'*, *32 Encounter 23 (June 1969)*. *See also* D. Bakan, *The Slaughter of the Innocents* (1971); J. Boswell, *The Kindness of Others: the Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1989); M. Piers, *Infanticide: Past and Present* (1974); Dellapenna, *supra* note 5, at 395-400; Helmholz, *supra* note 8.

[47] P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1984).

[48] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife and the Witch* 144-147 (1966). Wet-nurses as well as midwives could have been characterized as major population control arrangements. J. Guillemeau, *The Nursing of Children*, preface (1612). *See generally* Dellapenna, *supra* note 5, at 396-397.

Only the emergency of abortion as a real alternative to infanticide brought a decline in the incidence of infanticide and the legal attention to it. The intimate relationship between abortion and infanticide was demonstrated by the fact that the next section of Lord Ellenborough's Act after the first English statutory prohibition of abortion reduced the penalty for concealment from death to a term of imprisonment. 43 Geo. 3 c.58, secs. 2-4 (1803).[49]

C. Early in the Colonial Period, These Laws Were Received with Full Rigor in the United States

The colonists from England brought the common law with them. In just one colony, no less than three prosecutions for criminal abortion arose before 1664: *Proprietary v. Lambrozo*, 53 Md. Archives 387-391 (1663); *Proprietary v. Brooks*, 10 Md. Archives 464-465, 486-488 (1656); *Proprietary v. Mitchell*, 10 Md. Archives 171-186 (1652) [*see* Appendix B].[50] In two of these cases, the defendant escaped conviction by, before trial, marrying (and thereby disqualifying) the principal witness against him. Mitchell was indicted for and convicted of attempted murder, apparently because the prosecutor could not prove the cause of the death of the stillborn child.

Other colonial prosecutions for abortion arose at similar early dates. In Rhode Island, a woman was given 15 lashes for fornication and attempted abortion. *Colony v. Allen*, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.).[51] Other charges of abortion through violent physical assaults are recorded without indication of the outcome. *In re the Stillbirth of Agnita Hendricks' Bastard Child* (Del. 1679), Ct. Rec. of New Castle on Del. 1676-1681 at 274-275 (1904); *Colony v.*

---

[49] For the legislative history, *see Keown*, *supra* note 2, at 12-21.

[50] *See also Proprietary v. Robins*, 41 Md. Archives 20 (1658), and *Robins v. Robins*, 41 Md. Archives 85 (1658).

[51] Noted in L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth-Century New England* 329, 336 n. 132 (1980).

Powell (Va. 1635), 7 Am. L. Rec. 43 (1954). Finally, a 1716 municipal ordinance in New York forbade midwives to aid or counsel abortion. 3 Min. of the Common Council of N.Y. 122.[52] Abortion simply was never accepted in American society, contrary to the bald assertions of Means, Mohr, and others; nor is there any reason to believe that abortion was more readily available, or more frequently practiced, in the colonies than in England.[53]

Infanticide in the colonies had considerable legal activity against it.[54] The close empirical link of the concealment statutes and abortion was again demonstrated by 11 states which enacted a concealment statute contemporaneously with the state's first abortion statute, while 20 states codified the two statutes together.[55] Thus, from earliest times, colonial society prohibited the murder of an unwanted child by its parents, whether by abortion or by infanticide.

[52] M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* 174-175 (1949). For reference to a similar ordinance in Virginia, *see* S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (2d ed. 1942).

[53] C. Scholten, *Childbearing in American Society 1650-1850* 9 (1985).

[54] Hoffer & Hull, *supra* note 47, at 33-113. Statutes were enacted to punish concealment—of either the birth or the death of a child—as murder in eight colonies or states before they adopted an abortion statute, beginning with Massachusetts in 1696. *Charters & Gen'l L. of the Colony & Prov. of Mass. Bay* 293 (Dane, Prescott, & Story eds. 1814). There was at least one prosecution for concealment even before a colonial statute was adopted. 2 J. Winthrop, *History of New England 1630-1649* 317-318 (Hosmer ed. 1908). Even the Salem Witchcraft Trials have been linked to infanticide. Hoffer & Hull, *supra* at 55-56.

[55] Dellapenna, *supra* note 5, at 399.

D. When Abortion Became More Common than Infanticide with the Development of Technical Means for Aborting a Woman with a Lessened Danger to Her Life, English and American Law Came to Emphasize Abortion as the Primary Evil

The dramatic introduction of abortion statutes throughout the English speaking world in the Nineteenth Century has been amply documented.[56] The majority in *Roe v. Wade* viewed this development, and the similarly dramatic increase in prosecutions, as a result of Victorian sexual attitudes, fears for maternal health, and concern for the life of the unborn child. 410 U.S. at 147-152. The majority offered no explanation why these reasons became weighty only in the Nineteenth Century.

Means insisted that only the second reason applied.[57] He also did not attempt to explain why fear for maternal health should have come to the fore then and not earlier. Mohr, while recognizing distress over falling birthrates among the middle and upper classes and over a "moral prejudice" favoring the life of unborn children,[58] argued that the real reason was to assure the dominance of the newly organized American Medical Association over its less qualified competitors, especially midwives.[59] He did not explain why these concerns should have won public support, a glaring omission as he insisted that the public supported free availability for abortions. Thus, such

[56] *See* note 5 *supra*. This process occurred throughout most of the world during the same time. Kenny, *supra* note 44, at 183.

[57] Means I, *supra* note 6, at 511-515; Means II, *supra* note 6, at 382-392.

[58] Mohr, *supra* note 7, at 35-36, 85-118, 128, 167-168, 175-176, 182-196.

[59] *Id.* at 32-37, 147-182. *See also* M. Walsh, *Doctors Wanted: No Women Need Apply* (1977). Mohr discounted concern for maternal health because he believed that abortion was safe. *Id.* at 25-40. A similar argument, made across a much broader front, appears in P. Starr, *The Social Transformation of American Medicine* (1982). For a critique of Starr's neglect of the role of technological change in transforming medicine, *see* Brandt, *The Ways and Means of American Medicine*, Hastings Cntr. Rep., June 1983, at 41.

views simply beg the question of why abortion suddenly became a subject of significant legal and social concern in the Nineteenth Century, and seriously misconceive the legal, medical, and social import of the abortion statutes.

Voluntary surgery has nearly always been treated as a private matter between a patient and an attending physician. Until *Roe v. Wade*, voluntary abortion simply was not treated as such a private matter. For example, in 1828 the New York legislature rejected a proposal to ban all surgery unless "necessary for the preservation of life", but accepted another part of the same proposal declaring abortion a crime.[60] This difference is rooted in technological change and social values.

The technological change was the introduction of intrusion techniques in England in the early Eighteenth Century.[61] The new technique first turned up in a legal case when a woman was sentenced to be pilloried and to serve three years in prison for aborting another woman, before quickening, by inserting an iron rod into the second woman's womb. *R. v. Beare*, 2 The Gentleman's Magazine 931 (Aug. 1732) [*see* Appendix B]. The report of the case is striking for the strong shock the event provoked in the Queen's Counsel and the court. They decry the incident as "barbarous" and "unnatural", particularly mentioning the manner used to induce the abortion, suggesting a novelty unlikely if such techniques where part of the common fund of knowledge of folk medicine at the time. Note also that the case involved an apparently voluntary abortion with no reported lasting ill effects for the mother.

Convictions are reported in similar cases in rather rapid order. *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806) [*see* Apendix B]; *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816). Such abortions, however,

[60] Means I, *supra* note 6, at 451.

[61] Shorter, *supra* note 31, at 188-208, places the invention of effective intrusion techniques as late in the Nineteenth Century. *See also* M. Potts, P. Diggory & J. Peel, *Abortion* 170-188 (1977).

remained highly dangerous: Margaret Tinckler was convicted of murder of the mother. Inserted objects became a highway to infection that could cause loss of the uterus or death, and was sufficiently painful (especially if the uterine wall was pierced) to induce life-threatening shock.[62]

Dangerous and painful as these procedures were, death was not as certain as with the injury and ingestion techniques. Intrusion techniques quickly became the technique of choice, setting the stage for the surgical and other intrusion techniques that account for most abortions performed today. Lord Ellenborough himself seemed to reflect the resulting sudden upsurge in abortions in the preamble to his famous Act: it concerned "certain . . . heinous offenses . . . of late also frequently committed . . ." 43 Geo. III, c. 58. At this time fears of a threat to the health of the mother from voluntary abortion also appear for the first time in the legal and medical literature.[63]

Both England and the American states undertook to codify their criminal law beginning early in the Nineteenth Century. The earliest statutory prohibitions of abortion were part of that process, as was true of Lord Ellenborough's Act, *supra*,[64] and of the New York proposals, *supra*, to regulate abortion and other surgeries. That abortion statutes were part of the codification process suggests an intent to restate the law of abor-

[62] Bates & Zawadski, *supra* note 30, at 85-87. Apparently abortions killed one-third of the women undergoing them early in the Nineteenth Century. Dellapenna, *supra* note 5, at 400, 412.

[63] O. Bartley, *A Treatise on Forensic Medicine* 3, 5 (1815); J. Burns, *The Anatomy of the Gravid Uterus* 57-58 (1799); 1 East, *supra* note 24, at 230; G. Male, *An Epitome of Judicial or Forensic Medicine* 116-117 (1816); A. Taylor, *Manual of Medical Jurisprudence* 595 (1842). *See also State v. Murphy*, 27 N.J.L. 112, 114-115 (1858). *See generally* Keown, *supra* note 2, at 35-38.

[64] Officially styled the "Offenses against the Person Act", the first comprehensive such English statute in English law. *See* 11 *Holdsworth*, *supra* note 8, at 537.

tion, not to change it, particularly when as in New York, proposals to change the law were rejected.

The New York proposals of 1828 highlight other dimensions of the process of codifying the law of abortion. All surgery was highly dangerous for the same reasons as intrusive abortions: infection and shock. Only for abortion were social pressures likely to induce one to undergo the procedure without prior risk to life or limb. Thus aborton statutes could be seen as a response to premature application of new medical technology.[65] The statutes, which quickly broadened their reach to all kinds of abortion at all stages of pregnancy, served to indicate that intrusive abortions were as criminal as abortions by injury or ingestion techniques. The statutes also settled the somewhat uncertain law governing abortion[66] (the very uncertainty of which suggests that the procedure was not something commonly encountered), and perhaps solemnly reaffirmed social policy in the face of changing social behavior.

The broadening of the statutes to all stages of pregnancy suggests the second major motivation behind the Nineteenth Century abortion statutes: protection of the life of the foetus. Many courts expressed this as the major purpose of the abortion statutes. *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Moore*, 25 Iowa 128 (1868); *People v. Sessions*, 58 Mich. 594, 26 N.W. 291 (1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 16 Utah 212, 51 P. 1091 (1898); *State v. Howard*, 32 Vt. 380 (1859). Medical and religious leaders also supported this

[65] *See generally* Keown, *supra* note 2, at 12-48.

[66] Note the split in the Nineteenth Century American cases over whether abortion before quickening was a crime at common law: *Mitchell v. Commonwealth*, 78 Ky. 204 (1879) (no crime); *Lamb v. State*, 67 Md. 524, 10 A. 208 (1887) (crime); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845) (no crime); *Commonwealth v. Bangs*, 9 Mass. 387 (1812) (no crime); *Mills v. Commonwealth*, 13 Pa. 630 (1850) (crime).

view.[67] Unless one believes, as Mohr argued, that these were insincere ruses to hide less noble motives, one must concede that protection of unborn children from a rising number of abortions was at least as significant a motive for the Nineteenth Century abortion statutes as protection of the life of the mother.

II. *Roe v. Wade* Should Be Overruled and the Resolution of the Competing Claims of Mothers and Their Offspring Should Be Returned to the Legislative Branches of Government

The abortion problem, a result of the intersection of policies protecting mothers and unborn children with changing medical technology, requires balancing the claims of mother and child that is best left to legislative development rather than dictation by courts. Consider the analysis of the late Professor Alexander Bickel of the trimester scheme from *Roe v. Wade:*

> "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached. If medical considerations only were involved, a satisfactory rational answer might be arrived at. But, as the Court acknowledged, they are not. Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?"[68]

A. Changes in Medical Technology Are Central to a Proper Resolution of the Controversies over Abortion

At all times, evolving medical technologies of abortion and of recognition of, and care for, an individual unborn child, have

[67] The majority in *Roe v. Wade*, 410 U.S. at 141-142, quoted representative samplings of such statements. *See also* Mohr, *supra* note 7, at 35-36, 175-176, 182-196. *See also* notes 59 & 60 *supra*.

[68] A. Bickel, *The Morality of Consent* 28 (1975). *See also Roe v. Wade*, 410 U.S. at 219-223 (Rehnquist & White, JJ., dissenting).

shaped the interests feeding the abortion controversy. Until the Twentieth Century, both resulting interests converged on criminalizing abortion. Now those interests have diverged, bringing controversy to an area where once all agreed that only evil could be found.[69]

Technical progress did not end with a crude insertion device. Modern medical techniques, basic general surgical advances, have further reduced the pain of, and the danger of uterine injury from, an abortion, making the procedure physically safe for the mother. Pain-killing drugs (beginning with morphine in 1806), anesthesia from the 1840's, antiseptics after 1867, and finally sulfa drugs in the 1930's and antibiotics (beginning with penicillin in 1940) have dramatically reduced the risk of death or injury through shock or infection. Many women thus came to see the abortion's prohibition, rather than its possibility, as the threat to their well-being.[70]

Yet the perceived interests of society in unborn children also changed with new medical technologies of human reproduction, shown by the demise of the ancient distinction of "quickening".[71] With the application of cell theory to embryology at the opening of the Nineteenth Century, a revolution in our understanding of human reproduction occurred.[72] Opinion leaders in all areas of society quickly concluded that a new human life began at conception, and not at quickening.[73] The

[69] Even Margaret Sanger, founder of Planned Parenthood, initially condemned abortion. M. Sanger, *Motherhood in Bondage* 394-396 (1928).

[70] *See generally* Dellapenna, *supra* note 5, at 411-414; Potts, Diggory & Peal, *supra* note 61, at 170-188; Shorter, *supra* note 31, at 191-224.

[71] A distinction in English law at least as early as Bracton. *Supra* note 14, at 341.

[72] *See generally* 3 *A History of Science* 456-483 (R. Taton ed. 1965); A. Meyer, *The Rise of Embryology* 28-120, 138-147, 170-194, 302-341 (1939); J. Needham, *A History of Embryology* 115-229 (1959).

[73] *Roe v. Wade*, 410 U.S. at 141-142; D. Callahan, *Abortion: Law, Choice and Morality* 410-461 (1970); Mohr, *supra* note 7, at 35-36, 175-176, 182-196.

adoption of abortion statutes removing any distinction based on quickening[74] highlight that the statutes were crafted to protect human life. In a different context (staying the execution of a pregnant woman), an English court also interpreted the statutory term "quickening" to mean conception, rather than a felt movement of the child within the womb, reflecting again a change in the concept of when human life begins. *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838).

Today an embryologist or fetologist can diagnose and treat an unborn child independently of its mother, including removing the child from the womb for surgery and returning it to the womb to complete gestation. Such physicians can hardly continue to consider the child a mere extension of its mother, a fact strikingly demonstated by the odyssey of Dr. Bernard Nathanson from "Abortion King" of New York to anti-abortion activist.[75] For one not impressed by claims of fetal personhood, continuing prohibition of abortion in the face of the increasing safety of the procedure for mothers can only seem a serious intrusion into the liberty of women because of "moral prejudice".[76] This view ignores the unbroken tradition of the common law of protecting an unwanted child from aggression by its parents.

Reproductive technology continues to advance rapidly. The majority in *Roe v. Wade* and *Doe v. Bolton* clearly was deeply

[74] The first was the Offenses against the Persons Act, 7 Will. 4 & 1 Vict., c. 85 (1837). Illinois had already removed the quickening distinction, but only for abortions by a "noxious substance", Ill. Rev. Code sec. 46 (1827), perhaps suggesting a concern to protect the mother and not the child. Maine adopted the first American statute to remove all distinctions based on quickening, Me. Rev. Stat., ch. 160, secs. 13, 14 (1840).

[75] B. Nathanson, *Aborting America* (1979); B. Nathanson, *The Abortion Papers* (1983). *See generally* Dellapenna, *supra* note 5, at 414-416.

[76] *See Doe v. Bolton*, 410 U.S. 179, 193-194, 197-198, 199 (1973), where the majority stressed repeatedly that there was "no reason" to treat abortion differently from other minor surgery.

concerned about physicians' autonomy.[77] Without denying the necessary impact of professional opinion on these questions, and recognizing the virtue of professional autonomy if advances all want are to continue, the law still cannot be fashioned solely to protect the autonomy of the technicians as the issues concerning abortion transcend mere technical competence.

The abortion controversy involves balancing interests and values created or reinforced by changing medical technologies. In all areas of medical practice, except abortion, states have broad authority to regulate acts by physicians. Even for abortion, the social community, not individual physicians, should be the final arbiter of the propriety of conduct. *Simopolous v. Virginia*, 462 U.S. 506 (1983).

B. Legislatures Are Best Placed to Explore Appropriate Regulatory Responses to Changing Reproductive Technologies

The central problem in this controversy is which institution of government is charged by the Constitution to balance the competing interests and values in the abortion controversy.[78] As Justice Stevens argued in his concurring opinion to *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 731-732 (1989), legislatures are better suited to establishing policies for the future, leaving to courts primary responsibility for fashioning remedies for past wrongs. Why should this not apply to abortion? Lacking the tools of inquiry of a legislature, the Court is

[77] *See* particularly *Doe v. Bolton*, where the majority accorded doctors standing as a class, 410 U.S. at 188-189, and the majority repeatedly adverted to the doctors' privacy interest. *Id.* at 192-193, 196-201. Although the majority denied standing to a specific doctor in *Roe v. Wade*, 410 U.S. at 125-127, they repeatedly referred to medical opinions, *id.* at 130-132, 141-146, 149-150, 159, 163, and they finally gave the physician decision-making power equal to the mother. *Id.* at 153, 162-166. *See also Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-765 (1986); *Colautti v. Franklin*, 439 U.S. 379 (1979).

[78] *Cf.* A. Bickel, *The Least Dangerous Branch* 142 (1962).

simply not suited to serve as a board of review for the impacts of medical technology. *City of Akron, supra*, at 454-459 (O'Connor, dissenting). Yet, ever since *Roe v. Wade* was decided, the Court has confronted a series of challenges to abortion regulations requiring the Court to devise correct policies in response to difficult questions of technical fitness and social acceptability.[79]

The majority in *Roe v. Wade* itself recognized its inability to deal with the issues at stake when it was unable to decide when a "person" begins. 410 U.S. at 160. Furthermore, these issues require the government to answer difficult questions involving a balancing of interests rather than the application of neutral principles accepted by nearly all in our society.[80]

Legislatures are best equipped to acquire and update the necessary information to assess the import of changing technologies that create or reinforce interests to be balanced in resolving the resulting controversies. Legislatures are also better equipped to strike a balance through their representative nature.[81] Women are not an insular minority whose interests are any longer likely to be slighted by a legislature.[82] Nor need physicians fear such a legislative process. Legislatures consistently have been sensitive to the interests of the

[79] *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Collauti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973).

[80] *Cf.* A. Cox, *The Role of the Supreme Court in American Government* 113-114 (1976); Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920, 949 (1973).

[81] *Cf.* R. Dworkin, *Taking Rights Seriously* 22-28 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-310 (1973).

[82] *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

organized medical profession in regulating abortion.[83] There is no reason to expect this to change.

Finally, as Justice Brandeis argued in his dissent to *New State Ice Co. v. Liebman*, 285 U.S. 262, 309-311 (1932), to define federalism in terms of the states as great laboratories for social experiment is one of the best models for approaching questions of whether to preempt state competence. As this Court unanimously affirmed in *Addington v. Texas*, 441 U.S. 418, 431 (1979), the right of states to develop a variety of solutions, consistent with constitutionally-mandated minimum standards, is "the essence of federalism". In an area where the facts change faster than judicial procedures can cope with the resulting issues,[84] courts should defer to the state legislatures as better able to explore regulatory responses to the ensuing problems.

C. If *Roe v. Wade* Is to Continue to Survive in Some Form, the Court Must Continually Reexamine, as It Did in *Webster v. Reproductive Health Services*, the Application of the *Roe* Criteria in Light of New Medical Technology

Justice O'Connor pointed out in her dissent to *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-459 (1983), that if *Roe v. Wade* is to continue as the basis of the law of abortion, it is a decision "on a collision course with itself". *Id.* at 456. To avoid contradicting the values announced in *Roe v. Wade*, the Court must reconsider the rules laid down in, or inferred from, the decision. The Court has begun this process in *Webster v. Reproductive Health Services*, 109 S. Ct.

---

[83] The sway of the organized physicians over legislatures was the theme of such books as B. Brookes, *Abortion in England 1900-1967* (1988); Donnison, *supra* note 48; Keown, *supra* note 2; Mohr, *supra* note 7; Starr, *supra* note 59; Walsh, *supra* note 59.

[84] *Cf. Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79, 95-99 (White, J., dissenting, with Burger, C.J., & Rehnquist, J.), 101-102 (1976) (Stevens, J., concurring).

3040 (1989). At the very least, if the Court refuses to completely reconsider *Roe v. Wade*, a correct understanding of the history of abortion and the impact of changing medical technology on that history must inform the Court's continuing endeavors to revise the application of *Roe v. Wade* to ongoing state efforts to regulate abortion rationally.

Nowhere does this appear more starkly than with the "live-birth" abortion.[85] Some have argued that the "freedom" protected by *Roe v. Wade* is not the freedom to be rid of an unwanted pregnancy, but the freedom to kill an unwanted child.[86] With the conviction of physicians for killing an aborted child after its birth alive,[87] we have come full circle to the days when the desire to be rid of unwanted pregnancies was expressed as infanticide rather than abortion. To translate unnecessarily, in effect if not in form, an asserted right to be rid of a pregnancy into the right to kill a child is indefensible. It makes a mockery of all efforts to deal with child abuse and mocks the values usually considered as embodied in our government.

---

[85] Kleiman, *When Abortion Becomes Birth*, N.Y. Times, Feb. 15, 1984, at B1, col. 1. This had actually become a problem before *Roe v. Wade* was decided, although the leaders of NARAL kept the fact from the Court. L. Lader, *Abortion II* 164-166 (1973).

[86] *E.g.*, "For legal purposes, abortion means feticide: the *intentional* destruction of the fetus in the womb, or any untimely delivery brought about with intent to cause the death of the fetus.". G. Williams, *Textbook of Criminal Law* 290 (2d ed. 1983) (emphasis in the original).

[87] *E.g.*, Philadelhia Inquirer, Sept. 29, 1983, at 14A, col. 2.

CONCLUSION

We live in a world in which law and values are increasingly reshaped by science and technology. Nowhere has this process been more dramatic than regarding human reproduction. This case presents an opportunity to return the central questions posed by this developing technology to the political branches of government—branches that can acquire and assess the rapidly changing data to weigh its impact on societal needs and values. For the reasons advanced in this brief, *Roe v. Wade* should be overruled. Failing that, the application of *Roe v. Wade* should be reconsidered, and the state statutes upheld as consistent with the values and policies expressed in that decision.

Respectfully submitted,

Joseph W. Dellapenna
Professor of Law
Villanova University
Villanova, PA 19085
(215) 645-7075

Attorney for amicus curiae,
The American Academy of
Medical Ethics

Appendix

TABLE OF CONTENTS

Page:

Appendix A: What Really Happened in *Rex v. de Bourton?* 1a

Appendix B: Other Representative Common Law Cases on Abortion 1b

APPENDIX A[1]

WHAT REALLY HAPPENED IN *REX v. de BOURTON?* *(a.k.a. the Twinslayer's Case)*

1327-1328

The Uncorrected, Incomplete Year Book Report of R. v. de Bourton Y.B. Mich. 1 Edw. 3 f. 23 pl. 18 (1327)[2]

A writ issued to the sheriff of Gloucester to apprehend one D. who, according to the testimony of Sir G. Scrop, is supposed to have beaten a woman in an advanced state of pregnancy who was carrying twins, whereupon directly afterwards one twin died, and she was delivered of the other, who was baptized John by name, and two days afterwards, through the injury he had sustained, the child died: and the indictment was returned before Sir G. Scrop, and D. came, and pled Not guilty, and for the reason that the Justices were unwilling to adjudge this thing a felony, the accused was released to mainpernors, and then the argument was adjourned sine die. Thus the writ issued, as before stated, and Sir G. Scrop rehearsed the entire case, and how he [D.] came and pled.

Herle: to the sheriff: Produce the body, etc. And the sheriff returned the writ to the bailiff of the franchise of such place, who said, that the same fellow was taken by the mayor of Bristol, but of the cause of this arrest we are wholly ignorant.

---

[1] The appendix is adapted from unpublished research of Dr. J.H. Baker of Cambridge University and of Mr. Philip Rafferty of the Los Angeles Bar. On Dr. Baker, *see* note 2 of the brief. All translations are Dr. Baker's. All footnotes are mine.

[2] This is the form of the case known to the later common law commentators such as Staunford, Coke, Hale, Blackstone, and Hawkins, as well as how it is known to all modern commentators. *See, e.g.*, Means II at 337.

The Corrected, Incomplete Year Book Report of R. v. de Bourton[3]

A writ issued to the sheriff of Gloucestershire to take one D., who (by the testimony of Sir Geoffrey Scoop) is supposed to have beaten a woman great with two children, so that immediately afterwards one of the children died, and she was delivered of the other, which was baptised by the name of Joan, but died two days later from the injury which the child had; and the indictment was returned before Sir Geoffrey Scrop; and D. came and pleaded Not guilty; and because the justices were not minded to treat[4] this thing as a felony, the indictee was released on mainprise [bail] and then this matter remained with a day set, and so the writ was issued as above, and it said that *by testimony of* Sir Geoffrey Scrop *etc.*, *and* recited the whole of the case *as above*, and how he came and pleaded etc., *and that the sheriff should have caused his body to come etc.*[5] And the sheriff returned the writ to the bailiffs of the franchise of such and such a place, who said that the person in question had been taken by the mayor of Bristol, but they were wholly unaware of the reason for the taking etc. *Therefore, a writ issued to the mayor of Bristol to cause the body to come, together with the cause etc.*

---

[3] Dr. Baker uncovered this text by examining the four original manuscripts of the Year Book Report: Lincoln's Inn MS. Hale 72 at fo. 86v; Lincoln's Inn MS. Hale 116 at fo. 3; Lincoln's Inn MS. Hale 137(2) at fo. 11; Bodleian Library Oxford MS. Bodl. 363 at fo. 9v. The four agree with each other and differ from the printed version—some two centuries later than the manuscripts. Matters wholly omitted in the printed text are italicized. Dr. Baker's letter describing his search is on file with Mr. Rafferty.

[4] *d'agarder* ("to award") in all MSS.; *to adjudge* only in the printed version.

[5] The passage is garbled in the printed version, coming after the reference to C.J. Herle, who was Chief Justice of Common Pleas and not of the King's Bench [the court before which this case was heard].

The Original Court Records of Rex v. de Bourton
K.B. 27/270, Rex m.9 (Mich. term 1327)

Gloucestershire. The lord king has sent his writ to the sheriff of Gloucestershire in these words: Edward by grace of God king of England, lord of Ireland and duke of Acquitaine, to the sheriff of Gloucestershire, greeting! Because we have learned by the certificate of our beloved and faithful Geoffrey le Scrop, our chief justice, that Richard de Bourton has been indicted for that he entered the house of William Carles, tailor, at Bristol, and assaulted Alice, wife of the same William, being there greatly pregnant with two children, and with his hands beat and ill treated her, and violently knocked her to the ground, and with his feat so trampled upon the ground that he feloniously killed one of the aforesaid children in the belly of the same Alice its mother, and broke the head and arm of the other of the same children so that it was forthwith born and baptised by the name of Joan, and immediately after receiving her baptism died from the injury aforesaid; and that the foregoing matters still remain undetermined before ourself; and that this Richard had a day before us at a certain day now past for hearing the jury of the country on which, for good and ill, he put himself concerning the felony aforesaid, by mainprise of John le Traverner of Bristol and others named in the said certificate, who mainprised to have him before us at the said term; and on behalf of the selfsame Richard we are given to understand that by reason of the foregoing he has been taken, since the mainprise, and detained in our prison of Bristol, on account of which he could not come before us on the aforesaid day to stand to right upon the foregoing according to the law and custom of our realm: We, willing what is just to be done upon the foregoing, command you (as we commanded before) that if the same Richard is detained in the aforesaid prison by reason of the foregoing and not otherwise, and if he finds you sufficient mainpernors who mainprise him before us in a fortnight from Michaelmas day wheresoever we should then be in England, to do and receive what our court should decide in the foregoing, then cause the selfsame Richard to be meanwhile

delivered from prison by the mainprise aforesaid. And have you there the names of those mainpernors, and this writ. And if the same Richard is indicted for any other felonies or tresspasses in your county, then without delay send us distinctly and openly under your seal the tenor of the aforesaid indictment at the aforesaid day, that we may do further therein what by the law and custom aforesaid should be done, or else signify unto us the reason why you will not or cannot carry out our command heretofore directed unto you. Witness my self at Northallerton, the 14th day of July in the first year of our reign [1327].

By virtue of which writ, the sheriff (namely, Thomas de Rodbergh) returns that he commanded Everarrd Fraunceys and Robert Grene, bailiffs of the liberty of the vill of Bristol, who answered him that Richard de Bourten, lately indicted for the death of Joan, daughter of William Carles, tailor, at Bristol, as is contained in the writ, has not been taken by them the said bailiffs nor is for that reason detained in prison, but that he has been taken and detained by Roger Rurtels the mayor of the aforesaid vill for certain reasons which are unknown to them the said bailiffs etc.

And, after inspection of the aforesaid writ and return etc., the mayor and bailiffs of the vill of Bristol are commanded that if the same Richard finds sufficient mainpernors to be before the king in a fortnight from St. Hilary wheresoever etc. to hear the aforesaid jury and to do further and receive what the king's court should decide for him, then they cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by the above-mentioned mainprise. And if he is indicted for any other felonies or tresspasses before them in the vill aforesaid, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid upon the incumbent peril, so that the lord king further etc. what is to be done etc.

At which day the mayor and bailiffs of the vill of Bristol return that the aforesaid Richard de Bourton did not or would not find sufficient mainpernors for being before the lord king at this day, namely in the quindene of St. Hilary etc., and to do

and receive what is commanded in the writ, as a result of which they did nothing further in executing the writ etc. And because the same mayor and bailiffs have not returned here before the king the names of themselves according to the form of the statute etc., and also have not answered etc. for what reason the aforesaid Richard de Bourton has been taken, as in the lord king's writ directed them therein was commanded, nor whether or not the aforesaid Richard is indicted for any other felonies or tresspasses before them in the vill aforesaid, the same mayor and bailiffs (namely, John le Romeseie, mayor, and Hugh de Langebrigge and Stephan Lespcier, bailiffs etc.) are in mercy. And they are assessed by the justices at 40s. And the sheriff is commanded that he should not omit by reason of the liberty of the aforesaid vill to enter the same etc., and if the same Richard should find him sufficient mainpernors to mainprise to have him before the king in a fortnight from Easter day wheresoever etc. to hear the jury aforesaid etc. and further to do etc., then he should cause the selfsame Richard to be meanwhile delivered from the aforesaid prison by mainprise aforesaid etc. The sheriff is also commanded that he should not omit on account of the liberty to cause the aforesaid mayor and bailiffs to come before the king at the said term to answer the king for the return etc. Also the mayor and bailiffs are commanded that if the aforesaid Richard is indicted for any felonies and tresspasses before them in the aforesaid vill, then they should distinctly and openly under their seals send that indictment (if any there be) or else the cause for which he was taken, to the king at the day aforesaid etc. so that further etc.

The Original Court Records of Further Proceedings in R. v. de Bourton

K.B. 27/242, Rex m. 9 (Easter term 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition etc. whether Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, slain in the suburbs of Bristol, whereof he has been indicted (as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and

which the king caused to come before him), is put in respite until the octaves of St. John the Baptist wheresoever etc., for want of jurors, because none [came] etc. Therefore, let the sheriff have the bodies of all the jurors before the king at the said term, etc. And let the aforesaid Richard meanwhile be released by the mainprise which heretofore found, from day to day until etc. And the sheriff is commanded that except for them etc. he should put in as many and such etc. and have them before the king at the said term etc.

The Original Court Records of the Conclusion of R. v. de Burton, K.B. 27/273, Rex m.12d (Octave of St. John, 2 Edw. III, 1328)

Gloucestershire. The jury at the suit of the lord king to make recognition of whether or not Richard de Bourton of Bristol is guilty of the death of Joan, daughter of William Carles, tailor of Bristol, feloniously slain in the suburbs of Bristol, whereof he is indicted—as appears to the king by a certain indictment lately made thereof before the coroners of the vill of Bristol, and which the king has caused to come before [himself] etc.—is put in respite until one month from Michaelmas day, wheresoever etc., for want of jurors, because none [came] etc. Therefore let the sheriff have the bodies of all the jurors before the king at the said date etc. Afterwards, the same term, the aforesaid Richard came and proffered a charter of the present lord king for pardon of the aforesaid felony, which is enrolled in Hilary term in the first year of the reign of our present king. Therefore he [is to go] thereof sine die etc.

Dr. Baker's Comments on the Problem of Deciding the True Course of Events in Rex v. de Bourton

These comments are from two letters from Dr. Baker to M.: Rafferty, dated Nov. 6 and Dec. 12, 1985.

From the letter of Nov. 6:

"Richard de Bourton was indicted before the coroners of Bristol (1) for feloniously killing a child which died in the womb,

(2) for causing the death of the other (Christened Joan). We do not . . . have the indictment, though as summarized . . . [in the year book report] it does seem that the words of the felony applied to both children. In later entries, the offense is described only as the killing of Joan, but that may have been clerical shorthand.

"The indictment was removed into the King's Bench some time in the reign of Edward II. The indictment files do not survive. I discovered that the King's Bench held two goal deliveries in Gloucestershire in the 1320's, but the indictment is not recorded there (K.B. 27/247, Rex m.1d; K.B. 27/255, Rex m.24).

"Bourton pleaded Not guilty, and was released on mainprise to appear at some time before Michaelmas term 1327, but before his appearance he was arrested by the mayor and bailiffs of Bristol for some undisclosed cause . . . . [that] the judges were not minded to treat it as a felony . . . seems to me . . . was not a final determination of that question—indeed the record says that the issue of felony was still pending in 1328—but related only the bail application."

From the letter of Dec. 12:

"As I now see the case, the record shows that Bourton was indicted for feloniously killing a child which died in the womb of the mother and another (Joan) which died after birth and baptism; that he plead Not guilty, but was never tried; and that in Trinity term 1328 he was discharged on the strength of a pardon granted a year earlier. There is therefore nothing of record to show whether the court considered the facts alleged to amount to a felony or not, except insofar as the case was continued through several terms on the basis that it *was* a felony. (It could be, however, that only the killing of Joan was so regarded.) It is therefore the yearbook report that remains crucial, and this appears to say (in the middle) that Bourton was granted bail because the judges were not minded to treat it as a felony. The status and meaning of this pronouncement still

seem[s] to me less than clear. For one thing, it seems contrary to the record, which shows that the case was continued on the basis that a jury had been summoned to try whether Bourton was guilty of feloniously killing (what we should call manslaughter). That issue arose from Bourton's plea of not guilty, which the court had recorded. [T]here is therefore no question of the indictment having been quashed on the ground that it did not disclose a felony. Secondly, although it is probable that bail was not thought to be grantable for murder in medieval times (Y.B. 25 Edw. III, fo. 85; Coke, *Treatise on Bail & Mainprise;* Staunford P.C. 72a), it seems to have been allowable for felony.[6] It could hardly be argued that the release of Bourton on bail shows that if the facts were true he would not have been guilty of felony, because that again would be contrary to the record. I therefore do not really understand the year book in this respect, and suspect it may be a defective report.

"A pardon does not necessarily imply a legal doubt, at this date. Pardons were sometimes granted for favour. This case does look unusual however, because it appears from the patent roll (*Calendar Patent Rolls 1327-1330*, p. 113: Pat. 1 Edw. III, pt. 2, m.17) that Bourton was included in the general pardon of 29 May 1327 but with the special proviso that, unlike the other persons pardoned with him, he was to be excused from serving against the Scots. (The others were apparently ordinary felons conscripted into the army.)

"The pardon is not to be found in the roll for Hil. 1 Edw. III, which is defective."

---

[6] The Statute of Westminster I (3 Edw. I, c. 15, 1275) provides that one indicted for homicide is not mainpernable or replevisable except when he is indicted on "light suspicion". Although Dr. Baker does not advert to "light suspicion", this might explain the apparent confusion in the Year Book reports of the case.

APPENDIX B[1]

OTHER REPRESENTATIVE COMMON LAW CASES ON ABORTION

Agnes' Appeal (1200)
1 Selden Soc'y 39 (no. 82 (1887)

Lincolnshire. Agnes, the daughter of Saxi, appeals John of Paris that whereas she was in labor, he came to her house and dragged her out by the feet and struck her with a certain pole in such a way that she lost her child. And the citizens of Lincoln came and showed a charter of the lord king which witnesses that they should not be impleaded outside the walls of Lincoln (except for their moneyers and officials), and that they ought not to make battle concerning any appeal but to deraign themselves[2] according to the liberties and laws of the city of London;[3] and they prayed this liberty. A day is given to them before the lord king wheresoever he should then be in England on the morrow of St. Edmund to hear their judgment.[4]

Gundwine's Appeal, Just. 1/274, m.14d (1247)

Amice, who was the wife of Ralph Gundwine, appeals Adam Warner, William Warner and Henry Warner that they came to the house of her the said Amice and broke her house, and took her the said Amice and beat her severely so that, by reason of that beating, she the said Amice lost her child which was in her belly. And that they did this to her wickedly and feloniously against the peace etc., she offers etc.

---

[1] When translations were necessary (*see* the table of contents), in order to achieve consistency, I have used original translations provided by Dr. J.H. Baker (*see* Appendix A n.1) to Mr. Philip Rafferty. All footnotes are mine.

[2] *I.e.*, To vindicate themselves or to prove their innocence.

[3] *I.e.*, trial by wager or law — through oath-helpers.

[4] The outcome has not been found.

And the aforesaid Adam and others come and deny the [breach of the peace], the beating, and the whole etc. and put themselves upon a jury of the township. And they offer the lord king 50 pounds for having the jury therein, by pledge of [12 name_].

And the jurors say upon their oath that in truth the aforesaid Adam and others beat the aforesaid Amice; but they say that she immediately went off, and walked about hither and thither, and afterwards when eight days had elapsed she aborted a certain child having the form of a male five inches long; but they believe that this was rather due to the labor and foolish behavior[5] of the selfsame Amice than to the aforesaid beating.

Juliana's Appeal (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healy ed. 1897)

John de Rechich beat one Juliana, daughter of Maynard, so that he killed her boy in her womb, and fled. Therefore let him be exacted and outlawed. He was received at Stoke Curcy. Therefore [that township] is in mercy.[6] The jurors concealed that matter; therefore they are in mercy. He had no chattels.

Rex v. Anonymous (aka. The Abortionist's Case) (K.B. 1348) Fitzherbert, Graunde Abridgement, tit. Corone, f. 268, pl. 263 (1st ed. 1516)[7]

One was indicted for that he killed a child in its mother's belly, and the opinion [was] that he shall not be arraigned on

[5] *stultum gestum*.

[6] *I.e.*, to be amerced: to pay a fine in lieu of more serious punishment.

[7] Dr. Baker, in a letter to Philip Rafferty (Dec. 12, 1985), indicated that the case does not appear in the various Year Books for 1348, and cannot be traced back before Statham's *Abridgment* (c. 1490, f. 58, pl. 91), which is reproduced in Fitzherbert's *Abridgement*.

this since no name of baptism was in the indictment, and also it is hard to know whether he killed it or not etc.

Rex v. Lichefeld

K.B. 27/974, Rex. m.4 (1505)

Nottir.ghamshire. Heretofore, namely on the vigil of the Epiphany of [our] Lord in the nineteenth year of the reign of the present lord king [Jan. 5, 1504], at Basford in the aforesaid county, before Richard Parker one of the said lord king's coroners in the aforesaid county upon the view of the body of Jane Wynspere of Basford aforesaid, it was presented by the oath of twelve jurors that the said Jane Wynspere of Basford in the county of Nottingham, single woman, being pregnant,[8] on the twelfth day of December in the year above mentioned [1503] at Basford aforesaid, being inspired by the devil drank various bad and [pure][9] potions in order to kill and destroy the child in her body, and took them into her body, as result of which the said Jane then and there died, and thus the same Jane in manner and form aforesaid feloniously and as a *felo de se* slew and poisoned herself and the child in her body; and that Thomas Lichefeld of Basford in the county aforesaid, cleric, knowing that the said Jane had committed said felony in form aforesaid, then and there feloniously harbored *the* said Jane . . . .

On the Thursday after the quindent of Hilary [Jan. 30, 1505], Lichefeld comes in custody and demurs to the indictment on the ground that the principal is dead and that he cannot answer without her. The court adjudges that he is discharged *sine die*.[10]

[8] *puerpera:* perhaps "in labor".

[9] *immaculata*, which Dr. Baker suggests here should be translated as "polluted" although it means the opposite; perhaps, the *im-* here refers to putting something in the potion rather than to negative *-maculata*.

[10] Note that the lack of the allegation "*contra pacem*" in the indictment would also have been sufficient grounds for a demurer.

The Endorsement of the Indictments After Mandamus for Removal to the King's Bench, K.B. 9/513/23d (1530)

TRUE BILL taken at St. John's Street in the county of Middlesex before Sir John More, knight, Robert Wroth, Robert Chesemen, John Brown, Richard Hawkes, and John Palmer, keepers of the peace of the lord king and the same king's justices assigned to hear and determine various felonies, tresspasses, and misdeeds in the county of Middlesex, on the Thursday next after the feast of the Conception of the Blessed Virgin Mary in the twenty-first year of the reign of King Henry VIII [Dec. 9, 1529], by the oath etc. of . . . jurors[11] delivered before the lord king on the Saturday next after the quindene of St. John this same term [July 9, 1530], by the hand of the aforesaid John More, one of the aforesaid justices, in order to be determined.

[Sewn to the bill, in the King's Bench file, is a writ dated April 29, 1530, ordering the justices of the peace for Middlesex to send all indictments concerning William Wodlake for appearance "before the king", i.e., before the King's Bench. The writ, tested by Chief FitzJames, is endorsed by Sir John More that all indictments concerning Wodlake have been sent according to the tenor of the writ.]

In the Controlment Roll of the Clerk of the Court, K.B. 29/162/m.11d (1531)

Middlesex. William Wodlake (dead) of the parish of St. Clement Danes in the county aforesame, net-maker, is to be taken [and brought here] in the octave of Michaelmas [to answer] for various felonies, murders, and misdemeanors of which he is indicted . . . . Afterwrds, in Hilary term 22 Henry VIII [1531] he is to be taken [and brought here] in the quindene of Easter: at which day he is dead. Therefore let the process against him here totally cease.

---

[11] Of the grand jury.

***Cockaine v. Witnam*, Hil., 19 Eliz. 1 (1577) (Action for Slander)**

Version 1, Brit. Lib., Ms. Landsdowne 1067, fo. 97

"The Lady Cockeyn [*sic*] offered A.B. her maid a drink in order to murder her child, because her butler had gotten it." And although this was not murder, for the infant was *en ventre sa mere*, the action nevertheless lay.

Version 2: Cro. Eliz. 49, pl. 4 (1586)

Action for words. At the Nisi Prius the defendant pleaded *concord puis le darraine* continuance, judgment *si al enquest*, etc. And by all the justices it was no plea, but he ought to conclude, judgment *si actio*, etc., and so in all pleas pleaded since the last continuance.

Then it was moved, if judgment shall be given upon this, or a new Nisi Prius be granted; and upon good advice judgment was given for the plaintiff, for it was a confession of the matter in issue.

The words were "My Lady Cockaine did offer two shillings to a woman with child, to get her a drink to kill her child, because it was gotten by J.S. Sir Thoma Cockaine's butler." And it was moved the action did not lie for these words; but it was adjudged for the plaintiff, for by them the lady's credit is impaired; and, if true, there was cause to bind her to good behavior, although it was not said she did give money, or any hurt was done, but that she offered etc. This case was adjudged Hill. 19 Eliz. Intratur, Mich. 17 & 17 Eliz. Rot. 183. *Ex relatione* Chamberlaine. *Vide* 4 Co. 16.b.

Version 3: Harv. L.S. Lib. Ms. 1180(1), fo. 387

For this he vouched a case in Michaelmas 17 & 18 Eliz., roll 483, between Sir John Cockin [*sic*] and his wife and one Wyman [*sic*], because Wyman spoke these words, "My lady Cockin did offer one Bash 10 pounds to get her a drink to destroy the child she went withall, because Mr. Cockin's butler had begotten it";

and it was ruled that an action lay, and yet he did not say that a drink was got, but only an offer to get . . . .

Regina v. Turnour, Assize 35/23/29 (Essex 1581)

Essex: The jurors for [our] lady the queen present that Jane Turnour of Stisted in the aforesaid county, spinster, being a common witch and enchantress, not having God before her eyes, but being seduced by the instigation of the devil, on the eight day of January in the twenty-second year of the reign of the Lady Elizabeth [1580], Queen of England, France, and Ireland, defender of the faith, devilishly and maliciously at Stisted aforesaid, on various days and occasions both before and since, maliciously and devilishly bewitched and enchanted a certain Helen Sparrowe, wife of John Sparrowe, in the body of the same Helen, being then great with a certain living child, by reason whereof not only was the same Helen then and there on various occasions gravely vexed in her body horribly troubled, to the greatest danger of her life, but also the aforesaid child (of which the same Helen was then and there great) then and there came to death. And thus the aforesaid jurors say upon their oath that the aforesaid Jane Turnour, in manner and form aforesaid, on the day in the year aforesaid, at Stisted aforesaid, maliciously and devilishly bewitched and enchanged the aforesaid Helen Sparrowe, and deprived the living child (of which the aforesaid Helen was then pregnant) of his life by reason of these enchangments and bewitchings, contrary to the form of the statute made and provided for such cases, and to the bad and pernicious example of all other offending in such cases, and against the peace of the said present lady the queen. [Note by the clerk:] Puts herself on the country;[12] guilty judgment.

Regina v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601)

Tresspasse and assault was brought against one Sims by the Husband and the Wife for beating of the woman.

[12] *I.e.*, accepts trial by jury.

Coke [Attorney-General]: the case is such, as appers by examination. A man beats a woman which is great with child, and after the child is born living, but hath signes, bruises in his body, received by the said batterie, and after dyed thereof, I say that this is murder.

Fenner & Popham [JJ.], *absentibus caeteris*, clearly of the same opinion, and the difference is where the child is born living, for it be dead born it is no murder, for *non constat*[13] whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death, but when it is born living, and the wounds appear in his body, and then he dye, the Batteror shall be arraigned of murder, for now it may be proved whether these wounds were the cause of the death of not, and for that if it be found, he shall be condemned.

Regina v. Webb (Q.B. 1602), Calendar of Assize Rec., Surrey Indictments, Eliz. 1 at 512 (no. 3146) (J. Cockburn ed. 1980)

Surrey. The jurors for our Lady the Queen present, that Margaret Webb, lately of Godalmyn, spinster, on the tenth day of August, in the forty-first year of the reign of our Lady Elizabeth [1599] by the grace of God Queen of England, France and Ireland, and defender of the faith, with force and arms, and at the aforesaid Godalmyn in the aforesaid county, not having the fear of God before her eyes, but moved and seduced by the instigation of the devil, once ate the poison called "ratesbane" with the intention of spoiling and destroying the infant in the womb of Margaret herself and thus the aforesaid Margaret, by reason of eating the aforesaid poison, spoiled and destroyed then and there the infant in her womb, as a pernicious example to all malefactors offending in like manner, against the peace of our Lady Queen, her crown and dignity.

[13] It cannot be proved.

***Proprietary v. Mitchell*, 10 Md. Arch. 171-186 (1652)**

[The following record of the trial is found at 10 Md. Arch. 182-185; the remainder of the citation consists of extensive depositions providing the evidence brought against Captain Mitchell to prepare the charges.]

The Court this day took into Consideration a Peticon exhibited by Capt. William Mitchell who intended (as it Seems) to have preferred the Same to the Assembly had it gone on the Peticon being as followeth vizt.:

To the Honble the Assembly for regulateing the affairs of the Province of Maryland:

The humble Peticon of Capt. Wm. Mitchell Humbling Shewing That your Peticoner was on Saturday last comitted prisoner to the Common Goal upon a Warrant Signed by Robert Brooke Esq., In which your Peticoner Stands charged in general words with Murther, Atheisme, and Blasphemy, Crimes never in the least acted or within the Intention of your Peticoner. Your Peticoner therefore humbly prays he may be Speedily called to his Answer, and have his liberty restored in Case noe crime in Law be proved against him that warrants his Imprisonment upon the warrant before menconed, And that his Natural filing for which God hath pleased to afflict and humble your Peticoner, may not be pressed against your Peticoner in Cases wherein the Laws of England are Silent, And your Peticoner Shall ever pray.

[Signed] Wm. Mitchell

Upon reading of which Peticon the Court gave direction for a Speedy tryall whereupon his Lordships Attorney, Mr. Hatton, brought in his charge as followeth, vizt.:

May it please this Honble Court: It is fallen to my Lott upon the alteracon in the Government[14] as Attorney to the Lord-

[14] This probably refers to the displacement of the Catholic government of the colony by its first Protestant government in 1652, *Worldmark Encyclopedia of the States* 242 (1981).

Proprietary to be prosecutor against Capt. William Mitchell now prisoner here upon Mr. Brookes Warrant, I could have wished there been no Such occasion, The Crimes for which I am to charge him being Soe many and Soe heynous, that I have not known or heard of the like, It troubles me the rather in regard the Lord Baltemore hath been formerly Soe deceived in him as to place him here in the Seat of Judicature, which by his Scandolous course of life and gross haynous offences, he hath extreamly abused, Whereas he ought (especially Soe placed) to have given good example to others and to imploy that Talent and those abilities of witt and understanding (which almighty God hath indeed in a large measure bestowed on him) to his glory and the publick good, But by Common experience it is apparent, that the chiefest use he hath made thereof hath been to colour over his Villanous Courses, and to mock and deride all Religion and Civil Government, As the Court (in part) take notice by the particulars of his Charge being as followeth Vizt.:

The charge of the Lord Proprietary's Attorney by way of Indictment against Capt. William Mitchell in the name of the Keepers of the Liberties of England by Authority of Parliamt. First: That by his expressions as well as practice (as will as I conceive appear by proofe) he hath not only professed himself to be an Atheist, but hath also endeavoured to draw others to believe there is noe God, Makeing a Common practice by blasphemous expressions and otherwise to mock and deride God's Ordinances, and all Religion, thereby to open a way to all wicked listfull licentious and prophane Courses. Secondly: That he hath Committed Adultery with one Susan Warren. Thirdly: That he hath Murtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren. And is much Suspected (if not known) to have brought his late wife to an untimely end in her late Voyage hiterward by Sea. Fourthly: That (as I conceive will appear by proofe) he hath Since his late wife's death lived in fornication with his now pretended wife Joane.

And for these and other grosse Crimes and Misdemeanors

(sufficiently I conceive) appearing by proofe, My humble request is that the prisoner may be brought to his Answer, and upon a Speedy tryall may receive punishment according to Justice to God's glory and discharge of the Government in that particular.

To which charge the Said Capt. Mitchell the prisoner by his Answer pleading not Guilty, made Choice to be tryed by a Jury Whereupon these persons following were warned to be of the Grand Jury for the tryall vict: . . . , who being all particularly called by name and attending the Court, The prisoner being demanded whether he could take any personal excepcon against any of them, expressed that he could not but was well Satisfied therein. Whereupon the Jurors were Sworn and their charge given them to bring in a Just and true verdict upon every branch of the Attorneys Charge aforesaid according to evidence to the best of their Skill who after much time Spend therein brought in their Joynt verdict in the words following vixt.:

Vera[15] to the first Soe far as one Deposition with Sundry Circumstances thereunto agreeing Shall be thought valid in Law.

To the Second, third, and fourth: *Billa Vera.*

After the bringing of which verdict the Court discharged the Jurors and the day being far Spent and by reason of other Occasions, the Governor adjourned the Court till the day following.

. . .

Capt. William Mitchell this day referred himself wholly to the determination and Judgement of the Court for all matters charged against him upon which the Grand Jury had given in their verdict the day before not desiring that the Court Should

[15] "True bill" — a good indictment.

be troubled with impannelling another Jury for the further tryall thereof.

This Court therefore takeing the matter into Serious Consideracon upon the perusal of the proofs and in pursuance of the verdict of the Grand Jury for his Several Offenses of Adultery, fornication and Murtherous intention, and in respect of his lewd and Scandalous Course of life Sufficiently appearing upon the proofs doth Order that the Said Capt. Mitchell Shall forthwith pay Five thousand pounds of Tobacco and Cask or the value thereof as a Fine to the Lord Proprietary, And to enter into bond for his good behavior. And that he and his now pretended wife Joane be Seperated till they be Joyned together in Matrimony in the usual allowed Manner, And that paying the Court Charges of imprisonment he is to be discharged of his Imprisonment in the particular.

Rex v. Beare (Derby, England, Aug. 15, 1732)
2 The Gentleman's Magazine 931 (Aug. 1732)

ELEANOR MERRIMAN, now the wife of *Ebenezer Beare*, indicted for a Misdemeanor, in endeavouring to persuade Nich. Wilson to poison his Wife, and for giving him Poison to that End.

Indicted a second time by the Name of *Eleanor Beare*, for a Misdemeanor, in destroying the Foetus in the Womb of *Grace Belfort*, by putting an iron Instrument up into her Body, and thereby causing her to miscarry.

Indicted a third time, for destroying the Foetus in the Womb of a certain Woman, to the jury unknown, by putting an Iron Instrument up her Body, or by giving her something to make her miscarry. Pleaded Not Guilty.

. . .

To the Second Indictment

COUNSEL: Gentlemen, you have heard the Indictment read, and may observe, that the Misdemeanor for which the

Prisoner stands indicted, is of a most shocking Nature; to destroy the Fruit in the Womb carries something in it so contrary to the natural Tenderness of the Female Sex, that I am amazed how ever any Woman should arrive at such a degree of Impiety and Cruelty, as to attempt it in such a manner as the Prisoner has done, it has really something so shocking in it, that I cannot well display the Nature of the Crime to you, but must leave it to the Evidence: It is cruel and barbarous to the last degree.

Call *Grace Belfort*.

GRACE BELFORD [sic]: I lived with the Prisoner as a Servant about ten Days, but was not hired, and I was off and on with her about fourteen Weeks: When I had been with her a few Days there came Company into the House, and made me drink Ale and Brandy (which I was not used to drink) and it overcame me; my Mistress sent me unto the Stable to give Hay to some Horses, but I was not capable of doing it, so [I] laid me down in the Stable; and there came to me one Ch____r, a young Man that was drinking in the House, and after some Time I feared I was with Child by Ch____r; upon that, my Mistress asked me if I was with Child, I told her I thought I was; Then she said if I could get 30 shilling from Ch____r, she would clear me from the Child, without giving me Physick. A little Time after, some Company gave me Cyder and Brandy, my Mistress and I were both ~~full of Li~~quor, and when the Company was gone, we could scarce get up Stairs, but we did get up; then I laid me on the Bed, and my Mistress brought a kind of an Instrument, I took it to be like an Iron Skewer, and she put it up into my Body a great Way, and hurt me.

COURT: What followed upon that?

EVIDENCE: Some Blood came from me.

COURT: Did you miscarry after that?

EVIDENCE: The next Day after I went to *Allesiree*, where I had a Miscarriage.

COURT: What did the Prisoner do after that?

EVIDENCE: She told me the Job was done. I then lodged two or three Nights with one *Ann Moseley* (now *Ann Oldknowles*) and coming one Morning to see the Prisoner, I called for a Mug of Ale and drank it, and told her I was going home; then came in *John Clark*, and on the Prisoner's saying I was going home, ~~he s~~aid he would give me a Glass of Wine to help me forward, which accordingly he did, out of a Bottle he had in his Pocket, then I took my leave of him; and when I was a little Way out of Town, I fell down at a Style, and was not well, I lay a little while, then got up, and went to *Nottingham* that night.

Call *Ann Oldknowles*.

COURT: Do you know any Thing of *Grace Belford* having a Miscarriage?

EVIDENCE: I know nothing, but that when she lay with me, I saw all the Symptoms of Miscarriage on the Bed where she lay.

Call *John Clark*.

COURT: Do you know the Prisoner?

EVIDENCE: Yes, I have frequented her House.

COURT: Did you ever hear her say anything that she had used Means to make a Woman with Child miscarry, by putting any kind of Instrument up their Bodies, or by giving them any Thing to take inwardly?

EVIDENCE: Yes, I have. ——

COURT: Have you seen her Instrument for that Purpose, or have you seen her use any Means to make any Woman with Child miscarry?

CLARK: No, but I have heard her say she had done it, and that she then had under her one *Hannah* _____, whose other Name I know not.

COURT: Have you heard her say she had been sent for for these wicked Practices, or had any Reward for causing any one to miscarry?

CLARK: I heard her say she had been once sent for to *Nottingham*, and, as I remember, she said she had five Pounds for the Journey.

PRISONER: Did you not say you never heard me say any thing of using any Means to cause Miscarriage in any Person, or saw me use any Means for that End?

CLARK: No, I said I never saw you do any thing that Way, but had heard you say you had done it. Would you have me forswear myself?

PRISONER: No, but I would have you speak the Truth.

CLARK: I do.

Then the Prisoner called several Persons to speak in her Behalf, but only two appeared, and they only gave her Friends a reputable Character, and said the prisoner had a good Education, but they knew nothing of the latter Part of her Life.

MR. MAYOR: The Prisoner at the Bar has a very bad Character, and I have had frequent Complaints against her for keeping a disorderly House.

Many evidences were ready in Court to have proved the Facts she stood charged with in the third Indictment; but his Lordship observing that the second Indictment was proved so plainly, he thought there was no Necessity for going upon the third.

His Lordship summed up the Evidence in a very moving Speech to the jury, wherein he said, he never met with a Case so barbarous and unnatural. The Jury, after a short Consultation, brought the Prisoner in Guilty of both Indictments, and she received sentence to stand in the Pillory, the two next Market-Days, and to suffer close Imprisonment for Three Years.

Derby, August 18, 1732. This day *Eleanor Beare*, pursuant to her Sentence, stood for the first Time in the Pillory in the Market place; to which Place she was attended by several of the Sheriff's Officers; notwithstanding which, the Populace, to show their Resentment of the horrible Crimes wherewith she had been charged, and the little Remorse she has shown since her Commitments, gave her no Quarter, but threw such quantities of Eggs, Turnips, etc. that it was thought she would hardly have escaped with her Life: she disengaged herself from the Pillory before the Time of her standing was expired, jumped among the Crowd, whence she was with Difficulty carried back to Prison.

Rex v. Tinckler (August, 1781)

The Report in the Newcastle Chronicle, Nov. 24, 1781, at 2

Tuesday last Margaret Tinckler, midwife, was executed near Durham, for a crime in acting or recommending certain means to destroy an infant, which was effected; and finally with the death of the mother. Before she left the jail for execution, she confessed to a worthy Clergyman, and Mr. Smith, surgeon in Newcastle, then present, that she only recommended the means, but that the act itself was done by the deceased woman . . . [Her plea of pregnancy failed.]

The Published Report, 2 E. East, A Treatise of the Pleas of the Crown 354-356 (1803)[16]

Magaret Tinckler was indicted for the murder of Jane Parkinson, by inserting pieces of wood into her womb. A second count charged her as accessary before the fact. It was proved by several witnesses, that from the first time of the deceased taking to her bed, which was on the 12th of July, she thought that she must die, making use of different expresses, as, *that she was going; that she was working out her last;* and exclaim-

[16] This report, which is the one by which the case is generally known, has been verified by Dr. Baker against the original records of the case.

ing, *Oh! that Peggy Tinckler has killed me*. She lingered till the 23d, when she died. She never was up but once during that time, when on telling a friend who attended her that she thought herself better, she advised her to get up, which the deceased did, and walked as far as the passage going out of the room, but was forced to return and go to bed again. It appeared by the testimony of several witnesses, that from the moment of her taking to her bed till the time of her death she had declared, *that Tinckler had killed her and dear child*, (stating the particular means used, which agreed with the charge in the indictment.) And during the same period she had declared more particularly, "that she was with child by one P. a married man, who, being fearful lest his wife should hear of it if she were brought to bed, advised her to go to the prisoner, a midwife, to take her advice how she should get rid of the child, being then five or six months gone." "That the prisoner gave he the advice" in question, which she followed accordingly. It was proved by the testimony of a witness, that three days before the delivery, which was on the 10th of July, she saw the deceased in the prisoner's bed-chamber, when the prisoner took her round the waist and shook her in a very violent manner six different times, and tossed her up and down: and that she afterwards delivered at the prisoner's house. The deceased also declared during her illness, that after her delivery the prisoner gave her the child to take home; and bid her to go to bed that night and sleep, and get up in the morning and go about her business, and nobody would know anything of the matter; but that appearing very ill the next day at a relation's house, they had ordered her to go home and go to bed, which she did. The child was born alive, but died instantly; and the surgeons, who were examined, proved that it was perfect. There was no doubt but that the deceased had died by the acceleration of the birth of the child: and upon opening her womb it appeared that there were two holes caused by the skewers, one of which was mortified, and the other only enflamed; and other symptoms of injury appeared. A short time before her death she was asked whether the account she

had from time to time given of the occasion of her death, and the prisoner's treatment of her were true; and she declared it was. It was objected that the above evidence of the deceased's declarations ought not to be admitted, as she herself was *particeps criminis*, and likewise as it appeared at the time of her declarations she was better, or thought herself so. But Nares J. was of opinion, that however this objection might hold with respect to the second count, in which the prisoner was charged as an accessory to the deceased, yet the deceased was not willingly or knowingly an accessary to her own death; and therefore it was like the common case of any other murder. And as to the objection that she once thought herself better, and tried to get up, yet the same declarations she then made had been made repeatedly before to persons whom in confidence she told that she never should survive, when she first took to her bed; and she had repeated the same declarations the day before she died, and within a few hours of her death. And as to the fact itself, he was clearly of opinion it was murder on the authority of Lord Hale. The jury found the prisoner guilty on the first count, charging her as a principal in the murder, and execution being respited to take the opinion of the judges on the whole case, they all met to consider of it: and were unanimously of opinion that these declarations of the deceased were legal evidence: for thought at one time the deceased thought herself better, yet the declarations before and after and home to her death were uniform and to the same effect. And as to her being *particeps criminis*, they answered, that if two persons be guilty of murder, and one be indicted and the other not, the party not indicted is a witness for the crown. And thought the practice be not to convict on such proof uncorroborated, yet the evidence is admissable; and here it was supported by the proof of the prisoner tossing the deceased in her arms in the manner stated. Most of the judges indeed held that the declarations of the deceased were alone sufficient evidence to convict the prisoner; for they were not to be considered in the light of evidence coming from a *particeps criminis;* as she considered herself to be dying at the times, and had no view or intent to

serve in excusing herself, or fixing the charge unjustly on others. But others of the judges thought that her declarations were to be so considered; and therefore required the aid of confirmatory evidence.

(11) (9)

Supreme Court, U.S.
FILED
AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-790, 88-1309

IN THE

Supreme Court of the United States

October Term 1989

No. 88-790

BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Cross-Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF APPELLANTS IN *TURNOCK* AND CROSS-PETITIONERS IN *HODGSON*

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BRAMES, McCORMICK, BOPP & ABEL
191 Harding Avenue
Post Office Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amicus Curiae

August 31, 1989

QUESTION PRESENTED HEREIN

Is the decision of this Court in *Roe v. Wade* sufficiently implicated in the cases at bar, *Turnock v. Ragsdale* and *Minnesota v. Hodgson*, for *Roe v. Wade* to be reconsidered?

TABLE OF CONTENTS

Page:

Question Presented Herein i

Table Of Contents ii

Table of Authorities v

Interest Of Amicus 2

Summary Of Argument 3

Argument 4

Introduction 4

I. A Logical, Coherent Analysis Governing The Constitutional Necessity For This Court To Decide A Constitutional Issue Is Discernible From Precedent 5

A. Four Elements Govern the Consitutional Necessity of Deciding A Constititutional Issue Under this Court's Precedents 5

1. This Court has a duty to interpret the Constitution 5

2. This Court's duty to interpret the Constitution is limited by Article III of the Constitution . 7

3. This Court's duty to interpret the Constitution is limited by its jurisdictional statutes 8

4. This Court's duty to interpret the Constitution is limited by prudential considerations 9

B. These Four Elements Form a Logical, Sequential Analysis to be Employed in Analyzing the Necessity of Deciding a Constitutional Issue 10

C. Consideration of Some Specific Questions Concerning Reconsideration Reveal that Reconsideration of *Roe v. Wade* Is Appropriate in this Case 11

II. The Failure Of This Court To Agree Upon And Follow Such An Analysis Concerning Reconsideration Has Introduced Chaos Into The Law And Into This Court 15

A. That this Court Has Not Agreed Upon an Analysis for Reconsideratilon Is Evident from this Past Term 15

B. *Roe v. Wade* Demonstrates the Overreaching Possible with an Inadequate Analysis and the Resultant Overruling Required 17

C. *Webster* Demonstrates the Underreaching Possible with an Inadequate Analysis and the Resultant Chaos Attending Such Action 19

1. Is the *Roe* trimester scheme overruled *sub silentio?* 21

2. Is the abortion right now a liberty interest? . 22

3. Is *Akron* overruled *sub silentio* by rehabilitation of the unduly burdensome test? 23

III. Employing The Proper Analysis To The Issue Of Reconsideration Herein Reveals That *Roe v. Wade* Should Be Reconsidered In These Cases 24

A. This Court Should Go Through the Full Analysis to Determine What Issues Should be Decided and on What Grounds 24

B. The Issue of Reconsideration Itself Is Not One Which This Court May Avoid if It Chooses to Decide These Cases and Issue a Written Opinion

Because *Roe* and its Right and Analysis are Clearly Implicated 25

1. Compelling state interests in maternal health and unborn life, which underlie these statutes, are asserted throughout pregnancy 26

2. The right to effecutate the abortion decision is implicated 27

3. The right to consult one's physician in making the abortion decision is forbidden 27

Conclusion 29

TABLE OF AUTHORITIES

Cases *Pages*

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)..... 12, 16, 19, 21-24

Ashwander v. TVA, 297 U.S. 288 (1936) 6-10

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 8-9

Booth v. Maryland, 482 U.S. 496 (1987) 12-13, 17

City of Richmond v. J. A. Croson Co., 109 S.Ct. 706 (1989) 13

Cohens v. Virginia, 6 Wheat 264 (1821) 7, 15

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 14

Daniels v. Williams, 474 U.S. 327 (1986) 14

Doe v. Bolton, 410 U.S. 179 (1973) 2

Illinois v. Gates, 462 U.S. 213 (1983) 14

Mapp v. Ohio, 367 U.S. 643 (1961) 14

Marbury v. Madison, 1 Cranch 137 (1803) 5-7, 14

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) .. 14

Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989) 12, 15

Perez v. Campbell, 402 U.S. 637 (1971) 14

Perry v. Leeke, 109 S.Ct. 609 (1989) 13

Pointer v. Texas, 380 U.S. 400 (1965) 14

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 5

Roe v. Wade, 410 U.S. 113 (1973) ..... *passim*

Runyon v. McCrary, 427 U.S. 160 (1976) 12

South Carolina v. Gathers, 109 S.Ct. 2207 (1989) 12, 16

Thornburg v. American College of Obstetrician and Gynecologists, 106 S.Ct. 2169 (1986). 12, 21-23

Thornburg v. American College of Obstetricians and Gynecologist, 737 F.2d 283 (1984) 9

Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) ..... *passim*

Constitution and Statutes

28 U.S.C. § 1257 9

28 U.S.C. § 1331 8

28 U.S.C. § 1343(3) 8

Ill. Rev. Stat. ch. 111 ½ para. 205 730 (a) (c) (b) 27

Ill. Rev. Stat. ch. 111 ½, para. 205.730 (b) (3) 27

U.S. Const. art. III, § 1 8

U.S. Const. art. III, § 2 7

Other Authorities

Blum, Resnick & Stark, *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AJPH 619 (1987) 26

Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 181 B.Y.U. J. Pub. L. 181 (1989) 19

G. Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964) 6

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) 21

Jefferson to Justice William Johnson, June 12, 1823, I S. Car. His. & Gen. Mag. 1 (1900) 14

Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1 14

Wechsler, "Toward Neutral Principles of Constitutional Law," in *Principles, Politics, and Fundamental Law* (1961) 6

IN THE

Supreme Court of the United States

October Term 1989

No. 88-790

BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals
for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Cross-Respondents*.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. IN SUPPORT OF APPELLANTS IN *TURNOCK* AND CROSS-PETITIONERS IN *HODGSON*

INTEREST OF AMICUS[1]

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee, Inc. have supported legislation to protect unborn human life within these guidelines. The Illinois and Minnesota legislation at issue herein is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. and its Illinois and Minnesota affiliates, Illinois Federation for the Right to Life and Minnesota Citizens Concerned for Life. By means of this brief, the National Right to Life Committee, Inc. seeks to advance these interests by supporting the Minnesota regulations at issue herein.

---

[1] This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

In *Webster v. Reproductive Health Services*, members of the majority differed on whether and to what extent *Roe v. Wade* should be reconsidered. From the decisions of this Court, a logical, coherent, and sequential analysis may be constructed to govern when it is necessary to decide a constitutional issue, in fulfillment of this Court's constitutional duty to decide a case properly before it. Failure to follow this analysis has resulted in anomalous results, evident in the decisions of this Court in the last term, and confusion in the law, evident in the wake of *Webster*.

Applying this analysis, it is clear that reconsideration of precedent is required whenever a case is brought on the basis of the right and/or analysis created in that precedent. The right declared and the analysis to be employed in constitutional review are but means of applying the Constitution. The ultimate question in constitutional review is what the Constitution requires. This is always at issue in constitutional review, making the case declaring a right and/or analysis always at issue in such cases. Thus, the Court must always establish the standard of review, either implicitly or explicitly, in determining the constitutionality of a statute.

Furthermore, a court is required to give a reasoned, legal justification for its decision. This must resolve those constitutional issues embraced by an analysis of the case. This requires resolution of the issues associated with the standard of review. Thus, a precedent which establishes a constitutional right or sets forth the analysis to be employed in determining the constitutionality of a statute under that right must be reconsidered whenever the constitutionality of a statute is challenged on the basis of that right or employing that analysis. Therefore, reconsideration of *Roe v. Wade* may not be avoided in the cases at bar.

Moreover, although sufficient implication of *Roe* for reconsideration of that case is inherent in its seminal status, the

cases at bar implicate *Roe's* core analysis more fully than did *Webster.* Additionally, the confusion created by *Webster* itself implicates the heart of Roe's analysis, making reconsideration based upon the effect of that decision alone a constitutional necessity. Therefore, *Roe v. Wade* should be reconsidered in the cases at bar.

ARGUMENT

INTRODUCTION

The decision of this Court in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), settled the small portion of abortion jurisprudence encompassed by the Missouri statutes at issue in that case. But *Webster* settled these matters in a way which unsettled the remainder of abortion law.

Issues now unresolved go to the very core of this Court's opinion in *Roe v. Wade*, 410 U.S. 113 (1973). Were *Roe* and/or its later progeny overruled sub silentio in *Webster?* Is a woman's interest in obtaining an abortion a fundamental right, a limited fundamental right, or a liberty interest? Will abortion legislation now be reviewed under the traditional compelling interest standard or is an unduly burdensome analysis the de facto standard? What is an undue burden? Is the trimester scheme overruled or yet viable? Must abortion regulations be narrowly tailored to effectuate the underlying state interest or only reasonably related to the interest?

This confusion arose from the inability of the members of this Court to agree on the analysis to be employed in determining when constitutional necessity requires the reconsideration of precedent. The majority which decided Webster disagreed over whether and to what extent *Roe v. Wade* should be reconsidered. A particular focus of the debate was the "necessity" principle employed by this Court to "avoid [] passing upon a large part of all the constitutional questions pressed upon it for decision . . . , notwithstanding conceded jurisdiction, until *necessity* compels it in the performance of *constitutional duty.*"

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 569 (1947)(emphasis added).

This Court has never set forth, in one place, the full analysis by which to determine when the necessity exists which compels this Court to fulfill its constitutional duty to decide a constitutional issue. By reviewing the duties and limitations imposed upon this Court by the Constitution, its jurisdictional statutes, and prudence, one may discern a clear pattern. This brief sets out this pattern, logically organizing the duties and limitations of this Court into a coherent analysis. This analysis is then applied to determine whether reconsideration of *Roe v. Wade* is constitutionally necessary in the cases at bar.

I. A LOGICAL, COHERENT ANALYSIS GOVERNING THE CONSTITUTIONAL NECESSITY FOR THIS COURT TO DECIDE A CONSTITUTIONAL ISSUE IS DISCERNIBLE FROM PRECEDENT.

A. FOUR ELEMENTS GOVERN THE CONSTITUTIONAL NECESSITY OF DECIDING A CONSTITUTIONAL ISSUE UNDER THIS COURT'S PRECEDENTS.

Four elements govern whether, in a particular case, the decision of a constitutional issue is necessary in the performance of constitutional duty: (1) a constitutional duty to say what the law is, (2) a constitutional limitation of decision opportunities to cases and controversies, (3) a statutory limitation on subject matter jurisdiction, and (4) prudential principles imposed by this Court upon itself for sound jurisprudential reasons.

1. THIS COURT HAS A DUTY TO INTERPRET THE CONSTITUTION.

"It is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803)(emphasis added). So declared this Court in the famous case of *Marbury v. Madison*, in which it deter-

mined the Constitution to be the supreme law of the land, governing even enactments of Congress. *Id.* at 177-79. This Court also decided in *Marbury* that it had authority to review actions of other elements of government to determine whether they comported with this Court's declaration of "what the law is" with respect to the Constitution. *Id.*

This Court could most comprehensively fulfill its duty to declare what the law is by publishing its own commentary on the law, in the manner of William Blackstone or Lord Coke. Of course, such a project would be of immense and prohibitive proportions, and no commentary could cover every conceivable issue.

More significantly, however, this Court is prohibited from roaming about the constitutional field in such a manner by its constitutional charter. There are limits placed upon its power and duty to say what the law is, which are set forth in detail below.

However, these limitations must not be employed to avoid deciding matters which this Court has a duty to decide. Professor Gunther has styled as a neo-Brandeisian fallacy the misuse of the "necessity" principles set forth by Justice Brandeis in his concurrence to *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936)(Brandeis, J., concurring), to support a view that this Court has a general discretion not to adjudicate. *See generally* G. Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964)(commenting on the content and uses of the *Ashwander* rules). *Cf.* Wechsler, "Toward Neutral Principles of Constitutional Law," in *Principles, Politics, and Fundamental Law (1961).*

The duty to decide, when constitutionally required, is illustrated by Justice Marshall in Marbury, where he felt compelled, in giving a legal justification for his decision, to comment on matters not necessary to the decision of the case but necessary to a legal justification of the case. He wrote:

> The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

Marbury, 1 Cranch at 154. To this comment must be added another of Justice Marshall's remarks in the case of *Cohens v. Virginia*, 6 Wheat 264, 404 (1821):

> Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty.[2]

2. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY ARTICLE III OF THE CONSTITUTION.

The Constitution of the United States allows this Court to interpret the Constitution only in relation to "Cases . . . arising under this Constitution." U.S. Const. art. III, § 2.

From this limitation arise certain rules, which Justice Brandeis set forth in his concurring opinion to *Ashwander v. TVA*, 297 U.S. at 346-48 (1936)(Brandeis, J., concurring). These rules apply even where jurisdiction is conceded under the controlling jurisdictional statutes, *id.* at 346, for they are constitutionally mandated by Article III.

Justice Brandeis set forth these rules as follows:

First, "[t]he Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding. *Id.* at 346.

---

[2] This brief does not enter into the debate over this Court's discretion to decline the exercise of jurisdiction. It merely addresses the necessity of deciding all elements of a case which are required in giving a legal justification for this Court's decision in a case which is decided by this Court. Your amicus does not believe that the standard of review is an issue which may properly be avoided. It is different in kind from construing a statute to avoid constitutional difficulty or deciding a case on procedural grounds to avoid a constitutional issue.

Second, "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" nor will it "'decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Id.* at 346-47 (citations omitted).[3]

Third, "[t]he Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." Id. at 347.

Fourth, "[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." Id. at 348.

3. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY ITS JURISDICTIONAL STATUTES.

Pursuant to its authority to "ordain and establish" federal courts, U.S. Const. art. III, § 1, Congress has enacted jurisdictional statutes which require a "deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" or a claim "arising under the Constitution, laws, or treaties of the United States" for federal district court jurisdiction. 28 U.S.C. §§ 343(3) and 1331. Without satisfaction of these prerequisites, the cases at bar should not have come before this Court by way of the lower federal courts.[4] Similarly,

---

[3] As noted *infra*, the question of establishing the appropriate standard of review is a necessary decision to this Court's constitutional review of a case and not a discretionary matter which may be avoided if convenient.

[4] In addition to establishing the proper standard of review, this Court must also examine its jurisdiction. As noted in text, this Court only has jurisdiction over these cases if there is yet a constitutional right to abortion.

In *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), this Court declared that "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts

(footnote continued)

had these cases come up through state courts, this Court could only have heard them if the statutes at issue were "repugnant to the Constitution" or if a constitutional right were claimed. 28 U.S.C. § 1257.

4. THIS COURT'S DUTY TO INTERPRET THE CONSTITUTION IS LIMITED BY PRUDENTIAL CONSIDERATIONS.

Self-imposed, prudential principles have been developed by this court, based upon policy considerations. These rules were summarized in Justice Brandeis' *Ashwander* concurrence as follows:

First, "[t]he Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring)(citations omitted).

Second, "[t]he Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.*

Third, "'[w]hen the validity of an act of the Congress[5] is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Id.* at 348 (citation omitted).

Footnote 4 continued
in a cause under review,' even though the parties are prepared to concede it." *Id.* at 541 (citation omitted). The question of jurisdiction is a "fundamental" one, which "the Court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Bender*, 475 U.S. at 547. Thus, in determining whether subject matter jurisdiction lies in the present case, this Court must carefully consider *Roe*, the case upon which federal jurisdiction rests.

[5] This principle has been extended to acts of state legislatures, as well. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 737 F.2d 283, 294 (1984).

B. THESE FOUR ELEMENTS FORM A LOGICAL, SEQUENTIAL ANALYSIS TO BE EMPLOYED IN ANALYZING THE NECESSITY OF DECIDING A CONSTITUTIONAL ISSUE.

These duties and rules may be arranged in logical, sequential order. The result is conceptually similar to a series of increasingly fine filters; the analysis filters cases, then issues, and then grounds of decision at subsequent levels until only those which are properly to be decided remain. The phases of the analysis are as follows:

1. *Is there a case or controversy?* Logic compels that initial consideration be given to the requirements of the Constitution, which authorized creation of this Court and granted it powers within the jurisdiction to be prescribed by Congress. Justice Brandeis' four rules dealing with Article III, set forth above, are properly asked at this point. These questions determine whether a concrete, adversarial context exists for the resolution of constitutional issues. They prevent abstract decisions on hypothetical points.

2. *Is there jurisdiction?* Logic likewise compels that the jurisdictional statutes be next examined. Congress further defined the jurisdiction of this Court and created the lower courts and limited their jurisdiction by these statutes. These statutes require, in part relevant herein, that a suit must be initiated based upon the violation of a constitutional right.

If there is an Article III case and jurisdiction exists, then the case itself is properly before this Court, whether it arrives by grant of a writ of certiorari or by appeal.

3. *Are there prudential reasons for avoiding certain aspects of the case?* At this point, the three prudential rules of Justice Brandeis' *Ashwander* principles must be considered. Is there some statutory or procedural basis for decision by which a constitutional decision may be avoided? May a statute be construed in a manner favoring constitutionality? If a constitutional decision must be made, what are the narrowest possible grounds upon which it may be properly made?

This last question must be asked in light of this Court's duty both to say what the law is by interpreting the Constitution when required and by its judicial duty to give the legal basis for its decision in a reasoned manner. Reasoned exposition of all elements of the analysis which are logically required in order to give an explanation of that legal basis of the decision must be deemed necessary to the decision.

The proper filtering analysis decides first which cases must be heard, then — employing prudential considerations — what issues must be heard, and finally what grounds must logically be given to support the decision. Prudence requires that the fewest possible issues be resolved on the lowest level of grounds required. The required grounds are all those necessary to logically justify the decision. This analytically includes the standard — the constitutional analysis — to be employed. Without such a determination, the decision has not been legally and logically justified.

C. CONSIDERATION OF SOME SPECIFIC QUESTIONS CONCERNING RECONSIDERATION REVEAL THAT RECONSIDERATION OF *ROE v. WADE* IS APPROPRIATE IN THIS CASE.

Finally, some specific questions with regard to reconsideration have arisen in the opinions of this Court. These questions have already been settled and require brief exposition at this point.

First, *must the parties ask for reconsideration?* No. Necessity of reconsideration of a constitutional issue is not determined by whether the parties have requested reconsidera-

tion.[6] Just last term, in *Patterson v. McClean Credit Union*, 109 S.Ct. 2363 (1989), this Court reconsidered *Runyon v. McCrary*, 427 U.S. 160 (1976), without any request from the parties. *Patterson*, 109 S.Ct. at 2380 (Brennan, J., dissenting)("I find it disturbing that the Court has in this case chosen to reconsider, without any request from the parties . . . .").

Second, *is it sufficient for reconsideration if the right created by a prior case is the basis of the claim in a later case?* Yes. This is the basis upon which the Court reconsidered the *Patterson* case. In *Patterson*, the plaintiff brought an action based upon the statutory right created by an interpretation of 42 U.S.C. § 1981 in *Runyon*, 427 U.S. 169, i.e., that § 1981 encompasses a private contract between an employer and employee. It is a more difficult task where a prior case is not as directly implicated as to provide the right upon which the suit is founded. This is evident in *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), decided by this Court last term. In *Gathers*, Justices O'Connor and Kennedy and Chief Justice Rehnquist, in dissent, decided that the holding of the prior case of *Booth v. Maryland*, 482 U.S. 496 (1987), was not sufficiently implicated for reconsideration of that case. *Id.* at 2212 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.). This was so because *Gathers* involved prosecutorial comments about a criminal victim's character in closing argument, not in the submission of evidence which *Booth* forbade. Thus, *Booth* was not sufficiently implicated for Justices O'Connor and Kennedy and Chief Justice Rehnquist to reconsider that case. *Id.* at 2211.

[6] *In Thornburgh v. American College of Obstetricians and Gynecologists*, Justice O'Connor implied that she would not reach the issue of reconsideration of *Roe v. Wade* because the parties had not asked the Court to do so. 106 S.Ct. at 2213. However, in *Akron v. Akron Center for Reproductive Health*, she personally reached the issue of *Roe's* constitutional correctness and declared much of it unconstitutional, despite the fact that the parties had not asked the Court to reconsider *Roe*, a point which she expressly noted. 462 U.S. at 458, 452. Further, in *Webster*, she declared her willingness to reconsider Roe in a proper case.

Justice Scalia would have overruled *Booth*, *id.* at 2217-18, as, apparently, would have Justice White. *Id.* at 2211.

Third, *may this Court decide a case on broader principles than reasonably required by the precise facts of the case before it in appropriate circumstances?* No, but it must resolve a sufficient number of constitutional issues to give a reasoned, legal justification for its decision. This properly includes a decision concerning the standard of review, i.e., in this case, whether or not the analysis of *Roe v. Wade* is still good law. It may also include resolution of other matters not required by a simple judgment of affirmation or reversal which are, however, necessary to give a legal justification for the decision rendered. This question is often erroneously framed as whether a decision may be made on a broader than necessary basis. When "necessary" is properly understood to encompass those matters necessary to giving the required legal justification for a decision, the confusion is resolved. The rule, then, is that no Court should declare a rule of constitutional law broader than required by the precise facts of the case, but that this concept includes matters, such as resolving the appropriate standard of review (even if that requires reconsideration of precedent), necessary to giving a reasoned, legal justification for the decision.[7]

[7] Many examples exist where this Court has decided issues it felt necessary to giving a legal justification for its decision but has been criticized for reaching issues not necessary under the facts of the case. Because all matters necessary to a legal justification of an opinion are required but decision of other matters is not permitted, the question of what matters ought to be addressed in an individual case is one subject to differing judgment. In *City of Richmond*, 109 S.Ct. 706 (1989), Justice O'Connor, writing for the Court, authored an opinion which went beyond the facts to state a set of governing principles — presumably to give legislative bodies guidance in developing the law. *Id.* at 735. This was observed by Justice Marshall, writing for the dissent. *Id.* at 752 (Marshall, J., dissenting)("the majority has gone beyond the facts of this case to announce a set of principles"). In another case from last term, *Perry v. Leeke*, 109 S.Ct. 609 (1989), this Court reached an issue which Justice Kennedy did not feel was necessary to the decision. *Id.* at 602

(footnote continued)

This principle explains Justice Marshall's decision in *Marbury* to comment on matters required for giving a legal justification for the Court's decision. He expressed both his sensitivity to avoiding overbroad decisions and the need to resolve those constitutional issues required for a legal justification of his opinion. In discussing the issue of whether a mandamus could go to the Secretary of State, he wrote, "It may not be proper to mention this position; but I am compelled to do it." *Marbury*, 1 Cranch at 149. He was compelled to do it because of this Court's duty to provide a reasoned, legal justification for its ruling. He commented, "These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration." *Id.* at 156.[8]

Footnote 7 continued
("In view of our ruling, it is quite unnecessary to discuss whether prejudice must be shown when the right to counsel is denied. I would not address that issue . . . ."). Other cases where the Court has been accused of deciding more broadly than the precise facts required are *Daniels v. Williams*, 474 U.S. 327 (1986); *Illinois v. Gates*, 462 U.S. 213 (1983); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); *Pointer v. Texas*, 380 U.S. 400 (1965); and *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court has even expressly acknowledged its broader than strictly required holding in some cases, such as *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), and *Perez v. Campbell*, 402 U.S. 637 (1971).

Acknowledging that resolution of all issues necessary to a reasoned legal justification of this Court's decision is required but that going beyond that is forbidden resolves the tension between the practice of this Court in the cases above and its rule against overly broad decisions.

[8] Much debate has raged over Justice Marshall's decision, *see e.g.*, Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, including the criticism that, given its conclusion, the Court should have said only that it lacked jurisdiction. Much of what was said in the early part of the opinion, regarding the propriety of issuing mandamus against an executive's illegal acts, might be characterized as *obiter dictum*. Indeed, Thomas Jefferson, the contemporary President and a key player in the *Marbury* drama, insisted throughout his life that most of *Marbury* was "merely an obiter dissertation of the Chief Justice." *Jefferson to Justice William Johnson, June*

(footnote continued)

I. THE FAILURE OF THIS COURT TO AGREE UPON AND FOLLOW SUCH AN ANALYSIS CONCERNING RECONSIDERATION HAS INTRODUCED CHAOS INTO THE LAW AND INTO THIS COURT.

The disagreement on this Court over the analysis to be applied with regard to reconsideration of precedent is evident in three cases from last term where reconsideration was considered and treated in three different ways. The chaotic results which flow from this failure to agree on an analysis are illustrated by two abortion cases, *Roe v. Wade* and *Webster v. Reproductive Health Services*. The former overreached, causing this Court in *Akron* to overrule part of that decision. The latter underreached, creating chaos in abortion law. Either approach is wrong, both for sound jurisprudential reasons and because of the illicit results.

A. THAT THIS COURT HAS NOT AGREED UPON AN ANALYSIS FOR RECONSIDERATION IS EVIDENT FROM THIS PAST TERM.

In this past term, this Court considered three key cases in which reconsideration was proposed. The inconsistent manner in which these were handled reveals the lack of an agreed analysis for reconsideration.

In the first case, *Patterson v. McClean Credit Union*, 109 S.Ct. 2363, this Court plenarily reconsidered *Runyon v. McCrary*, 427 U.S. 160. There was no disagreement among the majority over whether reconsideration should occur, although, as noted *supra*, neither party asked for reconsideration and the sole implication of the prior decision was that it created the right under which the action was brought.

Footnote 8 continued
12, 1823, I S. Car. His. & Gen. Mag. 1, 9-10 (1900). Justice Marshall himself later called some of his statements about Article III in *Marbury* unduly broad and partially rejected them in *Cohens v. Virginia*, 6 Wheat 264 (1821). Nonetheless, the fact that he may have erred by going somewhat beyond what was required to give a legal justification for his decision does not vitiate the principle. His error, if any, was of degree and not of principle.

In the second case, *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, the members of the majority could not agree that reconsideration was proper even though *Roe v. Wade* created the right under which the action was brought. And such reconsideration as was called for was not plenary, with the exception of that proposed by Justice Scalia. The plurality declared that only the trimester scheme was implicated and Justice O'Connor thought that nothing of Roe was implicated.[9]

As argued in this brief, however, distinguishing the degrees of implication of a seminal case — one which creates the right or analysis under which the cause of action arose — is unnecessary. Such a case is always fully implicated in a cause which invokes that right or analysis. Such distinguishing of degrees of implication was not engaged in in *Patterson*, nor is it appropriate under the principle that the decision of all matters necessary to a reasoned justification of the Court's decision — including establishment of the standard of review — is constitutionally necessary. The result of the failure of this Court to employ a consistent analysis with regard to reconsideration resulted in turmoil and confusion in abortion jurisprudence, as more fully set forth *infra*. It further resulted in the failure of a majority of this Court to address a decision, *Roe*, which five Justices have declared to be constitutionally flawed.

In the third case, *South Carolina v. Gathers*, 109 S.Ct. 2207 (1989), the very decision-making process of the potential working majority in that case was disrupted by its inability to agree on an analysis regarding reconsideration. It is apparent from the opinions in Gathers that five Justices of this Court believe that *Booth v. Maryland*, 482 U.S. 496 (1987) — the case which created the right of criminals not to have evidence of their

[9] It must be noted that Justice O'Connor viewed the Missouri statute as not inconsistent with *Roe* or its progeny because it did not "unduly burden" the abortion right. However, this unduly burdensome or "absolute obstacle" test, championed in *Akron* by Justice O'Connor, and under which she would have upheld the ordinances at issue in *Akron*, was expressly rejected by this Court as violative of *Roe v. Wade*. *Akron*, 462 U.S. at 420 n.1.

victim's character introduced at trial — was wrongly decided. The result, however, was the extension of the reach of *Booth v. Maryland* to prosecutorial statements about the victim's character.

While judicial restraint is admirable and required by sound, constitutional jurisprudence, it is improperly applied to avoid considering the precedent which creates the foundational right upon which a cause is brought. Consideration of that foundational right, and the case creating it, is essential in giving a reasoned, legal justification for this Court's decision in any case based upon that right. The havoc wrought by this Court's failure to consistently apply the sort of analysis proposed herein is further illustrated in two cases, *Roe* and *Webster*.

B. *ROE v. WADE* DEMONSTRATES THE OVERREACHING POSSIBLE WITH AN INADEQUATE ANALYSIS AND THE RESULTANT OVERRULING REQUIRED.

Roe demonstrates both the matters necessary to deciding a constitutional issue and the perils in deciding those that are not necessary.[10] The *Roe* majority correctly began by establishing the proper standard of review, to which it devoted the majority of the opinion. Given its judgment that the Texas criminal abortion statute — excepting only cases of risk to maternal life — was unconstitutional, the Court needed to decide the issues necessary to give a reasoned, legal justification of its decision. To merely strike down the Texas statute, without explanation, would not have fulfilled this Court's constitutional duty to declare what the Constitution means when deciding the case.[11]

[10] This, of course, in no way concedes any correctness as to the substantive holdings of the *Roe* Court.

would not have fulfilled this Court's constitutional duty to declare what the Constitution means when deciding the case.[11]

Necessary to a reasoned, legal justification of this Court's decision in *Roe* was its holding that there is a fundamental right to abortion. Likewise, a holding that no compelling interests extended throughout pregnancy was vital to the analysis. *Roe* also demonstrated proper restraint in not deciding the issues of paternal rights and parental rights (of parents with minors seeking abortion). *Roe*, 410 U.S. at 165 n.67. Deciding these issues, which were not presented by the facts, would have decided constitutional questions in advance of the necessity of doing so. In Article III terms, no case existed with respect to these matters, and, therefore, this Court was without constitutional authority to decide them.

Unnecessary to a reasoned, legal justification of the decision in *Roe* was creation of the trimester scheme. Also unnecessary were the inherently legislative declarations, such as the statement that a hospitalization requirement for post-first-trimester abortions was constitutionally permissible. The Court reached these issues in advance of the necessity of deciding them, violating Article III, and it decided matters more broadly than required by the facts, violating prudence. The *Roe* majority ought to have awaited another case involving a viability line to reach a discussion of viability. It should have decided the maternal health line in a case properly presenting that issue, such as a case requiring hospitalization for abortions after a certain point.

[11] Of course, this Court has the power to summarily affirm or reverse decisions in appropriate circumstances. However, constant reliance on such a practice would not comport with this Court's duty to decide. Practically, such a practice would also unduly prolong the trial and error, see-saw interaction between this Court and the legislatures in their attempt to pass constitutional legislation. Such considerations, however, do not justify overreaching beyond what is necessary to give a reasoned, legal justification of a decision.

The imprudence of such premature decision-making was demonstrated in the progeny of *Roe*, especially in the case of *Akron v. Akron Center for Reproductive Health*. 462 U.S. 416 (1983). In *Akron*, the majority found it necessary both to alter the trimester scheme, precipitously created in *Roe*, and to reject a post-first trimester hospitalization requirement, prematurely approved in *Roe*. *Akron*, 462 U.S. at 435-47.[12]

Thus, *Roe* well illustrates how a court may begin correctly and then go astray by overreaching. A proper analysis would preclude such overreaching.

C. *WEBSTER* DEMONSTRATES THE UNDERREACHING POSSIBLE WITH AN INADEQUATE ANALYSIS AND THE RESULTANT CHAOS ATTENDING SUCH ACTION.

By contrast with *Roe*, the *Webster* amalgam of opinions did not even begin correctly. Neglected was the essential first step in constitutional analysis, the determination of the standard of review — the constitutional analysis — to be employed in reviewing the statutes at issue. The core issue in any constitutional challenge to a statute is whether the statute comports with the Constitution — not whether it complies with a prior decision of this Court. Deciding whether a statute conforms to the requirements of some precedent is but a shorthand way of asking whether constitutional requirements are met. Therefore, it is essential to the analysis to determine what the Constitution requires. In a matter already decided, this question is answered by citation to precedent, the principles of which are applied to the new fact situation. But in each subsequent case, the question of what the Constitution requires must be asked. It may be simply answered by reaffirmation of the precedent, either express or implicit, but it must be

[12] *See* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 181 B.Y.U. J. Pub. L. 181, 202-07 (1989)(discussing this disregard of stare decisis at length).

answered. The Constitution is at issue in constitutional adjudication.

Therefore, in *Webster*, the constitutionality of *Roe v. Wade*, *was* before this Court. It could not properly be avoided. The standard of review, by which the Constitution is applied to determine the constitutionality of a statute, must be decided. It is not of a nature permitting avoidance until some more convenient time or some greater implication. If a case is brought to declare a statute unconstitutional on the basis of the decision establishing the right and setting forth the analysis, then that case is implicated. Once implicated, it must be applied, modified, or overruled; its reconsideration is then proper. A state need not reenact the Texas statute struck down in *Roe* before this Court may properly reconsider *Roe*.

Deciding the standard of review as a necessary first step in constitutional analysis is something one may not avoid by prudential principles. It is inherent in constitutional review. It is the very essence of constitutional review, serving as the link between the statutes reviewed and the Constitution. It is not of the same nature as a constitutional challenge to a statute which may be avoided by a permissible construction of the statute. Nor is it of the same nature as a constitutional challenge to a statute which may be avoided by deciding a matter on a statutory, procedural, or independent state law basis. The issue of the correct standard of review arises *precisely when the Court has been unable to avoid a constitutional question and must determine whether a statute is constitutional*. It is *inherently necessary* to decide in the discharge of this Court's constitutional duty and may not properly be avoided.

Therefore, *Webster* underreached — the Court did not fulfill its duty to say what the law is in justifying its decision. The resulting chaos demonstrates clearly why strict adherence to a sound analysis with regard to deciding constitutional matters, and especially the standard of review, is essential to sound constitutional adjudication. Indeed, the chaos created by *Webster* alone is sufficient to call this Court to say what the law is in the cases at bar.

The confusion resulting from *Webster* may be seen in the varying interpretations given to the opinion, which run along a spectrum from a *sub silentio* reversal of *Roe*, to a *sub silentio* reversal of the trimester scheme and this Court's most recent pronouncements in *Akron* and *Thornburgh*, to a mere funding case with few other implications. In light of such diversity of possibilities, how may the legislatures act? What is permitted?

One may of course say that nothing was overruled in *Webster*, for the Court used no such language. However, the notion of *sub silentio* reversal is a commonplace in the law. And is the meaning of a case circumscribed by its proper holding? The legitimate holding of *Roe* — if legitimacy be limited to that permitted by the narrowest holding based upon the specific facts — was but the tip of the iceberg which comprised the full meaning of *Roe* for abortion jurisprudence.

Justice Oliver Wendell Holmes declared that the state of the law is nothing more than a prediction of what a court will do at a given time with a given set of facts. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). Employing this analysis of legal realism, the meaning of *Webster* may be determined by examining the statements of various Justices, both in *Webster* and before, to determine what elements of abortion jurisprudence yet enjoy majority support. The result of such analysis raises significant questions.

1. IS THE *ROE* TRIMESTER SCHEME OVERRULED *SUB SILENTIO?*

It appears from the opinions in *Webster* that majority support for the trimester scheme of *Roe* has disappeared. Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissents to *Akron* and *Thornburgh*. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)("I . . . remain of the views expressed in my dissent in *Akron*. The State has

compelling interests in ensuring maternal health and in protecting potential human life . . . throughout pregnancy."). With Chief Justice Rehnquist and Justices White, Scalia[13], and Kennedy saying the same thing in *Webster*, it is readily apparent that a majority of this Court has now recognized these two interests as existing throughout pregnancy, indicating the demise of the trimester scheme. *Webster*, 109 S.Ct. at 3057.

But this Court has not stated this demise in express language. Will legislatures feel free to act upon it? By comparison with the small area of the law this Court settled in *Webster*, the areas it unsettled are immense, going to the core of *Roe v. Wade*.

2. IS THE ABORTION RIGHT NOW A LIBERTY INTEREST?

Similarly, the very nature of a woman's interest in choosing abortion is now unclear. In *Roe*, this Court determined that a woman has a fundamental right to choose abortion, employing a substantive due process analysis. The *Webster* plurality declared that a woman has only a "liberty interest" in abortion under the Due Process Clause of the Fourteenth Amendment. *Webster*, 109 S.Ct. at 3058. Justice O'Connor, with her advocacy of the rational basis standard of review in most cases, agrees that there is no general, fundamental right to abortion. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, where there is an undue burden, she might find a fundamental right, evidenced by her requiring a compelling state interest to justify regulation of abortion in such cases. *Id.* Thus, there is now a majority of the Court which no longer believes that there is a general fundamental right to abortion. But what is the law? What does the Constitution require?

---

[13] As Justice Scalia would reverse *Roe*, it is assumed that, to the extent a fundamental right to abortion is given continued recognition, he would agree that there are offsetting compelling interests in maternal health and unborn life.

3. IS *AKRON* OVERRULED *SUB SILENTIO* BY REHABILITATION OF THE UNDULY BURDENSOME TEST?

In *Akron*, this Court found the unduly burdensome test to be an unconstitutional form of analysis, forbidden by the dictates of *Roe v. Wade* itself. *Akron*, 462 U.S. at 420 n.1. Logically then, any invocation of, or reliance upon, the unduly burdensome test would be in direct derogation of *Roe*. However, in *Webster*, Justice O'Connor readily relied upon this analysis to uphold the statutes at issue in *Webster* and to declare that all of the Missouri statute could be upheld under prior decisions of this Court, at the same time arguing that no prior abortion decision of this Court was sufficiently implicated for purposes of reconsideration. *Webster*, 109 S.Ct. at 3060. At a very minimum, however, the resurrection of the unduly burdensome test implicated *Akron*, directly rejecting a key holding of that decision.

Is the unduly burdensome test — as the lowest common denominator of the current majority on abortion issues — the proper analysis to be employed by lower courts and legislatures? If *Akron* is indeed overruled *sub silentio*, is legislation such as that found in *Akron* and in *Thornburgh* now constitutional?

A further problem arises if Justice O'Connor's lowest-common-denominator analysis is now the *de facto* analysis for review of abortion legislation. It has been generally thought since *Roe* that the fundamental rights analysis required the showing (1) that the state has a compelling interest and (2) that the legislation enacted is narrowly tailored to effect only the compelling interest. *Roe*, 410 U.S. at 155. But Justice O'Connor wrote in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be 'narrowly tailored' to express only the relevant state interest. In Roe, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the Roe analy-

sis. In its decision today, the Court fully endorsed the Roe requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle' be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting)(citations omitted and case names not italicized in original). Which standard must abortion legislation now meet — must it be narrowly tailored or rationally related to a compelling interest?

In sum, *Webster* has thrown abortion jurisprudence into disarray. The very core analysis of *Roe* has been placed in question: as to the nature of the interest, as to the standard of review, as to the temporal extent of the states' compelling interests, and as to the second prong of the *Roe* analysis for legislation burdening (unduly or not?) a fundamental right — if indeed, there is yet a fundamental right. And if the unduly burdensome test controls, what does unduly mean? This chaos alone compels this Court to perform its constitutional duty, which it avoided in *Webster* but which exists in these cases, to say what the law is.

III. EMPLOYING THE PROPER ANALYSIS TO THE ISSUE OF RECONSIDERATION HEREIN REVEALS THAT *ROE v. WADE* SHOULD BE RECONSIDERED IN THESE CASES.

A. THIS COURT SHOULD GO THROUGH THE FULL ANALYSIS TO DETERMINE WHAT ISSUES SHOULD BE DECIDED AND ON WHAT GROUNDS.

It is beyond the scope of this brief — which addresses reconsideration of *Roe v. Wade* — to apply the analysis herein in all of its respects to the statutes at bar. This Court should take this opportunity to employ a systematic approach to determine what issues should be decided and on what grounds. However,

if this Court decides to consider the constitutionality of any part of the statutes at issue herein, i.e., it finds that it cannot avoid them by decisions on other than a Constitutional basis, then it should reconsider *Roe*, which is the nexus between the Constitution and the statutes. *Roe v. Wade*, as both the source of both the right and analysis to be employed in constitutional review is clearly implicated for purposes of reconsideration.

B. THE ISSUE OF RECONSIDERATION ITSELF IS NOT ONE WHICH THIS COURT MAY AVOID IF IT CHOOSES TO DECIDE THESE CASES AND ISSUE A WRITTEN OPINION BECAUSE *ROE* AND ITS RIGHT AND ANALYSIS ARE CLEARLY IMPLICATED.

In giving a reasoned, legal justification for any decision reached in these cases, the Court must set forth the proper constitutional analysis to be employed. This requires reconsideration of *Roe v. Wade*. It is inherent in the analysis as discussed at length above.

Moreover, although further "implication" is not required, it is certainly present in these cases. These cases more directly implicate *Roe*, in terms of involving more of its analysis and affecting more periods of pregnancy, than did *Webster*. Unlike *Webster*, which largely involved funding matters (already settled in principle by this Court) and regulation after viability (where compelling state interests exist even under *Roe)*, the cases at bar implicate three key elements of *Roe*, the compelling interests in unborn life and maternal health throughout pregnancy, the right to effectuate the abortion decision, and the right to make the abortion decision in consultation with one's physician. The statutes at issue in these cases, therefore, directly impinge upon the right to abortion created in *Roe* to an even greater extent than in *Webster*.

1. COMPELLING STATE INTERESTS IN MATERNAL HEALTH AND UNBORN LIFE, WHICH UNDERLIE THESE STATUTES, ARE ASSERTED THROUGHOUT PREGNANCY.

Underlying the Minnesota parental notice statute at issue in *Hodgson* are compelling state interests in unborn human life and in protecting traditional family authority and vulnerable minors. Indeed, the Minnesota parental notice statute has had the demonstrated effect of reducing the adolescent abortion rate — dramatically furthering the State's compelling interest in protecting unborn human life.[14] Yet this statute applies throughout pregnancy, not just after viability.

Furthermore, underlying the Illinois clinic statute at issue in *Turnock* are the State's compelling interests in maternal health and in unborn life. These likewise apply throughout pregnancy. The State's compelling in protecting maternal health is the

---

[14] Statistics from the Minnesota Department of Health indicate that in Minnesota during 1975-80, before the parental notice statute went into affect, minors showed the following annual patterns:

1. Pregnancies increased from 4142 to 4360 = an increase of 5%.

2. Births decreased from 2494 to 2033 = a decrease of 19%.

3. Abortions increased from 1648 to 2327 = an increase of 41%.

In the period from 1981-86, following enactment of the statute the following patterns emerged:

1. Pregnancies decreased from 4360 to 3171 = a decrease of 27%.

2. Births decreased from 2033 to 1626 = a decrease of 20%.

3. Abortions decreased from 2327 to 1545 = a decrease of 34%.

Data from Minnesota Department of Health (adjusted for population fluctuation).

There is no evidence that this dramatic drop in the abortion rate resulted from teens leaving the state to obtain abortions. Blum, Resnick & Stark, *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*, 77 AJPH 619, 620 (1987).

principle justification of this regulatory scheme. The State's interest in protecting unborn life, however, is also advanced by the provision requiring counseling concerning alternatives to abortion. Ill. Rev. Stat. ch. 111 1/2, para. 205.730(b)(3). This counseling is intended, in part, and has the effect, to cause women to more seriously consider alternatives to abortion, thereby decreasing the number of abortions. Unborn lives are thereby saved.

Thus, for purposes of reconsideration, the holdings of *Roe* that the state's compelling interests in maternal health only arise after the first trimester and in unborn life after viability are squarely contradicted. In contrast, *Webster* involved only the State's compelling interest in unborn life after viability.

2. THE RIGHT TO EFFECTUATE THE ABORTION DECISION IS IMPLICATED.

The right to effectuate the abortion decision is also guaranteed by the decisions of this Court. *Roe*, 410 U.S. at 163. Under the Illinois statute at issue in *Turnock*, first trimester abortion clinics are thoroughly regulated. This again implicates a key holding of *Roe* that regulation of the abortion decision and its effectuation must be left to the woman and her physician in the first trimester. After that, regulation is only permitted for protection of the woman's health. In this case, it is asserted that such regulations are not indicated for the protection of maternal health, and, in any event, these regulations extend into the forbidden zone of the first trimester. For purposes of reconsideration, *Roe* is sufficiently implicated.

3. THE RIGHT TO CONSULT ONE'S PHYSICIAN IN MAKING THE ABORTION DECISION IS FORBIDDEN.

Finally, a direct and absolute bar to one of *Roe's* key elements is present in the Illinois provision (at issue in *Turnock*) which prevents anyone with a monetary interest in the performance of the abortion decision from counseling a woman concerning her abortion decision. Ill. Rev. Stat. ch. 111 1/2, para.

205.730(b)(2)(D). As interpreted by the lower courts, this provision directly conflicts with *Roe*'s provision that a woman is free to make her abortion decision "in consultation with her physician," *Roe*, 410 U.S. at 163, because it forbids this consultation. A key holding of *Roe* is therefore implicated, which justifies reconsideration of that case.

In sum, this Court ought to reconsider *Roe v. Wade* if it decides any constitutional issue in this case; because establishing the standard of review and confirming the right under which the case is brought are essential to the analysis of constitutionality; because explication of the standard of review is necessary to providing a reasoned, legal justification for the judgment; and because key aspects of *Roe* are implicated by the statutes themselves.

CONCLUSION

For the reasons given herein, this Court should reconsider *Roe v. Wade* in its consideration of the cases at bar. Upon reconsideration, this Court should determine that the doctrine of stare decisis does not preclude the reversal of *Roe v. Wade*,[15] *that, under the correct test for fundamentality,*[16] *there is no fundamental right to abortion in the history and tradition of our nation,*[17] *and that, therefore, Roe v. Wade* should be reversed.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
BRAMES, McCORMICK, BOPP & ABEL
191 Harding Avenue
Post Office Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amicus Curiae

August 31, 1989

---

[15] *See* Brief Amici Curiae of the Hon. Christopher H. Smith, Alan B. Mollohan, Vin Weber, Robert K. Dornan, Earl Hutto, John La Falce, Virginia Smith, Bill Emerson, Henry H. Hyde, and Gordon J. Humphrey, Members of the Congress of United States, in Support of Appellants in *Turnock* and Cross-Petitioners in *Hodgson*.

[16] *See* Brief Amicus Curiae of Free Speech Advocates in Support of Appellants in *Turnock v. Ragsdale*.

[17] *See* Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Appellants in *Turnock* and in Support of Cross-Petitioners in *Hodgson*.

Nos. 88-805, 88-1125 and 88-1309

Supreme Court, U.S.
FILED
SEP 1- 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

JANET HODGSON, MD., *et al.*,

Petitioners and *Cross Respondents,*

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents and *Cross Petitioners.*

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS IN NOS. 88-1125, 88-1309 AND IN SUPPORT OF APPELLEES IN NO. 88-805

MARK D. SCHNEIDER
1300 Connecticut Ave., N.W.
Room 810
Washington, D.C. 20036
(202) 857-5250

DONALD N. BERSOFF
(Counsel of Record)
SUSAN R. PODOLSKY
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Attorneys for Amici Curiae

September 1, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
INTRODUCTION	4
ARGUMENT	7
I. COMPELLING DISCLOSURE TO HER PARENTS OF A MINOR'S PREGNANCY AND DECISION TO HAVE AN ABORTION IMPOSES A SUBSTANTIAL BURDEN ON THE MINOR'S RIGHT TO CHOOSE	7
A. Parental Notice Provisions Most Directly Affect Those Adolescents Who—For A Variety Of Compelling Reasons—Believe They Cannot Consult With Their Parents About The Abortion Decision, And Unduly Burden Their Right To Obtain An Abortion	7
B. Mandatory Parental Notification Harms Some Adolescents Who Otherwise Would Not Involve Their Parents In The Abortion Decision	9
C. Minnesota's Two-Parent Notification Requirement Places Extraordinary Burdens On Many Adolescents	12
D. An "Arbitrary And Inflexible" Waiting Period—Whether 24 Or 48 Hours—Places Greater Burdens On Adolescents Than It Does On Adults	14
II. THE SUBSTANTIAL BURDENS IMPOSED BY COMPELLED NOTIFICATION AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL	15

TABLE OF CONTENTS—Continued

Page

A. The Evidence Suggests That Mandatory Parental Notification Statutes Do Not Foster Productive Intrafamily Communication 16

B. There Is No Empirical Support For The Proposition That Compelled Parental Disclosure Will Help Ensure That The Minor's Decision To Obtain An Abortion Is A Capable One 17

1. Psychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about life situations.. 18

2. Research does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion 21

C. There Is No Empirical Support For The Proposition That Mandatory Parental Disclosure Will Assist Minors In Dealing With The Psychological Sequelae Of Abortion 26

1. Adolescents who choose to abort are not less stable psychologically than other adolescents 26

2. Much of the stress pregnant adolescents experience is due to unwanted pregnancy, not to abortion 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Bellotti v. Baird, 443 U.S. 622 (1979) 5, 6, 16, 18
Carey v. Population Services Int'l, 431 U.S. 678 (1977) 16
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) 4, 6, 15
Doe v. Bolton, 410 U.S. 179 (1973) 4
Fare v. Michael C., 442 U.S. 707 (1979) 5
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 5
H.L. v. Matheson, 450 U.S. 398 (1981) 6, 16, 27
Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986) ..... *passim*
Indiana Planned Parenthood v. Pearson, 716 F.2d 1127 (7th Cir. 1983) 15
Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) 6
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) 4, 6, 17, 23
Roe v. Wade, 410 U.S. 113 (1973) 16
Stanford v. Kentucky, 109 S. Ct. 2969 (1989) 5
Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 16

STATUTORY AND REGULATORY PROVISIONS:

45 C.F.R. Part 46 17
Minnesota Statutes § 144.343 (1)-(7) 4
Ohio Amended Substitute House Bill 319 4
Ohio Rev. Code Ann. § 2151.85 4
Ohio Rev. Code Ann. § 2919.12 4
Ohio Rev. Code Ann. § 2505.073 4

MISCELLANEOUS:

Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) 28
Alan Guttmacher Institute, *School Sex Education in Policy and Practice*, 3 Issues in Brief 1 (1983) 17

TABLE OF AUTHORITIES—Continued

Page

Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) 21, 23

Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper presented at American Psychological Association Convention) 23

APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987) 22, 25

Ashton, *Pattern of Discussion and Decision-Making Amongst Abortion Patients*, 12 Journal of Biosocial Sci. 247 (1980) 25

Belter & Grisso, *Children's Recognition of Rights Violations in Counseling*, 15 Prof. Psychology 899 (1984) 21, 24

Bennett & Dickinson, *Student-parent Involvement in sex, birth control and venereal disease education*, 16 J. Sex Research 114 (1980) 26

Bersoff, *Children as Research Subjects: Problems of Competency and Consent in* THE RIGHTS OF CHILDREN 186 (J. Henning ed. 1982) 17

Bracken, Hackamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 15 J. Nervous and Mental Disorders 155 (1974) 28

Braine & Rumain, Logical Reasoning in HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 263 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983) 19

Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am. Soc. Rev. 385 (1963) 8, 20

Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986) 8

TABLE OF AUTHORITIES—Continued

Page

Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18 (1980) 28

C. CHILMAN (ed.), ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY (NIH Pub. No. 79-1426) (1978) 28

Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283 (1982) 7, 10

Conger, *A World They Never Knew: The Family and Social Change in* TWELVE TO SIXTEEN 197 J. Kagan & R. Coles eds. 1972) 20

D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983) .. 17

David, Rasmussen & Holst, *Postpartum and Post-abortion Psychotic Reactions*, 13 Fam. Plan. Persp. 88 (1981) 28

DEPT. OF CORRECTIONS, MINNESOTA PROGRAMS FOR BATTERED WOMEN (January 1985) 14

Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-authorized Abortions*, 15 Fam. Plan. Persp. 259 (1983) 8, 24

Dubbe, *What Parents Are Not Told May Hurt: A Study of Communication Between Teenagers and Parents*, 14 Fam. Life Coordinator 96 (1965) 11

Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. Soc. Issues 114 (1978) 22

D. FINKELHOR & ASSOC., A SOURCEBOOK ON CHILD SEXUAL ABUSE (1986) 10

Fox & Inazu, *Mother-Daughter Communication About Sex*, 29 Fam. Rel. 347 (1980) 11

Furstenberg & Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. Marriage and Fam. 893 (1985) 13

Furstenberg, Nord, Peterson and Zill, *The Life Course of Children of Divorce*, 48 Am. Sociological Rev. 656 (1983) 13

TABLE OF AUTHORITIES—Continued

Page

Gelles, *Violence and Pregnancy: A Note On The Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975) 10

Gelles & Straus, *Behind Closed Doors—Violence in the American Family*, 35(2) J. Soc. Issues 15 (1979) 10, 14

Greenberg, An Empirical Determination Of The Competence Of Children To Participate In Child Custody Decision-Making (1983) (Dissertation Abstracts Int'l) 20

Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134 (1980) 21, 24

Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 Prof. Psychology 412 (1978) 22

Grodin & Alpert, *Informed Consent and Pediatric Care in* CHILDREN'S COMPETENCE TO CONSENT 93 (G. Melton, G. Koocher & M. Saks eds. 1983) 22

Harter, *Developmental Perspectives On the Self System in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME IV: SOCIALIZATION, PERSONALITY & SOCIAL DEVELOPMENT 275 (Heatherington ed. 1983) 20

Hofferth, *Updating Children's Life Course*, 47 J. Marriage and Fam. 93 (1985) 13

B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1958) 19

Kohlberg, *Moral Stages and Moralization: The Cognitive-Developmental Approach in* MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (Lickona ed. 1976) .. 19

Kohlberg & Hersch, *Moral Development: A Review of the Theory*, 16 Theory into Practice 53 (1977) 19

Laufer & Wolfe, *Privacy as a Concept and a Social Issue*, 33(3) J. Soc. Issues 22 (1977) 11

TABLE OF AUTHORITIES—Continued

Page

Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980) 21, 22

Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987) 24

Marecek, *Consequences of Adolescent Childbearing and Abortion in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96 (G. Melton ed. 1986) 27, 29

Marecek, *Counseling Adolescents with Problem Pregnancies*, 42 Am. Psychologist 89 (1987) 26

Marsh, Serafica & Barenboim, *Effect of Perspective-taking Training on Interpersonal Problem Solving*, 51 Child Development 140 (1980) 19

Marsh, Serafica & Barenboim, *Interrelationships Among Perspective Taking, Interpersonal Problem Solving, and Interpersonal Functioning*, 138 J. Genetic Psychology 37 (1981) 20

Marsman & Herold, *Attitudes Toward Sex Education and Values in Sex Education*, 35 Fam. Relations 357 (1986) 26

Melton, *Decision Making by Children: Psychological Risks and Benefits in* CHILDREN'S COMPETENCE TO CONSENT 21 (G. Melton, G. Koocher & M. Saks eds. 1983) 11

Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. Fam. L. 445 (1984) .. 22

Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79 (1987) 24

Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?* 62 Neb. L. Rev. 455 (1983) 25

Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 1 (G. Melton ed. 1986) 21, 24

TABLE OF AUTHORITIES—Continued

Page

Mnookin, Bellotti v. Baird: *A Hard Case in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149 (R. Mnookin ed. 1985) 7, 24

Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477 (1986) 29

Montemayor and Leigh, *Parent-Absent Children: A Demographic Analysis of Children and Adolescents Living Apart from their Parents*, 31 Fam. Relations 567 (1982) 13

Moore, Nord & Peterson, *Nonvoluntary Sexual Activity Among Adolescents*, 21 Fam. Plan. Persp. 110 (1989) 10

J. MORRISSEY, A. HOFFMAN, and J. THROPE, CONSENT AND CONFIDENTIALITY IN THE HEALTH CARE OF CHILDREN AND ADOLESCENTS (1986) ..6, 12, 21

NATIONAL ACADEMY OF SCIENCES, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 113 (1987) 7, 15, 17, 24, 28, 29

NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T HEALTH AND HUMAN SERVICES, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 (1989) 10

Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 Am. J. Orthopsychiatry 432 (1980) 27, 28

Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clinical Obstetrics & Gynecology 1161 (1978) 9

Parke & Swain, *Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants*, 11 Env't & Behav. 87 (1979) 11

Rauh, Johnson & Burket, *The Reproductive Adolescent*, 20 Pediatric Clinics of North America 1005 (1973) 26

Rest, *Morality in* HANDBOOK OF CHILD PYSCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 556 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983) 19

TABLE OF AUTHORITIES—Continued

Page

Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?* 15 Adolescence 44 (1980) 7, 8

Roth, Meisel, & Lidz, *Tests of Competence to Consent to Treatment*, 135 Am. J. Psychiatry 279 (1977) 22

Rothenberg, *Communication About Sex and Birth Control Between Mothers and Their Adolescent Children*, 3 Population and Env't. 35 (1980) 25

Rozema, *Defensive Communication Climate as a Barrier to Sex Education in the Home*, 35 Fam. Relations 533 (1986) 14, 26

Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children in* HANDBOOK ON SEXUAL ABUSE OF CHILDREN 19 (L. Walker ed. 1987) 10

Russo, *Adolescent Abortion: The Epidemiological Context in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 40 (G. Melton ed. 1986) 15, 27

Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. Am. Acad. Child Psychiatry 505 (1978) 22

R. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL STUDIES (1980) 19

Seltzer & Bianchi, *Children's Contact with Absent Parents*, 50 J. Marriage and Fam. 663 (1988) 13

Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976) 28, 29

Sternberg & Powell, *The Development of Intelligence in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 341 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983) 19

Tapp & Kohlberg, *Developing Senses of Law and Legal Justice in* LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 89 (J. Tapp & F. Levine, eds. 1977) 19

TABLE OF AUTHORITIES—Continued

Page

Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980) 7, 8

U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, CHILD SUPPORT AND ALIMONY: 1985 (Series P-23, No. 154, 1989) 13

Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G. Melton, G. Koocher & M. Saks ed. 1983) 18, 23

Wadlington, *Minors and Health Care: The Age of Consent*, 11 Osgoode Hall L.J. (1973) 6

Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. Davis L. Rev. 255 (1979) 22

Weithorn, *Children's Capacities in Legal Contexts in* CHILDREN, MENTAL HEALTH, AND THE LAW 25 (N. Reppucci & Assoc. eds. 1984) 21

Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions in* LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (G. Melton ed. 1982) 22

Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child. Dev. 1589 (1982) 17, 21, 24

Wolfe, *Childhood and Privacy in* CHILDREN AND ENV'T. 175 (I. Altman & J. Wohlwill eds. 1978) .. 11

Zabin & Hirsch, Effects of Abortion and Childbearing on Education and the Psychological Status of Black Urban Adolescents (1988) (Paper presented at Annual Meeting of American Public Health Association) 25

BRIEF FOR *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONERS/CROSS-RESPONDENTS IN NOS. 88-1125, 88-1309 AND IN SUPPORT OF APPELLEES IN NO. 88-805

INTEREST OF *AMICI CURIAE*[1]

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 75,000 members, including the vast majority of United States psychologists holding doctoral degrees. APA's purposes are to advance psychology as a science and profession, and to promote human welfare.

The National Association of Social Workers, Inc. (NASW), a non-profit professional association with over 120,000 members, is the largest association of social workers in the United States. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skills.

The American Jewish Committee (AJC) is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jews. The AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans, including access to abortion on a voluntary basis.

The parental notice and waiting period requirements at issue in these cases are premised upon the States' as-

---

[1] The parties have consented to the submission of this brief. Their letters of consent are on file with the Clerk of this Court.

sumptions that, in relevant ways, minors are more psychologically vulnerable than adults, that they are immature and unable to make competent choices concerning abortion, and that such requirements will foster intrafamily communication and cooperation while not harming the adolescents affected. The validity of these legislative assumptions has been tested through empirical research conducted by social scientists. Social science research is also relevant to the arguments of the professionals, pregnant minors, and parents who challenge these requirements that the laws unduly burden minors' rights to choose whether to carry a pregnancy to term or abort. Much of the relevant research has been conducted by members of *amicus* APA; that research is presented in this brief.[2]

SUMMARY OF ARGUMENT

Most younger adolescents and many older adolescents voluntarily inform one or both parents about their pregnancies, and seek their counsel about the abortion decision. Where such consultation is voluntarily sought, adolescents are often benefitted. Mandatory parental notification laws have no effect on this group of pregnant minors, however; only those minors who otherwise would *not* involve their parents in the abortion decision are directly affected by these laws.

The empirical research suggests that such adolescents typically have good reasons not to involve their parents in the abortion decision. They may fear a hostile, even violent, reaction to the news that they have been sexually active and are now pregnant. In many cases, they may be from dysfunctional families in which one or both parents

[2] Counsel gratefully acknowledge the assistance of APA members Bruce Ambuel, Ph.D., William Gardner, Ph.D., Julian Rappaport, Ph.D., and Lenore Walker, Ed.D., and APA staff members Brian Wilcox, Ph.D., and Janet O'Keeffe, Dr. P.H., in the preparation of this brief.

may be absent, or in which child abuse, including sexual abuse, has taken place. For such reasons, or simply wishing to protect their own informational privacy—an appropriate concern for adolescent females—pregnant minors in a State with a parental notification law may delay making the abortion decision, increasing the risk to their health of undergoing the procedure or leading to *de facto* decisions to carry to term. Point I.

Mandatory parental notification may actually undermine the very state interests it is meant to advance. In those families in which the minor daughter has chosen not to inform her parents, state-mandated notification is unlikely to produce greater intrafamily understanding or communication, and may well precipitate a family crisis or exacerbate existing family problems. Moreover, there are no data to suggest that adolescents are less capable than adults of making the abortion decision on their own. Furthermore, abortion itself, as a rule, relieves the stress associated with unwanted pregnancy rather than generates distress a parent (particularly one a minor would prefer to exclude from the process) could ameliorate. Point II.

Even with a bypass procedure, which in virtually every case results in affirmation of the minor's abortion decision but which itself deters some adolescents from seeking an abortion, parental notification laws unduly burden an adolescent's right to choose. *Without* a bypass procedure, the majority of pregnant adolescents who are competent to choose for themselves, and the significant number who would be placed at increased risk by notifying one or both parents, are faced with an intolerable choice: foregoing their right to abortion and becoming adolescent parents, on the one hand, or risking their physical or psychological health by complying with the notification statute, on the other. For these reasons, the Ohio and Minnesota statutes are both unconstitutional.

INTRODUCTION

These cases concern the constitutionality of Minnesota Statutes § 144.343 (1)-(7) ("the Minnesota statute") and Ohio Amended Substitute House Bill 319 ("the Ohio statute").[3] With certain exceptions, both statutory schemes prohibit a physician from performing an abortion upon a minor unless notice has been provided to the minor's parents. The Minnesota statute requires that the minor notify *both* parents 48 hours in advance of the procedure (whether or not her parents are living together or are or ever were married); unless judicially mandated, the scheme does *not* provide a judicial bypass through which mature minors or minors whose best interests would not be served by notification may be relieved of this obligation.[4] The Ohio statute requires notification of one parent, and establishes a bypass procedure that has been found unduly burdensome by the lower courts.

With or without a judicial bypass procedure, government certainly could not compel an *adult* to notify her parents or other third parties 24 or 48 hours before undergoing an abortion, because the burdens thereby imposed on the right to choose whether to abort or carry to term would not be justified by sufficiently weighty countervailing state interests. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67-72 (1976) (*Danforth*) (spousal veto of abortion decision ruled unconstitutional); *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (third party veto of abortion decision ruled unconstitutional); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 449-450 (1983) (*Akron I*) (24-hour waiting period unconstitutional). The validity of imposing such burdens on adolescents depends

[3] The key provisions of the Ohio statute are codified at Ohio Rev. Code Ann. §§ 2151, 2912.12, and 2505.073 (Page Supp. 1985).

[4] In the event a court invalidates the no-bypass provision, the statute provides that a bypass procedure will go into effect. This "backstop" provision was in effect for several years prior to the district court's final ruling.

upon whether doing so furthers state interests sufficiently to alter the balance.

This Court has recognized that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement." *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (*Bellotti II*). Thus, although it has asserted that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them," *id.* at 635, the Court has been careful to reject a State's *per se* claim that *all* adolescents are incompetent and immature. Both in the abortion context and in other cases dealing with minors, the Court has taken a more individualized approach in assessing the competency and maturity of minors to make important decisions.[5]

Specifically, this Court has never suggested that all adolescents are incompetent to decide whether to have an abortion. To the contrary, the Court has recognized that

[5] Outside the abortion context, see *Fare v. Michael C.*, 442 U.S. 707, 727 (1979) (Court applied such factors as adolescent's age, experience, education, background, and intelligence, in concluding that a 16-year old "voluntarily and knowingly waived his Fifth Amendment rights."); *id.* at 734 n.4 (Powell, J., dissenting) (recognizing that each case must be judged on its own merits, including an evaluation of the "minor's age" and "actual maturity."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982) (it violated first amendment to statutorily exclude press and public from courtroom during testimony of all victims of sexual offenses under age 18; the Court opted for case-by-case determination, including an analysis of the "minor victim's age, psychological maturity and understanding, [and] the desires of the victim."); *cf. Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (permissible for State to execute 16-year-old in cases in which adolescent has a developed moral sense).

the legal status of "minority" encompasses wide ranges of age and maturity levels. *See Danforth*, 428 U.S. at 75. It is only "immature minors" whom the Court perceives as sometimes lacking "the ability to make fully informed choices." *Bellotti II*, 443 U.S. at 640.[6] Thus, a mature minor's decision to have an abortion may not be made subject to her parent's veto. *Akron I*, 462 U.S. at 440; *Bellotti II*, 443 U.S. at 642-643; *Danforth*, 428 U.S. at 74-75. Indeed, the Court has held that "a blanket determination that all minors under the age of 15 are too immature" to make a decision related to procreation is unconstitutional. *Akron I*, 462 U.S. at 440.

The constitutionally recognized difference between immature and mature minors, *see Bellotti II*, 443 U.S. at 643-644 and n.23, is relevant in evaluating the relative benefits and burdens of a statute that requires all adolescents to consult with their parents before obtaining an abortion.[7] As discussed below, *see* Point II, *infra*, there is no empirical evidence to suggest that adolescents by about age 14 are less competent to consent to abortion than adults, or that at least some younger adolescents do not possess similar competence.[8]

---

[6] *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-491 (1983) (the State's interest is limited to "protecting immature minors").

[7] In related contexts, the "mature minor" doctrine permits a child to consent to medical treatment if he or she is capable of appreciating its nature and consequences. *See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115, 117-120 (1973); *see also H.L. v. Matheson*, 450 U.S. 398, 450 n.49, 453 (1981) (Marshall, J., dissenting), and cases cited therein.

[8] Indeed, it is difficult to reconcile the idea that minors are less competent than adults to consent to abortion with the fact that state law typically allows a minor parent—whatever her age—to consent not only to the health care of her child, but to her own health care as well, including abortion. *See* J. MORRISSEY, A. HOFFMAN, and J. THROPE, CONSENT AND CONFIDENTIALITY IN THE

ARGUMENT

I. COMPELLING DISCLOSURE TO HER PARENTS OF A MINOR'S PREGNANCY AND DECISION TO HAVE AN ABORTION IMPOSES A SUBSTANTIAL BURDEN ON THE MINOR'S RIGHT TO CHOOSE.

A. Parental Notice Provisions Most Directly Affect Those Adolescents Who—For A Variety Of Compelling Reasons—Believe They Cannot Consult With Their Parents About The Abortion Decision, And Unduly Burden Their Right To Obtain An Abortion.

Most adolescents, and younger adolescents in particular, can profit from *sympathetic* guidance from a parent or other adult concerning important choices, such as decisions concerning pregnancy. Research demonstrates that most minors—especially young adolescents aged 11-14—generally do consult their parents about their pregnancies, regardless of legal mandates.

Thus, one study found that approximately three-fourths of minors aged 15 or younger voluntarily informed their parents before they obtained an abortion,[9] and 25% of this group reported that their parents suggested the abortion.[10] In States requiring that minors either inform parents or obtain their consent prior to obtaining an abor-

---

HEALTH CARE OF CHILDREN AND ADOLESCENTS 43 (1986) [hereinafter MORRISSEY, HOFFMAN and THROPE].

[9] Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 287-290 (1980) [hereinafter *Telling Parents*]. *See generally* Mnookin, Bellotti v. Baird: *A Hard Case in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 149, 240-241 (R. Mnookin ed. 1985) [hereinafter Mnookin]; Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982) [hereinafter *Clary*]; Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?* 15 Adolescence 44 (1980) [hereinafter Rosen].

[10] *Telling Parents, supra* note 9, at 290; NATIONAL ACADEMY OF SCIENCES, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREG-

tion, young adolescents rarely use judicial bypass procedures.[11] Older adolescents who are unusually ambivalent about the abortion decision and who perceive themselves as relatively incompetent decisionmakers also are likely to voluntarily involve their parents in the decision.[12] In general, however, older adolescents fully competent to decide medical questions for themselves do not consult their parents about abortion as frequently as do young adolescents.[13]

Parental notice laws result in later, more hazardous, and more expensive abortions, and in minors carrying to term. In Minnesota, the district court found that the burdens of parental notification—even with bypass procedures available—cause "[s]ome mature minors and some minors in whose best interests it is to proceed without notifying their parents . . .to carry to term." *Hodgson v. Minnesota*, 648 F. Supp. 756, 763 (D. Minn. 1986). In Massachusetts, a smaller jurisdiction where it is less difficult to travel out-of-State to obtain an abortion, mandatory parental notification did not change the number of women who became pregnant, gave birth, or obtained abortions.[14] But the law did force approximately one-

---

NANCY, AND CHILDBEARING 113 (1987) [hereinafter NAS REPORT]. Only 8% of 17-year-olds who obtain abortions report that they did so at their parents' suggestion. *Telling Parents, supra* note 9, at 290.

[11] Nearly 90% of minors who use judicial bypass procedures are aged 16-17. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-authorized Abortions*, 15 Fam. Plan. Persp. 259, 261 (1983) [hereinafter *Judging Teenagers*].

[12] *Rosen, supra* note 9, at 48.

[13] In a large, multi-state study, the proportion of minors who decided, without parental consultation, to carry to term was similar to the proportion who decided to seek an abortion without parental consultation. *Rosen, supra* note 9, at 46. *See, e.g.*, Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 Am. Soc. Rev. 385 (1963) [hereinafter Brittain].

[14] *See* Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986).

third of the minors in the State seeking an abortion to leave the State and obtain the abortion in a jurisdiction without a parental consent statute. *Id.* [15]

Thus, mandatory parental notification creates substantial obstacles for many adolescents choosing to abort their pregnancies: they may have fewer, later, or more expensive abortions because they wish to avoid notifying one or both of their parents.

B. Mandatory Parental Notification Harms Some Adolescents Who Otherwise Would Not Involve Their Parents In The Abortion Decision.

Both courts and social scientists have identified the reasons mandatory notification has these deleterious effects. On the basis of a detailed record, the *Hodgson* court found that after five years of operation the compelled notice required by the Minnesota statute almost always had a negative impact, frequently harming the child's welfare. 648 F. Supp. at 764, 768-769. The court found as a matter of fact that compelled two-parent notification in families with a non-custodial or absent parent was typically disruptive, and led to violence and abuse in dysfunctional families. *Id.* at 769.[16]

Data support the district court's findings. One study of parental reaction to adolescent daughters' pregnancies showed that such an announcement typically evoked an initial response of anger and disappointment, and triggered a crisis in the family.[17] And anger is not the only response an adolescent need fear. A major government study has estimated that in 1986, more than one million

---

[15] Approximately twice as many women chose to leave the State to obtain their abortions as chose to utilize the judicial bypass. *Id.* at 398, 399.

[16] Appendix to Petition for a Writ of Certiorari in *Hodgson v. Minnesota*, No. 88-1125, filed January 4, 1989 at 141a (testimony of Dr. Lenore Walker).

[17] *See, e.g.*, Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clinical Obstetrics & Gynecology 1161 (1978).

children and adolescents nationwide had already experienced demonstrable harm as a result of abuse or neglect.[18]

In light of the relatively widespread nature of intrafamily abuse, it is not surprising that in about one-third of cases in which adolescents do not inform their parents about their pregnancy and planned abortion, they are motivated by fear of physical punishment or some other severe reaction.[19] Research on domestic violence has demonstrated that pregnancy does not deter and may even precipitate physical attacks by batterers.[20] Adolescents may particularly fear telling their parents about a pregnancy if it is the result of sexual abuse. Research indicates that such abuse—both extrafamilial and intrafamiliai—is disturbingly common.[21] Compelling parental in-

---

[18] NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T HEALTH AND HUMAN SERVICES, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 at xx (1989) [hereinafter HHS STUDY]. This figure is considered to be a minimum estimate because the incidence of abuse is substantially underreported. *Id.* at 7-2. *See generally* Gelles & Strauss, *Behind Closed Doors—Violence in the American Family*, 35(2) J. Soc. Issues 15, 24 (1979) [hereinafter Gelles & Strauss].

[19] Clary, *supra* note 9, at 284. Even if an adolescent misjudged her parents' response, the perception may be more important than the reality in causing adolescents to delay seeking medical assistance or making a decision whether to abort.

[20] Gelles, *Violence and Pregnancy: A Note On The Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975).

[21] *See generally* D. FINKELHOR & ASSOC., A SOURCEBOOK ON CHILD SEXUAL ABUSE (1986); HHS STUDY, *supra* note 18, at xx-xxi. *See also* Moore, Nord & Peterson, *Nonvoluntary Sexual Activity Among Adolescents*, 21 Fam. Plan. Persp. 110, 111 (1989) (data from the 1987 National Survey of Children indicate that 9 percent of 17-year olds, 7.5 percent of 16-year olds, 6.3 percent of 15-year olds and 5.8 percent of girls 14 and under have experienced nonvoluntary sexual intercourse; adolescent girls with parents who abuse alcohol and drugs were two to three times more likely to have experienced nonvoluntary sexual intercourse; sixty-eight percent of white females with three or more risk factors had been sexually abused before or during adolescence); Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children in* HANDBOOK ON SEXUAL ABUSE OF CHILDREN 19, 25 (L. Walker, ed. 1987) (research on a probability sample of 930 women found that 16 percent reported at least one experience of intrafamilial sexual abuse before the age of 18 and 12 percent had been sexually abused by a relative before 14 years of age; 31 percent reported at least one experience of sexual abuse by a non-relative before the age of 18).

volvement in such instances, particularly if the pregnancy is the result of incest, is likely to intensify or exacerbate an already traumatic and emotionally volatile situation.

Moreover, in many cases involving older adolescents, compelled disclosure will burden a young woman's interest in informational privacy.[22] The protection of privacy and the maintenance of control over personal information in sexual matters is an especially vital concern of adolescent females.[23] As the *Hodgson* district court found, based upon presentation of empirical research and clinical experience, assertion of privacy is a mark of maturity and psychological adaptation among adolescents. *Hodgson v. Minnesota*, 648 F.Supp. at 767, 775. Depriving an adolescent female of autonomy in making the abortion decision often imposes far more stress on her than does making the decision itself or undergoing the medical procedure. *Id.* at 763-764.

---

[22] This interest is partially responsible for the rarity of parent-daughter discussions about sexual matters. Adolescents' discomfort in initiating or participating in such discussions, *see* Dubbe, *What Parents Are Not Told May Hurt: A Study Of Communication Between Teenagers And Parents*, 14 Fam. Life Coordinator 96, 97, 98 (1965); *see generally* Fox & Inazu, *Mother-Daughter Communication About Sex*, 29 Fam. Rel. 347 (1980), reflects, in part, a developmentally appropriate concern with privacy.

[23] *See* Melton, *Decision Making by Children: Psychological Risks and Benefits in* CHILDREN'S COMPETENCE TO CONSENT 21 (G. Melton, G. Koocher & M. Saks eds. 1983); Parke & Swain, *Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants*, 11 ENV'T & BEHAV. 87 (1979); Wolfe, *Childhood and Privacy in* CHILDREN AND ENV'T 175 (I. Altman & J. Wohlwill eds. 1978); Laufer & Wolfe, *Privacy as a Concept and a Social Issue*, 33(3) J. Soc. Issues 22 (1977).

Many States recognize the need to respect minors' privacy—and their competence—in making sensitive and important decisions concerning their health and future. Most States presume a minor competent to consent without parental notification to treatment for sexually transmitted diseases, mental health treatment, and medical treatment related to pregnancy, and recognize the crucial role confidentiality plays in permitting minors to obtain access to vitally necessary health services.[24] Minnesota singles out abortion as requiring parental notification. Minn. Stat. § 144.343(1). Additionally, States typically allow minors, whatever their age, to consent to their own health care once they become parents.[25]

Thus, parental consent laws risk causing harm to many of the adolescents they are intended to protect. For a variety of legitimate reasons—fear of domestic physical or psychological violence or appropriate concern for personal privacy—many adolescents will delay or avoid their decision to abort or carry to term, or go out of State to obtain the abortion if feasible, rather than comply with the notification requirement.

C. Minnesota's Two-Parent Notification Requirement Places Extraordinary Burdens On Many Adolescents.

Minnesota's requirement that *both* parents be notified is directed at those adolescents who would voluntarily consult one parent, but would not voluntarily speak with both parents before obtaining an abortion.[26] It imposes often insurmountable barriers. Due to high levels of marital dissolution and the high incidence of out-of-wedlock childbearing, the great majority of adolescents have lived at least for a time in single parent families. It is estimated

[24] *See generally* MORRISSEY, HOFFMAN & THROPE, *supra* note 8.

[25] *Id.* at 43.

[26] In many cases, *two* parent notification may override the judgment, not only of the adolescent, but of one of her parents, that one parent should not be notified.

that by age 17, 70 percent of white children born in 1980 will have spent at least some time with only one parent, and 94 percent of black children will have lived in one-parent homes.[27] Moreover, data obtained from the 1981 Current Population Report indicated that in 1980, 2.3 million or 3.7 percent of all unmarried noninstitutionalized children under the age of 18 were not living with either of their parents.[28]

Data from a nationally representative sample of children aged 11-16 indicates that when an adolescent lives apart from one of her parents, she frequently has little contact with the absent parent.[29] Over one-third of the children living with their mothers in one-parent homes have had no contact at all with their absent father during the previous five years, or are unaware if their father is alive or dead.[30] Over half have had no contact in the previous year.[31] And the little contact that occurs tends to be purely social, not involving counseling about life decisions.[32] "Coparenting among formerly married couples is more of a myth than a reality in all but a tiny fraction of families. [Nonresident parents] typically give up decision-making authority and exercise little direct in-

[27] Hofferth, *Updating Children's Life Course*, 47 J. Marriage and Fam. 93, 93 (1985).

[28] Montemayor and Leigh, *Parent-Absent Children: A Demographic Analysis of Children and Adolescents Living Apart from their Parents*, 31 Fam. Relations 567, 567 (1982).

[29] Furstenberg, Nord, Peterson and Zill, *The Life Course of Children of Divorce*, 48 Am. Sociological Rev. 656, 663 (1983).

[30] *Id.*

[31] *Id. See also* Seltzer & Bianchi, *Children's Contact with Absent Parents*, 50 J. Marriage and Fam. 663 (1988).

[32] Furstenberg & Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. Marriage and Fam. 893, 902 (1985) [hereinafter Furstenberg & Nord]. Lack of involvement by the non-custodial parent is also evidenced by the small proportion of absent fathers who contribute to their children's support. *See* U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, CHILD SUPPORT AND ALIMONY: 1985 (Series P-23, No. 154, 1989) at 1.

fluence over their children's upbringing." [33] Thus, in many instances, mandating parental disclosure would force the involvement of a disinterested parent in potentially disruptive ways. Most troubling is the potential for serious harm to both the mother and the adolescent if an absent father with a history of abusive behavior is notified.[34] In such families, mandatory two-parent notification may be particularly damaging.

Moreover, even in two-parent homes, it is very common for fathers to be completely uninvolved in providing information or giving advice about sexual matters to their daughters. Research has shown that the limited sex education that occurs in the home is usually done by the mother.[35] Moreover, the district court in *Hodgson* found that in many cases compelled two-parent notification had inhibited rather than advanced voluntarily initiated intrafamily communication. 648 F. Supp. at 777-778.[36] Thus, there is no reason to believe that requiring adolescents who would not otherwise do so to speak with their fathers about their abortion decision would promote any kind of beneficial family interaction, and reason in many cases to fear that harm may ensue.

D. An "Arbitrary And Inflexible" Waiting Period—Whether 24 Or 48 Hours—Places Greater Burdens On Adolescents Than It Does On Adults.

The 24-hour and 48-hour waiting periods here at issue impose even greater burdens on adolescents' right to ob-

---

[33] Furstenberg & Nord, *supra* note 32, at 903.

[34] Domestic violence—both wife battering and child abuse—is not uncommon in American homes. Gelles & Strauss, *supra* note 18. In Minnesota alone, there are an average of 31,200 assaults on women by their partners each year. DEPT. OF CORRECTIONS, MINNESOTA PROGRAMS FOR BATTERED WOMEN (January 1985).

[35] Rozema, *Defensive Communication Climate as a Barrier to Sex Education in the Home*, 35 Fam. Relations 533 (1986).

[36] The court found that some adolescents were dissuaded from contacting one parent because only the consent of both parents would eliminate the need for judicial proceedings.

tain an abortion than do similar provisions this Court has struck down as applied to all women. In *Akron I*, this Court concluded that the State "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible [24-hour] waiting period," and held that such a waiting period was unconstitutional. 462 U.S. at 450. The Court noted that the waiting period increased the cost and risk of obtaining an abortion, *inter alia*, because scheduling difficulties effectively delayed the planned abortion more than 24 hours. *Id.*

Such burdens on the right to obtain an abortion are particularly onerous for adolescents.[37] Adolescents already obtain abortions later in pregnancy than older women, and the risk of complications increases with each week of delay.[38] Thus, the additional state-imposed delay needlessly compounds the health risks adolescents already encounter.

II. THE SUBSTANTIAL BURDENS IMPOSED BY COMPELLED NOTIFICATION AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL.

This Court has asserted, as a guiding principle, that:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

---

[37] *See Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983) ("the same objections to the waiting period for adults listed in *City of Akron* apply to waiting periods for minors"); *Hodgson*, 648 F. Supp. at 765 ("[t]his statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments").

[38] *See* Russo, *Adolescent Abortion: The Epidemiological Context in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 40, 55-67 (G. Melton ed. 1986) [hereinafter Russo]; NAS REPORT, *supra* note 10, at 114, 277.

Carey v. Population Services Int'l, 431 U.S. 678, 696 (1977). The right to secure an abortion is fundamental, *Roe v. Wade*, 410 U.S. 113 (1973), protected at a minimum against imposition of "undue burdens," *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3063 (1989) (O'Connor, J., concurring). There can be no serious question, for the reasons set forth above, that the statutes at issue impose a substantial burden on all minors that would be unconstitutional if imposed on adults. *See* p. 4, *supra*.

The States have asserted three general purposes in defense of mandatory notification statutes, which in other contexts have been recognized by this Court:[39] promoting a family role in the child-rearing process, Cross-Petition for Writ of Certiorari in No. 88-1309 at 3; assuring that the decision to abort is an informed one, *id.*; and promoting the adolescent's emotional stability, particularly as it relates to "the minor's psychological sequelae that may attend the abortion procedure," *Hodgson*, 648 F. Supp. at 766. In *Hodgson*, after hearing evidence about the manner in which the Minnesota law operated for five years, the trial court found as a matter of fact that none of these interests was promoted. The scientific evidence supports the district court's findings.

A. The Evidence Suggests That Mandatory Parental Notification Statutes Do Not Foster Productive Intrafamily Communication.

As demonstrated in Point I, *supra*, the scientific and record evidence suggests that mandatory parental notification statutes are actually *destructive* of the family role in child-rearing. The productive communication patterns of a normal family that these laws purport to promote are based upon trust and the voluntary desire to

[39] *See Danforth*, 428 U.S. at 75 (family role in decisionmaking); *Bellotti II*, 443 U.S. at 635 (decisionmaking competence); *H.L. v. Matheson*, 450 U.S. 398, 412 (1980) (psychological consequences of abortion).

share or to know; compelled or coerced communication lacks these qualities.[40]

B. There Is No Empirical Support For The Proposition That Compelled Parental Disclosure Will Help Ensure That The Minor's Decision To Obtain An Abortion Is A Capable One.

These burdensome regulations also might be defended as needed to ensure that the pregnant woman is making an informed choice. Whether the laws' burdens are justified in light of this purpose should turn in substantial part on whether the scientific evidence supports the State's assumptions about the competence of minors to make decisions about pregnancy.

The Court has yet to define precisely what the capacity to make informed choices means.[41] It has, however, never relied upon a definition of capacity to consent that focuses on the choice made,[42] focusing instead on the individual's cognitive capacity to make the decision to abort, *i.e.*, the ability to understand the nature of the procedure, its risks, benefits, consequences, and possible alternatives. Perhaps the most complete statement of this Court's position on competency appears in *Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part): "The Court assumes that parental consent

[40] *See generally* D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983).

[41] *But see* 45 C.F.R. Part 46 (DHHS rules regarding consent to biomedical and behavioral research including consent to research with children); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Dev. 1589 (1982) [hereinafter Weithorn & Campbell]; Bersoff, *Children as Research Subjects: Problems of Competency and Consent in* THE RIGHTS OF CHILDREN 186 (J. Henning ed. 1982).

[42] Of approximately 1.1 million teenage pregnancies annually, about 40% are terminated by abortion. By any objective standard the decision to abort is one that a reasonable person, including a reasonable adolescent, could make. NAS REPORT, *supra* note 10, at 1, 15, 261; Alan Guttmacher Institute, *School Sex Education in Policy and Practice*, 3 Issues in Brief 1 (1983) [hereinafter AGI].

is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives." [43] Both psychological theory and significant and substantial evidence developed by social scientists bear on the empirical question whether adolescents possess the requisite capacity to consent under this formulation.

1. ***Psychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about important life situations.***

Developmental psychologists [44] have built a rich body of research examining adolescents' capacities for understanding, reasoning, solving problems and making decisions, especially in comparison to the same capacities in adults. Research consistently supports the conclusion that there is a predictable development during late childhood and early adolescence of the capacity to think rationally about increasingly complex problems and decisions. Although there are several competing theories of cognitive development, these theories each recognize that a revolution in rationality occurs during early adolescence.

The specific reasoning abilities that develop during early adolescence are closely akin to the capacity to consent, and include the capacity to reason abstractly about

---

[43] *See also Bellotti II*, 443 U.S. at 640 ("ability to . . . take account of both immediate and long-range consequences"). The concern that a minor have adequate *information* about her decision, as opposed to the capacity to choose based upon such information, *see Bellotti II*, 443 U.S. at 643, is less a component of the adolescent's competency than of the physician's legal and ethical duty to provide all material information to the patient. *See* Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G. Melton, G. Koocher & M. Saks eds. 1983).

[44] Developmental psychologists are scientists who study cognitive, perceptual, personality, social and emotional development along the life span of individuals.

hypothetical situations; the capacity to reason about multiple alternatives and consequences; the capacity to consider more variables and combine variables in more complex ways; and the capacity for systematic, exhaustive use of information.[45]

Competent decisionmaking is also dependent on social and personality development including the development of personal values, identity, autonomy, and the ability to resolve social dilemmas. Research in social and personality development contradicts the stereotype of adolescence as a period when young people are paralyzed by a struggle for identity, social confusion and rebellion against parents. In fact, by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas,[46] understanding social rules and laws,[47] reasoning about interpersonal relationships [48] and interpersonal problems,[49] and reasoning about

---

[45] For a discussion of these changes from three theoretical perspectives, see B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (1958); Braine & Rumain, *Logical Reasoning in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 263 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Sternberg & Powell, *The Development of Intelligence in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 341 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983).

[46] Rest, *Morality in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME III: COGNITIVE DEVELOPMENT 556 (P.H. Mussen ed., J.H. Flavell & E.M. Markman vol. eds. 1983); Kohlberg, *Moral Stages and Mortalization: The Cognitive-Developmental Approach in* MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES (Lickona ed. 1976); Kohlberg & Hersch, *Moral Development: A Review of the Theory*, 16 Theory into Practice 53 (1977).

[47] Tapp & Kohlberg, *Developing Senses of Law and Legal Justice in* LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 89 (J. Tapp. & F. Levine, eds. 1977).

[48] R. SELMAN, THE GROWTH OF INTERPERSONAL UNDERSTANDING: DEVELOPMENTAL AND CLINICAL STUDIES (1980).

[49] Marsh, Serafica & Barenboim, *Effect of Perspective-taking Training on Interpersonal Problem Solving*, 51 Child Development

custody preference during parental divorce.[50] By middle adolescence most young people develop an adult-like identity and understanding of self.[51] Furthermore, the majority of adolescents do not repudiate parental values, but incorporate them, during their search for autonomy.[52] Thus, by age 14 most adolescents have developed adult-like intellectual and social capacities including specific abilities outlined in the law as necessary for understanding treatment alternatives, considering risks and benefits, and giving legally competent consent.

There is not as much information about the practical decisionmaking competence of younger adolescents—those aged 11 to 13.[53] Research has indicated that there is considerable variability in cognitive development and decisionmaking competence among adolescents, and there are some 11-to-13-year-olds who possess adult-like capabilities in these areas.[54] It is instructive that young adolescents are deemed capable in many state statutes of giving informed consent to various medical procedures, including mental health services, treatment for sexually transmitted diseases, and surgery related to childbirth. Should they have a child, young adolescents are typically deemed competent to make health care decisions both for themselves

140 (1980); Marsh, Serafica & Barenboim, *Interrelationships Among Perspective Taking, Interpersonal Problem Solving, and Interpersonal Functioning*, 138 J. Genetic Psychology 37 (1981).

[50] Greenberg, An Empirical Determination of the Competence of Children to Participate in Child Custody Decision-Making (1983) (Dissertation Abstracts Int'l).

[51] Harter, *Developmental Perspectives On the Self System in* HANDBOOK OF CHILD PSYCHOLOGY, VOLUME IV: SOCIALIZATION, PERSONALITY & SOCIAL DEVELOPMENT 275 (Heatherington, ed. 1983).

[52] *See* Conger, *A World They Never Knew: The Family and Social Change in* TWELVE TO SIXTEEN 197 (J. Kagan & R. Coles eds. 1972); Brittain, *supra* note 13.

[53] Because few young adolescents become pregnant, it is difficult for researchers to obtain a sample large enough to study the abortion decisionmaking competence of this group.

[54] See sources cited *supra* notes 46-51.

and their child.[55] At a minimum, therefore, a case-by-case approach to assessing decisionmaking competence among young adolescents is essential.

For all the reasons set forth in this section, the assumption that adolescents as a group are less able than adults to understand, reason and make decisions about intellectual and social dilemmas is not supported by contemporary psychological theory and research.

2. *Research does not support the States' assumption that adolescents typically lack the capacity to make sound health care decisions, including decisions about abortion.*

There has been substantial empirical research testing adolescents' decisionmaking performance when faced with various types of practical problems involving treatment and non-treatment decisions. Some of these studies specifically compare the performance of adolescents to that of adults in making such decisions.[56] The evidence does not support the assumption underlying notification laws that adolescents lack an adult's capacity to understand and reason about problems and decisions, including medical and psychological treatment alternatives, or the ability to comprehend and consider risks and benefits regarding treatment alternatives.[57]

[55] MORRISSEY, HOFFMAN & THROPE, *supra* note 8, at 43.

[56] Studies comparing adolescents and adults include Belter & Grisso, *Children's Recogniton of Rights Violations in Counseling*, 15 Prof. Psychology 899 (1984) [hereinafter Belter & Grisso]; Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134 (1980) [hereinafter Grisso]; Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980); Weithorn & Campbell, *supra* note 41; Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) [hereinafter Ambuel].

[57] *See, e.g.*, Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 1 (G. Melton ed. 1986) [hereinafter Melton & Pliner]; Weithorn,

The two most directly relevant studies compared abortion decisionmaking by adolescents and adults at the time they received pregnancy tests in actual treatment settings. Results of both are consistent with the research and theory reviewed above showing that "adolescents are as able to conceptualize and reason about treatment alternatives as adults are." [58] In one study,[59] 16 unmarried adolescents, aged 13-17, and 26 unmarried adult women, aged 18-25, were asked to consider their options for responding to their own pregnancies at the time of their pregnancy tests. Standardized questions were used to determine their knowledge of pregnancy-related laws, sources of advice they had received or expected to seek, the range of factors one could consider in making choices about one's pregnancy, and the reasons for their own

---

Children's Capacities in Legal Contexts in CHILDREN, MENTAL HEALTH, AND THE LAW 25 (N. Reppucci & Assoc. eds. 1984); Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. Fam. L. 445 (1984); Grodin & Alpert, *Informed Consent and Pediatric Care in* CHILDREN'S COMPETENCE TO CONSENT 93 (G. Melton, G. Koocher & M. Saks eds. 1983); Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions in* LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (G. Melton ed. 1982); Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. Davis L. Rev. 255 (1979); Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. Soc. Issues 114 (1978); Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 Prof. Psychology 412 (1978); Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. Am. Acad. Child Psychiatry 505 (1978).

Not all older adolescents and not all adults reach the highest levels of competence to consent to treatment, *see* Roth, Meisel, & Lidz, *Tests of Competence to Consent to Treatment*, 135 Am. J. Psychiatry 279 (1977), but there is no substantial support for the proposition that cognitive abilities of the two groups are different.

[58] APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73, 73 (1987) [hereinafter Interdivisional Committee Study].

[59] Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980).

choices. The study revealed no differences between the unmarried minors and adults in the decisions they made or in their knowledge of pregnancy-related laws. Further, when asked to describe factors that could affect one's choice of abortion or motherhood, minors differed very little from adults in the frequency with which they mentioned various considerations and consequences. There were no differences on such factors as the positive emotions associated with mothering, financial concerns, the effect of given choices on one's goals or present lifestyle, or social stigma.

The second highly relevant study examined pregnancy decisionmaking in 15 adolescents aged 14-15, 19 adolescents aged 16-17, and 40 adults aged 18-21, at the time they sought a pregnancy test at a women's health clinic.[60] The sample was representative of various economic, racial and religious backgrounds. Each person participated in an extensive decisionmaking interview conducted by a counselor, which was audio-taped and later rated by trained, independent raters. The four measures used to evaluate decisionmaking competence were suggested by this Court's understanding of competency,[61] and focused on the individual's cognitive and volitional capacity: consideration of risks and benefits including immediate and future consequences; quality and clarity of reasoning; number and types of factors considered; and volition, *i.e.*, making a decision without being coerced by or acquiescing to others. Results showed that minors aged 14 to 17, who considered abortion as an option, equaled adults in all

---

[60] Ambuel, *supra* note 56; Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper Presented at American Psychological Association Convention, available from *amicus* counsel of record).

[61] *See Danforth*, 428 U.S. at 104 (Stevens, J., concurring in part and dissenting in part). *See also* Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G.P. Melton, G. Koocher & M. Saks eds. 1983).

four measures of competence. Taken together these two studies suggest that minors equal adults "in their 'competence' to imagine the various ramifications of the pregnancy decision," [62] and their capacity to make a reasoned choice when facing unplanned pregnancy.[63]

Indeed, the National Academy of Sciences, in a major review of the research, observed that almost all minors who employ judicial bypass procedures to avoid parental involvement are held to be mature, and their decisions to have an abortion are held to be in their best interests.[64] This evidence strongly suggests that many adolescents who choose not to consult with their parents are competent to make the abortion decision.[65]

---

[62] *Id. See* Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987).

[63] In another relevant study, 14-year old minors and adults were presented with four vignettes about individuals suffering from particular medical or psychological disorders. They were given detailed information about the nature, purpose, risks and benefits of the alternative treatments, and were asked to choose among them. The participants were then asked a series of standardized questions about their decisions. In most instances, the responses showed no difference between the adults and the 14-year-olds on any of the scales of competency used in the study—factual understanding, inferential understanding (appreciation), reasoning, choice of reasonable option, and evidence of choice. Weithorn & Campbell, *supra* note 41. For a confirming study, *see* Belter & Grisso, *supra* note 56; Grisso, *supra* note 56.

[64] *See* NAS REPORT, *supra* note 10, at 194-195. For supporting research *see* Melton & Pliner, *supra* note 57, at 26; Mnookin, *supra* note 9; *Judging Teenagers*, *supra* note 11, at 259-267; *see also Hodgson v. Minnesota*, 648 F. Supp. at 765, 766-67.

[65] Indeed, it can be seriously questioned whether a notification statute with a bypass procedure in practice does more than expend judicial resources. At worst, it is a source of anxiety, medically harmful delay, and family conflict. Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79, 82 (1987). That so many minors, despite its burdens, choose to undergo a bypass process and succeed in demonstrating their competence and best interests to a judge, dramatizes the fact that *without* a bypass, the burdens of mandatory parental notification would be intolerable.

Thus, empirical studies of treatment and abortion decisionmaking have found no differences between adolescents aged 14-18 and adults in factors related to legal competence.[66] There is therefore no scientific foundation for the States' assumption that adolescents' decisions to have an abortion are generally less thoughtful and informed than adults' decisions.

Moreover, related research indicates that attempts by the State to compel parental consultation in minors' abortion decisions are unlikely to result in better reasoned decisions.[67] One study found that although adolescents who were able to discuss their unintended pregnancy with two or three people they considered sympathetic and supportive decided upon a course of action faster than women with less social support, no benefit accrued from discussing the pregnancy with parents or others considered unsympathetic.[68] Research has consistently shown

---

[66] Studies have recognized differences between adults and adolescents regarding the decision to have an abortion, but those differences do not reflect upon the relative competence of adolescents (or adults) to make the abortion decision. Instead, the differences appear to be related to minors' and adults' differing social situations. For example, adolescents tend to see their decision as more influenced by consideration of its impact on others, and more frequently involve a parent in the decision. They also tend to take more time to reach a decision, making the added delays caused by notification and bypass procedures even more potentially harmful to the adolescents' health than similar requirements would be to adults' health. *See* Interdivisional Committee Study, *supra* note 58, at 73, and studies cited therein.

[67] Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?* 62 Neb. L. Rev. 455, 470-471 (1983); Zabin & Hirsch, Effects of Abortion and Childbearing on Education and the Psychological Status of Black Urban Adolescents 16 (1988) (Paper presented at Annual Meeting of American Public Health Association, available upon request from counsel of record). *See* Rothenberg, *Communication About Sex and Birth Control Between Mothers and Their Adolescent Children*, 3 Population and Env't 35 (1980).

[68] Ashton, *Pattern of Discussion and Decision-making Amongst Abortion Patients*, 12 J. Biosocial Sci. 247 (1980).

that parents are seldom significant sources of sex education for their children.[69] The findings of many studies suggest that sex is an issue of conflict that rarely elicits open and honest communication between parents and adolescents, and that a general lack of rapport between parents and adolescents contributes to their difficulty in communicating about sex.[70] In many instances, therefore, compelled parental involvement in the abortion decision is not likely to be constructive.

C. There Is No Empirical Support For The Proposition That Mandatory Parental Disclosure Will Assist Minors In Dealing With The Psychological Sequelae Of Abortion.

The scientific evidence also fails to lend any support to the States' assumptions that the psychological sequelae of abortion are more severe for an adolescent than for an adult and that forced parental involvement is therefore necessary to ensure the continuing psychological well-being of the adolescent.

1. *Adolescents who choose to abort are not less stable psychologically than other adolescents.*

The increasingly early biological maturation of adolescents is well documented.[71] A majority of individuals become sexually active during adolescence.[72] Indeed, 40% of today's 20-year-old women have had at least one

---

[69] Rozema, *supra* note 35, at 532; Bennett & Dickinson, *Student-parent Involvement in sex, birth control and venereal disease education*, 16 J. Sex Research 114, 115 (1980).

[70] *Id.* Parents, not surprisingly, generally disapprove of their children's premarital sexual relations. Marsman & Herold, *Attitudes Toward Sex Education and Values in Sex Education*, 35 Fam. Relations 357 (1986).

[71] Rauh, Johnson, & Burket, *The Reproductive Adolescent*, 20 Pediatric Clinics of North America 1005 (1973).

[72] Marecek, *Counseling Adolescents with Problem Pregnancies*, 42 Am. Psychologist 89 (1987).

pregnancy during their teen years.[73] And there is no empirical support for the supposition that adolescents seeking abortions are drawn from an especially psychologically or emotionally vulnerable subpopulation. Unmarried adolescents who seek abortions are similar in psychological makeup to other adolescents.[74] Moreover, compared to unmarried adolescents who choose to carry to term, those seeking abortions are likely to be somewhat advantaged in terms of social class status, family background and academic achievement.[75] Adolescents who seek abortions, compared to those who choose motherhood, are characterized by a number of traits associated with positive mental health and superior psychological maturity—greater independence, higher academic motivation and aspiration, and more feelings of competence and optimism.[76] Thus, not only is it unproven that as a group adolescents who choose abortions are at special psychological risk, but the opposite is actually shown to be the case.

2. *Much of the stress pregnant adolescents experience is due to unwanted pregnancy, not to abortion.*

More generally, the evidence does not support this Court's assertion that there are "potentially grave emotional and psychological consequences of the decision to abort." *H.L. v. Matheson*, 450 U.S. 398, 412-413 (1980). Three major reviews of the psychological and psychiatric research literature all confirm that for most women who undergo abortion, there are no long-term negative emotional effects.[77]

---

[73] Russo, *supra* note 38, at 63.

[74] Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 Am. J. Orthopsychiatry 432, 436 (1980) [hereinafter Olson].

[75] *Id.*

[76] *Id.*

[77] Marecek, *Consequences of Adolescent Childbearing and Abortion in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96

When women experience regret, depression, or guilt following an abortion, such feelings are mild and diminish rapidly.[78] When serious problems do occur, they are most likely to occur among women with prior histories of psychiatric problems.[79] With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient." [80] "Very few teenagers have severe psychiatric complications after induced abortion." [81]

Abortion not only carries a low risk of negative psychological consequences for adolescents, but the psychological sequelae of abortion for adolescents are usually positive, with significant diminution of anxiety and increased feelings of well-being. "The predominant response following abortion is generally relief." [82] Studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress,

---

(G. Melton ed. 1986) [hereinafter *Consequences*]; Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) [hereinafter Adler & Dolcini]; Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976) [hereinafter *Shusterman*]. *See generally* Brief for *Amicus Curiae* American Psychological Association in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

[78] Adler & Dolcini, *supra* note 77, at 84.

[79] *Id. See* NAS REPORT, *supra* note 10, at 195.

[80] Olson, *supra* note 74, at 440.

[81] Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18 (1980); *see* C. CHILMAN (ed.), ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY (NIH Pub. No. 79-1426) (1978); Bracken, Hackamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 15 J. Nervous and Mental Disorders 155 (1974); *see also* David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 Fam. Plan. Persp. 88 (1981) (only 11.4 psychiatric admissions per 10,000 abortions). *See generally* NAS REPORT, *supra* note 10, at 195-196.

[82] Adler & Dolcini, *supra* note 77, at 84 (and references cited therein).

as measured by standardized psychological tests.[83] Moreover, there is no evidence to support the proposition that any distress resulting from an adolescent's abortion would be mitigated by involuntary parental notification.

An abortion removes serious potential constraints on the minor's life and future. After an abortion, the adolescent can resume her normal life and activities in school, at home, and with peers. In contrast, "adolescent mothers are significantly more likely to curtail their education, to be relegated to low-paying jobs, to be single parents, and to be on welfare," [84] as well as to experience repeat pregnancies and, for those who marry to legitimate the birth, greater marital instability.[85]

As the National Academy of Sciences recently reported, "on the basis of existing research . . . *the contention that adolescents are unlikely or unable to make well-reasoned decisions or that they are especially vulnerable to serious psychological harm as a result of an abortion is not supported.*" [86] Moreover, as noted above, those who need support and can get it from their parents typically seek it voluntarily. For these reasons, it is unsurprising that bypass proceedings invariably result in a ruling favorable to the minor.

---

[83] *Shusterman, supra* note 77.

[84] NAS REPORT, *supra* note 10, at 18.

[85] *Consequences, supra* note 77, at 96. Regardless of one's moral position on abortion itself, and *amici* take none herein, the data strongly support the position that abortion is more psychologically benign than carrying to term for almost all adolescents.

[86] NAS REPORT, *supra* note 10, at 277 (emphasis added). "Perhaps the most authoritative form of post-publication review of scientific findings occurs when organizations such as the National Academy of Sciences . . . appoint panels of the most distinguished scientists in the field, provide them with ample time and resources, and commission a state-of-the-art evaluation of a given area of research." Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. Pa. L. Rev. 477, 501 (1986).

CONCLUSION

Both the Minnesota and Ohio statutes impose significant burdens on adolescents' right to choose whether to abort or carry to term without significantly advancing any of the asserted state interests. In these circumstances, even parental notification statutes that provide for judicial bypass impose unconstitutional burdens on mature adolescents and adolescents whose interests would be better served by not notifying their parents. The judicial process is invariably stressful and virtually always affirms the minor's choice to proceed without parental involvement. Moreover, to mandate parental notification and *not* provide for judicial bypass would be intolerable, leaving minors mature enough to decide for themselves, and those whose best interests would be injured substantially by parental notification, with a choice between suffering this statutorily imposed injury or carrying to term. Such a fearful choice cannot constitutionally be imposed without a substantial reason.

Amici therefore respectfully submit that the decision of the Eighth Circuit should be reversed and the Minnesota statute struck down in its entirety, and that the decision of the Sixth Circuit concerning the Ohio statute should be affirmed.

Respectfully submitted,

MARK D. SCHNEIDER
1300 Connecticut Ave., N.W.
Room 810
Washington, D.C. 20036
(202) 857-5250

DONALD N. BERSOFF
(Counsel of Record)
SUSAN R. PODOLSKY
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
(202) 223-4400
Attorneys for Amici Curiae

September 1, 1989

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1125
No. 88-1309

In the Supreme Court of the United States

OCTOBER TERM, 1989

HODGSON, ET AL.,
APPELLANTS AND CROSS APPELLEES,
v.
MINNESOTA,
APPELLEES AND CROSS APPELLANTS.

On appeal from the United States Court of Appeals for the Eighth Circuit

No. 88-805

OHIO,
APPELLANT,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH,
APPELLEE.

On appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* IN SUPPORT OF HODGSON APPELLANTS AND AKRON APPELLEES BY The Center for Population Options, et al.

(Complete list of *amici curiae* appears on first page)

JOHN H. HENN
(Counsel of Record)
NINA JOAN KIMBALL
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

The Center for Population Options
Planned Parenthood League of Massachusetts, Inc.
Girls Clubs of America
Massachusetts Judicial Consent for Minors Lawyer Referral Panel
Mobilization for Youth Health Services, Inc.
United States Student Association
YWCA of Brooklyn
Students and Youth Against Racism
William Kassen, Comm. on Child Development Research & Public Policy
American Public Health Association
National Family Planning and Reproductive Health Association
Abortion Rights Mobilization
Abortion Rights Council
Choices Women's Medical Center
Child Care Law Center
National Organization for Women
American Association of University Women
American Jewish Congress
National Council of Jewish Women
Women's Law Project
Women's Action Alliance, Inc.
National Gay & Lesbian Task Force
National Gay Rights Advocates
Lambda Legal Defense and Education Fund
National Council for Research on Women
Minority Prison Project
All-Peoples Congress
Women's Bar Association of Massachusetts
California Women Lawyers
Women's Bar Association of Illinois
Women Lawyers Association of Los Angeles
New York State Coalition Against Domestic Violence
Tucson Women's Commission
New York Women in Criminal Justice
Missouri Women's Network
Connecticut Women's Education and Legal Fund, Inc.
Hawaii Women Lawyers
North Carolina Equity
San Francisco Women Lawyers Alliance
Queen's Bench of the San Francisco Bay Area
Fresno Free College Foundation

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amici Curiae*	1
Summary of Argument	1
Argument	4
I. A Decision By This Court To Take Away or Constrain the Fundamental Right To Choose Would Devastate Teenage Girls	4
A. *Teenage Pregnancy Is Almost Always Unintended*	5
B. *Teenage Pregnancy and Childbearing Is Highly Risky Physically and Psychologically for Teenage Girls and the Children They Bear*	6
C. *Pregnant Teenagers, Teenage Mothers and Their Families Are More Likely to Lose Educational and Economic Opportunities and To Be Dependent Upon Public Support*	9
D. *Teenage Girls Need Even More Privacy in Matters of Sexuality Than Older Women and Forced Parental Involvement Harms, Rather Than Enhances, the Quality of Their Decision Making in Matters of Reproductive Rights*	12
II. The Fundamental Right of Minors To Exercise Their Right To Choose Should Not Be Conditioned on Parental Notice or Consent, and Certainly Not Without A Meaningful Judicial or Comparable By-Pass	14
A. *Parental Notification Laws and Parental Consent Laws Are Functionally Equivalent Because They Cause the Same Harm, and Because For Minors They Impose the Same Burden*	15
B. *Parental Notification or Consent Requirements Are Unduly Burdensome and Fail in Operation to Serve Their Intended Purposes*	16

Page

1. *Parental Notification or Consent Requirements Do Not Protect Minors From Making Immature Decisions* 16
2. *Parental Notification or Consent Requirements Do Not Enhance Intrafamily Communications* 18
3. *Parental Notification or Consent Requirements Harm Pregnant Teenage Girls by Delaying Their Abortion Choice* 19
4. *The Requirement That, to Avoid a Court Hearing,* Both *Parents Must Be Notified is Unduly Burdensome and Contrary to the State's Asserted Purposes in Many Family Situations* 21

C. *If Court Upholds Parental Notification, it Must Preserve a Judicial or Other By-Pass to Protect Minors' Privacy Rights, and the By-Pass Must Be Meaningful and Workable* 22

1. *By-Pass Must Be Preserved* 22
2. *By-Pass Must Be Meaningful and Workable* 23

Conclusion 27

TABLE OF AUTHORITIES

Cases:

Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) 14, 17, 22
Akron Center for Reproductive Health v. *Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd, Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), *jurisdiction noted*, 109 S.Ct. 3239 (1989) ... 25, 28
Baird v. *Attorney Gen.*, 371 Mass. 741 (1977) 23
Bellotti v. *Baird*, 443 U.S. 622 (1979) ..... *passim*
Brophy v. *New England Sinai Hosp., Inc.*, 398 Mass. 417 (1986) 26

Page

Ex Parte Anonymous, 531 So.2d 901 (Ala. 1988) 27
H.L. v. *Matheson*, 450 U.S. 398 (1981) 15
Hodgson v. *Minnesota*, 648 F.Supp. 756 (D. Minn. 1986), *rev'd on legal grounds*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 3240 (1989) ... *passim*
In re T.W., 543 So.2d 837 (Fla. App. 5 Dist. 1989) 26
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) 14, 22
Planned Parenthood League of Massachusetts v. *Bellotti*, 868 F.2d 459 (1st Cir. 1989) 26
Roe v. *Wade*, 410 U.S. 113 (1973) 14, 17
Superintendent of Belchertown State School v. *Saikewicz*, 373 Mass. 728 (1977) 26
Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 14, 17
Webster v. *Reproductive Health Servs.*, 109 S.Ct. 3040 (1989) 14

Statutes:

La. Rev. Stat. Ann. § 40:1299:35:5 (1989 Cum. Supp.) .. 25
1989 Me. Acts Ch. 573, § 2 ¶ (2), (3), (6) 23, 25, 26
Mass. Gen. L. ch. 112 § 12F (1983 & 1989 Cum. Supp.) .. 16
Mass. Gen. L. ch. 112 § 12S (1983 & 1989 Cum. Supp.) .. 24
Minn. Stat. Ann. § 144.343(1)-(7) (1989) 14, 16, 21
Nev. Rev. Stat. § 442.255.2(c) (1986 Supp.) 25
Ohio Rev. Code § 2151.85 (1988 Supp.) 14
Ohio Rev. Code § 2505.073 (1988 Supp.) 14
Ohio Rev. Code § 2919.12 (1988 Supp.) 14
Wis. Stat. § 146.78(5) (1989) 23
Wyo. Stat. § 35-6-118 (1989 Cum. Supp.) 25

Page

Other Authorities:

Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in *Adolescent Abortion: Psychological and Legal Issues* 84 (Melton ed. 1986) 9
Adolescent Pregnancy and Childbearing — Rates, Trends and Research Findings From the CPR, NICHD (1988) 10, 11
Alan Guttmacher Institute, *Teenage Pregnancy in the United States*, (1989) 2, 6, 12
Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981) .. 2, 3, 5, 6, 8, 20
American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987) 9
Baldwin & Cain, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34 (1980) 10
Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?* 14 Fam. Plan. Persp. 163 (1982) 12
Blum, Resnick & Stark, *The Impact of a Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619 (1987) 3, 13, 18
Bracken & Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 Am. J. Obstetrics & Gynecology 1008 (1975) 20
Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986) 5, 6, 13, 18
Cates, *Adolescent Abortions in the United States* 1 J. Adolescent Health Care 18 (1980) 7, 9, 20
Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in *Abortion and Sterilization: Medical and Social Aspects* 155 (Hodgson ed. 1981) .. 7, 17, 19
Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 N. Eng. J. Medicine 621 (1983) 7

Page

Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area* 72 Am. J. Pub. Health 283 (1982) 13, 15, 19
Center for Population Options [CPO], *Estimates of Public Costs for Teenage Childbearing* (1986) 11
CPO, *Estimates of Public Costs for Teenage Childbearing* (1987) 11
CPO, *1988 Report: Estimates of Public Cost for Teenage Childbearing in 1987* (1988) 2, 11
CPO, *The Facts: Teenage Childbearing, Education, and Employment* (1987) 2, 10, 11
CPO, *The Facts: Teenage Sexuality, Pregnancy, and Parenthood* (1987) 4
David, *Abortion Obtained and Denied: Psychosocial Risks, Statement prepared for presentation to the Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations of the U.S. House of Representatives* (Mar. 1989) 11
Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 259 (1983) 13
Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 Fam. Plan. Persp. 5 (1987) 2
Hofferth, *Contraceptive Decisionmaking Among Adolescents*, in *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. II. (Hofferth & Hayes eds. 1988) 6
Hunter, *Time Limits on Abortion*, in *Reproductive Laws for the 1990s* (Cohen & Taub eds. 1989) 7, 8
Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* (Brown ed. 1988) 8, 12
Institute of Medicine, *Preventing Low Birth Weight* (1985) 8, 9

Page

Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* (1986) 2, 5

Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987) 9, 16, 17

Mackinson, *The Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132 (1985) 7, 8

Marecek, *Consequences of Adolescent Childbearing and Abortion*, in *Adolescent Abortion: Psychological and Legal Issues* 96 (Melton ed. 1986) 9, 10

Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes*, 19 Fam. Plan. Persp. 240 (1987) 10

Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79 (1987) 18, 19

National Commission to Prevent Infant Mortality, *Death Before Life: The Tragedy of Infant Mortality* (1988) . 7, 8

National Center for Health Statistics, *Advance Report of Final Natality Statistics*, Monthly Vital Statistics Report 38:3 (1989) 8

Ory, *Mortality Associated with Fertility and Fertility Control*, 15 Fam. Plan. Persp. 59 (1983) 7,17

Planned Parenthood League of Massachusetts, *The Massachusetts Parental/Judicial Consent Law for Minors Seeking Abortion* (1988) 18, 24, 25

Risking The Future: Adolescent Sexuality, Pregnancy and Childbearing, Vol. I (Hayes ed. 1986) 7, 11, 19, 20

Russo, *Adolescent Abortion: The Epidemiological Context*, in *Adolescent Abortion: Psychological and Legal Issues* 40 (Melton ed. 1986) 20

Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in *Pregnancy in Adolescence: Needs, Problems, and Management* (Stuart & Wells eds. 1982) 7

Page

Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. Fla. L. Rev. 236 (1983) .. 14

Social Factors, Not Age, Are Found to Affect Risk of Low Birth Weight, 15 Fam. Plan. Persp. 142 (1984) 8

Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers, 16 Fam. Plan. Persp. 91 (1984) 8

Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues of Adolescent Psychiatry* 129 (Schoolar ed. 1973) 9

Tietze & Henshaw, *Induced Abortion: A World Review 1986* (1986) 7

Torres, *Does Your Mother Know ...?* 10 Fam. Plan. Persp. 280 (1978) 3, 13, 18

Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980) 3, 13, 15, 17, 18

Ventura, Taffel & Mosher, *Estimates of Pregnancies and Pregnancy Rates for the United States, 1976-85*, 78 Am. J. Pub. Health 506 (1988) 2

Yates & Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute*, 78 Am. J. Pub. Health 646 (1988) 19, 24

Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25 (1983) 5, 8, 12

Zelnick & Kantner, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan-Area Teenagers: 1971-1979*, 12 Fam. Plan. Persp. 230 (1980) 5

Interest of *Amici Curiae*

The Center for Population Options and other amici, whose interests are identified in Appendix A, are individuals and organizations concerned with problems of teenage pregnancy and too-early childbearing, and the need for confidential access to safe, legal abortion services for minors. Based on their experience and expertise with teenage girls, *amici* wish to bring to the Court's attention facts concerning the medical risks and societal cost of teenage pregnancy and too-early childbearing, and to urge that the Court allow minors to exercise the fundamental right to choose abortion without the compelled involvement of their parents.[1]

Summary of Argument

This brief focuses on pregnant teenage girls, on the individual and societal importance of preserving their right to make a personal individual choice between abortion and childbirth without the compelled involvement of their parents, and on the devastating harm that removing or restricting that right would cause to teenage girls in particular. At minimum, preservation of their right to choose requires that the state not compel parental notice or consent unless it provides for a meaningful judicial or other alternative.

Whatever we might wish, sexual activity and unintended pregnancies have become a concrete reality of teenage girls' lives. Because most teenage pregnancies are unintended, and because unwanted childbirth and motherhood are so exceptionally burdensome for a teenage girl, a pregnant teenager's right to determine her future must include the right to choose safe, legal abortion instead of childbirth. Legislatively-compelled parental notification can be the functional equivalent of a parental veto of the abortion choice. Teenage girls, therefore, need to be able to make this decision with the support of

[1] This brief is filed with the consent of the parties.

those they choose, including parents, but without the *forced* involvement of their parents, which could result in delays, outright denial of abortion or severe, even violent, consequences.

The life-shaping importance to teenage girls of their existing right to make a personal, individual choice whether to terminate a pregnancy is illustrated in these striking facts:

- Over 1 million teenagers become pregnant each year.[2]
- 84% of all teenage pregnancies (married and unmarried) are unintended.[3]
- 92% of premarital teenage pregnancies are unintended.[4]
- 42% of pregnant teenage girls choose abortion each year, and 44% of these are under the age of 18.[5]
- ~~One in four~~ teenage mothers drops out of high school, and only one in fifty finishes college.[6]
- In 1987, families begun with a teenage birth cost the federal government $19.27 billion in welfare payments.[7]

---

[2] Alan Guttmacher Institute [AGI], *Teenage Pregnancy in the United States*, Table 4 (1989) [AGI, *Teenage Pregnancy in the U.S.*]; Ventura, Taffel & Mosher, *Estimates of Pregnancies and Pregnancy Rates for the United States, 1976-85*, 78 Am. J. Pub. Health 506, 508, Table 2 (1988) (data for 1972 to 1985; 1985 is latest year for which detailed statistics on abortion are available); AGI, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 17 (1981) [AGI, *Teenage Pregnancy*].

[3] Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 40 (1986) [Jones, *et al.*]. Calculations by CPO from cited data.

[4] *Id.*

[5] AGI, *Teenage Pregnancy in the U.S.*, *supra* n. 2, Table 1; Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-83*, 19 Fam. Plan. Persp. 5 (1987).

[6] Center for Population Options [CPO], *The Facts: Teenage Childbearing, Education, and Employment* (1987).

[7] CPO, *1988 Report: Estimates of Public Cost for Teenage Childbearing in 1987* at 2 (1988) [CPO, *1988 Report*] (calculating payments under Food Stamps, Medicaid and Aid to Families with Dependent Children (AFDC) programs). The $19.27 billion represents more than half of all payments under these three programs.

- Parental notification requirements do not significantly increase parental involvement in the abortion decision.[8]
- Forced parental notification of the decision to abort would cause 20% of teenage girls who would not voluntarily consult their parents to self abort or have an illegal abortion rather than notify their parents.[9]
- Only 4% of unmarried teenage mothers surrender their infants for adoption.[10]

As this Court (including Chief Justice Rehnquist) observed in its leading case concerning minors and abortion:

> [T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, *there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.*[11]

---

[8] *Hodgson* v. *Minnesota*, 648 F.Supp. 756, 775 (D. Minn. 1986), *rev'd on legal grounds*, 853 F.2d 1452 (8th Cir. 1988) (en banc); Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987); Torres, *Does Your Mother Know ... ?*, 10 Fam. Plan. Persp. 280, 281 (1978).

[9] Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288-289 & Table 7 (1980).

[10] AGI, *Teenage Pregnancy*, *supra* n. 2, at 27.

[11] *Bellotti* v. *Baird*, 443 U.S. 622, 642 (1979) [*Bellotti II*] (plurality opinion) (emphasis added). The statement quoted in text surely commanded the support of eight members of the Court. *See id.* at 652 (concurring opinion of Justices Stevens, Brennan, Marshall, and Blackmun).

Part I of this brief, thus, will describe the unintended and unanticipated nature of most teenage pregnancy; the heightened physical and psychological risks to teenage girls of pregnancy and childbearing, which greatly exceed the risks of abortion at any stage of pregnancy; the overwhelming costs to teenage girls and to society of teenage pregnancy and too-early childbearing; the privacy needs of teenage girls in matters of sexuality and reproductive choice; and the severe, even violent, harm that follows from compelling unwanted parental involvement in the abortion decision. Part II will describe how a minor must be able to exercise her fundamental right to choose abortion without the compelled participation of her parents; will explain why minors must at least retain a judicial consent ("by-pass") or other alternative to such compelled participation; and will propose rules and guidelines for by-pass alternatives to compelled parental participation (specifically referring to those that have been successfully used in Massachusetts for nearly ten years).

Argument

I. A Decision by This Court to Take Away or Constrain the Fundamental Right to Choose Would Devastate Teenage Girls.

This Court would devastate the lives of teenage girls by erecting such insuperable barriers to their long-recognized fundamental right to choose between abortion and childbirth as compelled parental consent or notification. Teenage sexual activity and unintended pregnancies are concrete realities of American life today. Constraining the right to choose abortion by forcing parental involvement in the decision will not reduce teenage sexual activity or unintended teenage pregnancy.[12]

[12] In the United States today, seven out of ten teenage girls and eight out of ten teenage boys have sexual intercourse by the time they reach age twenty. CPO, *The Facts: Teenage Sexuality, Pregnancy, and Parenthood* (1987). As to unintended pregnancies, *see supra* notes 2-7 and statistics in the accompanying text.

What it will do is delay the abortion choice, provoke unnecessary crisis and disharmony in family relations and dramatically increase unwanted teenage childbearing, all with profoundly adverse costs to teenage girls' lives and futures.

A. *Teenage Pregnancy Is Almost Always Unintended.*

Teenage girls do not become pregnant by design. Eight out of ten of the 1.1 million teenage pregnancies in the United States each year are unintended.[13] Most teenagers do not use contraceptives or use them inconsistently, especially in the early months of sexual activity, whether due to ignorance or ambivalence about contraception, or ambivalence about sexuality, or both.[14] Thus, among unmarried teenagers who be-

Studies show that the restrictions on the availability of abortion caused by parental notification and consent laws do not reduce teen pregnancy. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986). The most effective way to reduce teen pregnancy is not to restrict or deny access to abortion but to increase sex education and the availability of contraception. A study comparing teenage pregnancy in the United States with that of other industrialized countries found sexual activity in the United States was comparable to that in other countries, but that teenage pregnancy and birth rates were lower in other countries because of greater availability of sex education, contraceptives and abortion services. Jones, *et al.*, *supra* n. 3, at 234-35.

[13] Jones, *et al.*, *supra* n. 3. 92% of pregnancies to unwed teenage girls are unintended and 51% of pregnancies to married teens are unintended. Altogether, approximately 84% of all teenage pregnancies are unintended, since the vast majority of teen pregnancies (almost 80%) occur out-of-wedlock. *Id.*

[14] AGI, *Teenage Pregnancy*, *supra* n. 2, at 14-16; Zelnick & Kantner, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan-Area Teenagers: 1971-1979*, 12 Fam. Plan. Persp. 230, 236, Table 8 (1980); Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25 (1983). Zabin's study reports that teens tend to delay almost a year (median of 11.5 months) after becoming sexually active before going to a family planning clinic. Moreover, nearly two thirds of unmarried teenage girls reported that they never used contraceptives or did so inconsistently. AGI, *Teenage Pregnancy*, *supra* n. 2, at 14. The reasons for failure to use contraceptives vary, including those who thought they could not become pregnant, those who did not expect to have sexual intercourse, those who "couldn't [use them] under the circumstances," and those who did not know how to get contraceptives. *Id.*

come pregnant, *fifty percent* of pregnancies occur within the first six months of becoming sexually active; *twenty percent* occur within the first month.[15] Forty-two percent of all teenage girls (married or unmarried) choose to resolve their unwanted pregnancies through abortion.[16] These statistics, which reflect the relatively low impact of current contraceptive availability and education on the teenage pregnancy rate, demonstrate that the vast majority of teenage girls do not focus on the issue of whether to bear a child and how childbearing will affect their future until an unintended pregnancy forces them to do so.

At this critical juncture in teenage girls' lives, abortion becomes an especially important — and in many cases life-saving — reality. Common sense, as well as the results of abortion restrictions directed specifically at minors,[17] teaches that erecting barriers to the right to choose abortion will not reduce teenage sexual activity and pregnancy; it will simply increase unwanted teenage childbearing.

B. *Teenage Pregnancy and Childbearing Is Highly Risky Physically and Psychologically for Teenage Girls and the Children They Bear.*

Adolescent pregnancies carried to term, and resulting childbearing, are usually very detrimental physically and psychologically for teenage girls, as well as for the infants they bear. During pregnancy, teenagers are at much higher risk of suffering from serious medical complications, including iron-deficiency anemia, pregnancy-induced hypertension ("toxemia", which is a leading cause of mortality), complications from small pelvises, and cervical immaturity resulting in premature

[15] Hofferth, *Contraceptive Decisionmaking Among Adolescents*, in *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. II., at 64 (Hofferth & Hayes eds. 1988) *[Risking* Vol. II]; AGI, *Teenage Pregnancy, supra* n. 2, at 16, 19.

[16] AGI, *Teenage Pregnancy in the U.S., supra* n. 2, Table 1.

[17] Cartoof & Klerman, *supra* n. 12, at 400.

births.[18] Mortality rates from continued pregnancy and childbearing are much higher for teenage girls than for women aged 20-24.[19] Teenage girls aged 15-19 are twenty-four times more likely to die from childbirth than from first-trimester abortion,[20] and the dangers are considerably higher for girls under age 15.[21] By contrast, for all women, but especially for teenage girls, abortion is one of the safest surgical procedures doctors perform.[22] At no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery.[23] The same is true for rates of morbidity — serious illness or injury with lasting effects — related to childbirth when compared to abortion.[24]

A major reason why the health risks of pregnancy and childbearing are greater for teenage girls than for adult women is

[18] Hunter, *Time Limits on Abortion*, in *Reproductive Laws for the 1990s*, at 134 & n. 15 (Cohen & Taub eds. 1989); National Commission to Prevent Infant Mortality, *Death Before Life: The Tragedy of Infant Mortality*, Appendix at 103 (1988) [NCPIM]. Inadequate prenatal care, a problem especially common for teenage girls, is associated with excessive weight gain, premature labor, prolonged labor, vaginal infections and vaginal lacerations. Mackinson, *The Health Consequences of Teenage Fertility*, 17 Fam. Plan. Persp. 132, 134 (1985).

[19] Ory, *Mortality Associated with Fertility and Fertility Control*, 15 Fam. Plan. Persp. 57, 59, Table 2 (1983). Calculations by CPO from cited data.

[20] *Id.*

[21] Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in *Pregnancy in Adolescence: Needs, Problems, and Management* 107 (Stuart & Wells eds. 1982); *Risking The Future: Adolescent Sexuality, Pregnancy and Childbearing*, Vol. I, at 124 (C. Hayes ed. 1986) [*Risking*, Vol. I].

[22] Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in *Abortion and Sterilization: Medical and Social Aspects*, 155, 177 (Hodgson, ed. 1981). "Complications following induced abortion are generally lower among adolescents than among older women, regardless of the gestation at which the abortion is performed or the method used." *Risking*, Vol. I, *supra* n. 21, at 125; *see also*, Cates, *Adolescent Abortions in the United States*, 1 J. Adolescent Health Care 18, 19-22 (1980) [Cates]; Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 N. Eng. J. of Medicine 621 (1983).

[23] Tietze & Henshaw, *Induced Abortion: A World Review 1986*, at 110, 111 (1986).

[24] Cates, *supra* n. 22, at 20; Cates & Grimes, *supra* n. 22.

that teenagers delay seeking prenatal care if they seek it at all.[25] In New York City, more than one third of pregnant teenage girls received no prenatal care or only last-trimester care, compared to eighteen percent for women as a whole.[26]

Teenage pregnancy, exacerbated by inadequate prenatal care, also leads to premature births and low birth weight,[27] which in turn are leading causes of infant morbidity and mortality. Low birth-weight infants are at increased risk of neurodevelopmental problems, especially cerebral palsy, seizure disorders and mental retardation.[28] Children of teenage mothers are twice as likely to die in infancy than those born to women in their 20s, and are also more likely to die than children of women in their 40s, whose children are also a high-risk group.[29] Low birth weight is also associated with longer-term

[25] Mackinson, *supra* n. 18, at 134. Teens tend to seek prenatal care later than adult women because of its cost, ambivalence or denial concerning their pregnancy, a desire for secrecy and confidentiality, difficulty in scheduling appointments, and/or lack of knowledge about the health care system. Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 78, 101 (Brown ed. 1988) [Inst. of Medicine, *Prenatal Care*]. Policies of some clinics and hospitals to notify parents when minors use their services affects minors' decision to seek prenatal care and choice of clinics. *See* Zabin & Clark, *supra* n. 14, at 26, 27, 29.

[26] Hunter, *supra* n. 18, at 134, citing to *New York City Dep't of Public Health, Summary of Vital Statistics* 16, 17 (1986). Nationally, 13 percent of teens receive late or no prenatal care whereas only 6 percent of women as a whole receive late or no prenatal care. National Center for Health Statistics, *Advance Report of Final Natality Statistics*, Monthly Vital Statistics Report 38:3 Table 30 (1989) [NCHS].

[27] AGI, *Teenage Pregnancy*, *supra* n. 2, at 29; NCHS, *supra* n. 26, Table 15.

[28] Institute of Medicine, *Preventing Low Birthweight* 26-29, 32-33, 37 (1985); *Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 Fam. Plan. Persp. 91-92 (1984).

[29] AGI, *Teenage Pregnancy*, *supra* n. 2, at 29. Studies show that other factors such as the mother's socioeconomic status, health care and nutritional habits and education also contribute to health and developmental problems of low birth-weight babies. Teenage mothers are at a high risk of experiencing these characteristics. Mackinson, *supra* n. 18, at 137-38; NCPIM, *supra* n. 18, at 103; *Social Factors, Not Age, Are Found to Affect Risk of Low Birth Weight*, 15 Fam. Plan. Persp. 142-43 (1984).

problems, including a greater frequency of illness, and developmental problems such as lack of success in school.[30]

An *unwanted pregnancy* is a serious and emotionally traumatic event in a teenager's life. Before abortions were legal and accessible to minors in a confidential manner, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant.[31] Few teenagers have adverse psychological reactions to abortion, and most are relieved to have terminated an unwanted pregnancy:[32] "[t]here is no research evidence to support" the assumption that "adolescents are especially vulnerable to serious psychological harm as a result of having an abortion."[33] To the contrary, pregnancy continuation poses "far greater psychological, physical, and economic risks to the adolescent than does abortion."[34]

C. *Pregnant Teenagers, Teenage Mothers and Their Families Are More Likely to Lose Educational and Economic Opportunities and to Be Dependent Upon Public Support.*

Childbearing irrevocably alters the life of a teenage girl. When a woman is ready to bear a child, motherhood is one of the most rewarding and fulfilling of life's experiences. But unwanted motherhood is devastating, especially for a teenage

[30] Inst. of Medicine, *supra* n. 28, at 32-33.

[31] Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues of Adolescent Psychiatry* 129, 136 (Schoolar ed. 1973).

[32] Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in *Adolescent Abortion: Psychological and Legal Issues* 84 (Melton ed. 1986).

[33] American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73, 74 (1987) [APA].

[34] Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84, 87 (1987); *see also* Marecek, *Consequences of Adolescent Childbearing and Abortion*, in *Adolescent Abortion: Psychological and Legal Issues* 96-115 (Melton ed. 1986); Adler & Dolcini, *supra* n. 32, at 90; Cates, *supra* n. 22, at 22.

girl. The cost of too-early childbearing is borne not just by the teenager, whose future is suddenly restricted, but by the child she bears and by society as a whole. These costs exist today — in a world in which teenagers *have* a right of abortion choice. The elimination or constriction of that choice could only make those costs vastly higher.

Pregnancy is the leading reason teenage girls drop out of school. One in four teenage mothers drops out of high school and only one in fifty graduates from college. By comparison, one in five women who put off childbearing until their mid-20s graduates from college.[35] Teenage mothers' family responsibilities and frequently truncated education lead them into lower-paying, lower-status jobs, where they accumulate less work experience and earn lower annual wages than women who postpone childbearing.[36]

Children born to teenagers from an unwanted pregnancy will be disadvantaged educationally, socially, and psychologically.[37] They tend to have lower I.Q. and achievement scores, and less success in school.[38] According to expert testimony before Congress on behalf of the American Public Health Association, children born of unwanted pregnancies experienced lower scholastic achievement, had less job satisfaction, fewer and less satisfying relations with friends, lovers and spouses, and began sexual activity earlier than children born of ac-

---

[35] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. II, *supra* n. 15, at 125-28. Teenage fathers are also more likely to drop out of high school than their counterparts who remained childless throughout their teens. The lower high school completion rate for teenage fathers restricts their financial ability to support their partner and child. Marsiglio, *Adolescent Fathers in the United States: Their Initial Living Arrangements, Marital Experience and Educational Outcomes*, 19 Fam. Plan. Persp. 241, 247, 249 (1987).

[36] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. I, *supra* n. 21, at 130-32.

[37] *See generally*, Marecek, *supra* n. 34.

[38] Baldwin & Cain, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34, 37 (1980); *Adolescent Pregnancy and Childbearing — Rates, Trends and Research Findings From the CPR, NICHD* 10-11 (1988) [*Adolescent Pregnancy and Childbearing*].

cepted pregnancies.[39] "In the aggregate, unwantedness in early pregnancy and involuntary child-bearing have a detrimental effect on the subsequent psychosocial development of the child with socially undesirable longer term implications."[40] That these children could be both unwanted, and forced upon a teenage girl by the state, is doubly tragic.

Teenage motherhood also imposes enormous costs on society. Teenage mothers, whose educational and economic achievement is severely restricted, are more likely to become dependent on public support. Fifty-three percent of AFDC payments are allotted to families that began when the mother was a teenager.[41] In 1987 alone, the federal government spent $19.27 billion in AFDC, Medicaid and Food Stamp benefits on families in which the mother first gave birth as a teenager.[42] It is estimated that over the next twenty years, the federal government will spend $5.7 billion in welfare payments to all babies born in 1987 to teenage girls.[43] Moreover, children of teenage parents are more likely to become teenage parents themselves, thus perpetuating the cycle of poverty begun by a teenage birth.[44]

Too-early childbearing is already a serious public health problem. Erecting barriers to the right to choose abortion will reverse the recent success in reducing the teenage birth rate

---

[39] David, *Abortion Obtained and Denied: Psychosocial Risks, Statement prepared for presentation to the Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations of the U.S. House of Representatives*, at 6 (Mar. 1989).

[40] *Id.*

[41] CPO, *Estimates of Public Costs for Teenage Childbearing* (1986); CPO, *Estimates of Public Costs for Teenage Childbearing* (1987); CPO, *1988 Report*, *supra* n. 7.

[42] CPO, *1988 Report*, *supra* n. 7, at 2. In 1975, 64 percent of AFDC mothers under age 30 had been teenage mothers compared to 24 percent of American women as a whole between age 20 and 30. *Adolescent Pregnancy and Childbearing*, *supra* n. 38, at 12.

[43] CPO, *1988 Report*, *supra* n. 7, at 3.

[44] CPO, *Teenage Childbearing*, *supra* n. 6; *Risking*, Vol. I, *supra* n. 21, at 134; *Adolescent Pregnancy and Childbearing*, *supra* n. 38, at 11.

and frustrate efforts to bring more women into early prenatal care,[45] making an already tragic situation worse.

D. *Teenage Girls Need Even More Privacy in Matters of Sexuality Than Older Women and Forced Parental Involvement Harms, Rather Than Enhances, the Quality of Their Decision Making in Matters of Reproductive Rights.*

Many teenage girls who are faced with reproductive decisions are just becoming acquainted with their own sexuality.[46] Their ambivalence and discomfort over sexual matters enhance their need for confidentiality and privacy in matters of reproductive choice, exceeding that of adult women.[47] For example, confidentiality is a primary reason teenagers choose a particular family planning clinic.[48] Forced parental notification of contraceptive use also leads to a decline in adolescent clinic use and effective use of contraceptives, but not to a decline in sexual activity, thus leading to a rise in unintended pregnancies among teens.[49] Although most teens, particularly young teens, voluntarily involve a parent in a pregnancy deci-

[45] AGI, *Teenage Pregnancy in the U.S.*, *supra* n. 2, Table 5.

[46] Fifty percent of pregnancies among unmarried teenagers occur during the first six months of sexual activity and twenty percent occur during the first month. *See supra* n. 15 and accompanying text.

[47] Unmarried teenage girls are especially concerned to keep confidential the existence of a pregnancy and their decision whether to terminate it. For example, one study found that a desire to keep the pregnancy secret and a need for confidentiality in obtaining prenatal health care services led many teens to seek late prenatal care and influenced their choice in health care providers. Institute of Medicine, *Prenatal Care*, *supra* n. 25, at 78. A study of 17 deaths following post-*Roe* illegal abortions concluded that a desire for secrecy was the primary reason two teenagers who died had self aborted. Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why are They Still Occurring?* 14 Fam. Plan. Persp. 163, 165 (1982); *see also Bellotti II*, 443 U.S. at 644 (requiring "anonymity" for minors' judicial consent for abortion proceedings).

[48] Zabin & Clark, *supra* n. 14, at 26, Table 1.

[49] Torres, *supra* n. 8, at 282. One study found that 56% of minors who attended a family planning clinic without their parents' knowledge (which represented 23% of those attending) would stop attending if their parents were notified. Of those, 65% would stop using medically prescribed contraceptives (i.e., pill, IUD, diaphragm) and would resort to non-medical methods (i.e., condom, foam, withdrawal), 10% would use no contraception at all, and only 10% surveyed said they would refrain from intercourse. Torres, Forrest & Eisman, *supra* n. 9, at 291, Table 10.

sion,[50] those teenage girls who choose not to involve their parents do so for good reasons, ranging from a concern for their parents' feelings to fear of violence or other serious negative consequences, to fear of being prevented from obtaining an abortion.[51]

Parental notification and consent requirements, where they exist, have failed significantly to increase parental involvement in their daughters' reproductive decisions.[52] Instead, most minors who do not choose to consult their parents find ways to avoid compelled parental involvement. For example, more than half of minors who attend family planning clinics without their parents' knowledge would stop attending if their parents were notified. A chilling thirty-nine percent of these girls stated that they would have an illegal or self-induced abortion rather than notify their parents as a condition of a legal abortion. Some would leave home, and four in ten surveyed said that they would carry to term rather than inform their parents of their decision to abort, thus giving up the exercise of their fundamental right to choose abortion.[53]

[50] Studies show that approximately 55% percent of girls under 18 voluntarily discuss matters of reproductive choice with one or both parents. Torres, Forrest & Eisman, *supra* n. 9, at 287 (55% discuss decision to have abortion with parents); Torres, *supra* n. 8, at 281 (55% discuss participation in family planning clinic with parents).

[51] Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982); Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 259, 260-262 (1983).

[52] Blum, Resnick & Stark, *supra* n. 8, at 620; Cartoof & Klerman, *supra* n. 12, at 400; Torres, *supra* n. 8, at 282.

[53] Torres, Forrest & Eisman, *supra* n. 9, at 289, Table 7. This study found that 55% of minors attending a family planning clinic did so with their parents' knowledge and 1% were not sure whether their parents knew. 21% of those surveyed would not voluntarily inform their parents, but would still

II. The Fundamental Right of Minors To Exercise Their Right To Choose Should Not Be Conditioned on Parental Notice or Consent, and Certainly Not Without A Meaningful Judicial or Comparable By-Pass.

The right to terminate a pregnancy free from unwarranted governmental intrusion remains fundamental for both adult women and minor girls,[54] and regulations that impinge on fundamental rights are assessed with heightened scrutiny.[55] Employing heightened scrutiny, the Court must strike down as unconstitutional an unduly burdensome state regulation that the state fails to demonstrate is narrowly tailored to further a compelling interest.[56]

The Minnesota and Ohio statutes,[57] though ostensibly meant to protect minors from making immature decisions and to enhance intrafamily communications, *in fact* fail to accomplish these purposes. At the same time, they impose severe burdens on teenage girls and their families, the very groups they are meant to protect. Accordingly, these statutes are, in

attend the clinic if their parents were required to be notified. The remaining 23% said they would not attend the clinic if their parents were notified: 9% (which represents 39% of the 23% who would no longer attend the clinic) would have an illegal or self-induced abortion; 9% would carry to term; 2% would leave home; and 3% said they did not know what they would do. *Id.*

[54] *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986); *Bellotti* v. *Baird*, 443 U.S. 622, 633 (1979) *(Bellotti II)*; *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74-75 (1976); *Roe* v. *Wade*, 410 U.S. 113, 153 (1973); *see Webster* v. *Reproductive Health Servs.*, 109 S.Ct. 3040, 3058 (1989).

[55] *Webster*, 109 S.Ct. at 3063 (O'Connor, J., concurring) (regulation that "unduly burdens" right to seek abortion is unconstitutional); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 427 (1983); *Bellotti II*, 443 U.S. at 640; *Roe* v. *Wade*, 410 U.S. at 155.

[56] *Id.*; Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. Fla. L. Rev. 236, 245 (1983) ("To uphold a regulation without determining that it will in fact [further the state's asserted interest] . . . would be inconsistent with the principles of heightened scrutiny.").

[57] Minn. Stat. Ann. § 144.343(2)-(7) (1989); Ohio Rev. Code §§ 2151.85, 2505.073, 2919.12 (1988 Supp.).

the constitutional sense, not only unduly burdensome, they are not minimally rational.

A. *Parental Notification Laws and Parental Consent Laws Are Functionally Equivalent Because They Cause the Same Harm, and Because For Minors They Impose the Same Burden.*

For minors, there is no real-world difference between parental consent and notification laws.[58] The dangers posed by such requirements are the same: compelled involvement of parents can lead to severely negative, even violent, parental reactions, including preventing the minor from having the desired abortion.[59] According to one study, twenty percent of girls who had decided to have an abortion without their parents' knowledge would carry to term if their parents were *notified* of their decision to have an abortion.[60] In reviewing Minnesota's two-parent notification requirement, the District Court found *as a fact* that revelation of a pregnancy or proposed abortion can lead to obstruction of the desired abortion and, particularly in dysfunctional families, violence and abuse.[61] Parental notification requirements, as well as consent requirements, therefore, can easily act as a veto of a minor's abortion decision. By definition, such an outright veto unduly burdens a minor's right to choose.

[58] Three members of the present Court and Justice Powell have recognized that parental notification requirements are the functional equivalent of consent in the burdens they impose on a minor's exercise of her right to choose. *See H.L.* v. *Matheson*, 450 U.S. 398, 420 & n. 9 (1981) (Powell, J., concurring); *id.* at 437-441 (Marshall, J., dissenting, joined by JJ. Brennan & Blackmun).

[59] Approximately 30% of minors surveyed in one study who did not inform their parents did so for fear of serious negative consequences in the form of physical abuse, other retaliation or being prevented from obtaining the abortion. Clary, *supra* n. 51, at 284.

[60] Torres, Forrest & Eisman, *supra* n. 9, at 288-289 & Table 10.

[61] *Hodgson* v. *Minnesota*, 648 F.Supp. 756, 768-769, 773 (D. Minn. 1986), *rev'd on legal grounds*, 853 F.2d 1452 (8th Cir. 1988) (en banc), *cert. granted*, 109 S.Ct. 3240 (1989).

B. *Parental Notification or Consent Requirements Are Unduly Burdensome and Fail in Operation to Serve Their Intended Purposes.*

Parental notification and consent laws are unconstitutional because they fail to achieve their intended purposes: that of protecting pregnant minors from uninformed or immature abortion decisions, or that of fostering healthy intrafamily communication concerning the decision.[62] Indeed, such laws impose further irrational, gratuitous and useless burdens on minors by damaging their family relationships and delaying their access to abortion services. These statutes were in fact enacted for the unconstitutional purpose of denying access to abortion services.

1. *Parental Notification or Consent Requirements Do Not Protect Minors From Making Immature Decisions.*

Parental notification or consent requirements are overly broad and do not in fact protect minors from making immature decisions. The Minnesota and Ohio statutes, by failing to distinguish mature from immature minors, sweep too broadly. Adolescents as they grow older are generally competent to recognize and assess the consequences of their decisions.[63] Indeed, many states that have enacted parental notification or consent requirements for abortion, including Minnesota and Massachusetts, recognize that minors may be competent to make decisions about their own health care.[64] Minors who are gen-

[62] *Bellotti II*, 443 U.S. at 634.

[63] Lewis, *supra* n. 34, at 85-87.

[64] Minnesota allows *any* minor to give independent consent for diagnosis and treatment for pregnancy, childbearing, venereal disease, alcohol and drug abuse, regardless of his or her maturity. Minn. Stat. Ann. § 144.343(1). In Massachusetts, a pregnant minor or a minor living apart from and financially independent of his or her parents may consent to all forms of medical treatment, including treatment for childbirth, except abortion or sterilization. Mass. Gen L. ch. 112 § 12F (1983 & 1989 Cum. Supp.).

erally less competent to make important decisions, i.e. those who are younger and those who tend to be more conflicted about the decision, generally consult their parents voluntarily.[65] Thus, a notification requirement that covers all minors regardless of age or maturity sweeps too broadly and is not *narrowly* tailored to achieving the state's asserted interest of protecting minors from making immature decisions.

Second, assuming *arguendo* that parental notification and consent requirements were properly motivated, their failure to "protect" immature minors is apparent in their irrational consequences. No intelligible principle could dictate that the best interests of a girl who is so young as to be considered immature and who does not want a child, would best be served by a state-imposed requirement that results in her unwillingly becoming a mother.

The *real* purpose of these statutes is to deny access to abortion. Since abortion is one of the safest medical procedures doctors perform — safer at all stages than childbirth — the special treatment of the abortion decision in these statutes must have as its purpose some reason other than protecting immature minors from making hasty or inadequately-considered decisions about their health care. Such statutes are *over-inclusive* because mature minors are not allowed to consent to an abortion; and they are *under-inclusive* because they allow minors regardless of their maturity to consent to other health care treatment that imposes far greater health risks than abortion.[66] These regulations are neither narrowly tailored, nor even rationally related, to the State's interest in protecting minors from making immature decisions, and are thus unconstitutional.[67]

[65] Lewis, *supra* n. 34, at 87; Torres, Forrest, & Eisman, *supra* n. 9, at 288.

[66] These statutes allow pregnant minors to consent to medical care relating to childbirth, yet teenage girls aged 15-19 are twenty-four times more likely to die from childbirth than from first trimester abortion. Ory, *supra* n. 19, at 59, Table 2. Even an appendectomy is 100 times more dangerous than a legal induced abortion. Cates & Grimes, *supra* n. 22, at 170.

[67] *Thornburgh*, 476 U.S. at 763; *Akron*, 462 U.S. at 427; *Bellotti II*, 443 U.S. at 640; *Roe* v. *Wade*, 410 U.S. at 155.

2. *Parental Notification or Consent Requirements Do Not Enhance Intrafamily Communications.*

These statutes also fail to further, and in practice undermine, the state's alternative asserted purpose of fostering productive intrafamily communication concerning a minor's abortion decision.[68] Most teenagers voluntarily involve their parents.[69] But for those who choose not to involve their parents, these statutes do not significantly increase parents' involvement.[70] Moreover, the evidence at trial in *Hodgson* failed to identify any beneficial effect on intrafamily communication of forced notification. Experts credited by the court testified that voluntariness has been found to be the hallmark of productive family communication, and that forced communication not only fails to promote productive relations but typically damages them. These experts further testified that revelation of a pregnancy or proposed abortion through compulsion or inadvertence "is almost universally negative" and can provoke crisis and disharmony.[71] Such provocation is particularly dangerous in dysfunctional families in which violence and abuse often result from revelation of a pregnancy or desire to terminate it.[72]

[68] *See* Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psychologist 79 (1987).

[69] One study found that in Minnesota 65.3% of minors voluntarily consult *at least one* parent. Blum, Resnick & Stark, *supra* n. 8, at 620. In Massachusetts, approximately 75% of minors get the consent of their parents for their abortion. Planned Parenthood League of Massachusetts, *The Massachusetts Parental/Judicial Consent Law for Minors Seeking Abortion* 3 (1988) [PPLM]. Two studies of minors attending clinics found that 55% voluntarily informed their parents of their participation in the clinic and of their decision to have an abortion. Torres, *supra* n. 8, at 281 (clinic use); Torres, Forrest & Eisman, *supra* n. 9, at 287 (abortion decision).

[70] One study found that the primary impact of the Massachusetts consent statute was to drive minors out of state to obtain a confidential abortion. Cartoof & Klerman, *supra* n. 12, at 399. A study comparing the notification rate of minors in Minnesota with that of minors in Wisconsin (which has no notification or consent statute) found only a slightly higher percentage of Minnesota minors notified both parents (as required by statute) than did Wisconsin minors, and that the percentage of minors in both states that voluntarily notified at least one parent was statistically indistinguishable (65.3% compared to 62.1%). Blum, Resnick & Stark, *supra* n. 8, at 620. Witnesses who provided counseling and abortion services to minors both before and after enactment of Minnesota's statute testified at trial in *Hodgson* that they did not observe any post-enactment change in the level of parental participation. 648 F.Supp. at 775. The court explicitly considered and rejected the possibility that the very existence of the statute had encouraged minors, particularly immature, non-best-interest ones, to inform parents of their pregnancy. *Id.*

3. *Parental Notification or Consent Requirements Harm Pregnant Teenage Girls by Delaying Their Abortion Choice.*

"The abortion decision is one that simply cannot be postponed."[73] Constricting the right to choose abortion by erecting parental notification or consent requirements (even with a bypass) harms teenage girls disproportionately by delaying their abortion choice. And delay is always harmful.

While abortion at any stage of pregnancy is safer for teenage girls than childbirth, delay in seeking and obtaining an abortion, particularly for girls entering their second trimester, has the largest single effect on the risk to teenage girls of complications from abortion.[74] Yet, for various reasons, teenagers are less likely than older women to obtain abortions during the safer, earlier weeks of gestation.[75]

[71] 648 F.Supp. at 766-770. Experts conclude that communication between parents and children about sexual matters is typically closed, and the forced involvement of parents would not lead to more open, productive communication. *Melton*, *supra* n. 67, at 81.

[72] Melton, *supra* n. 67, at 81; Clary, *supra* n. 51 at 284.

[73] *Bellotti II*, 443 U.S. at 643.

[74] Cates & Grimes, *supra* n. 22, at 158; Yates & Pliner, *Judging Maturity in the Courts: The Massachusetts Consent Statute* 78 Am. J. Pub. Health 646, 648 (1988); *see also Hodgson*, 648 F.Supp. at 765. After eight weeks' gestation, the risk of major complications from abortion rises approximately 15-30% for each week of delay. Cates & Grimes, *supra* n. 22, at 158.

[75] *Risking*, Vol. I, *supra* note 24, at 114. A national survey found that only 34% of abortions obtained by girls ages 15 and younger are performed during the first (and safest) eight weeks of gestation, compared with 41% of

Parental notification and consent requirements necessarily impose additional delay, not only because the minor must wait until the requirements are satisfied, but because the requirements impose another hard and inevitably time-consuming decision on a minor: whether to proceed with such compelled parental involvement, or to pursue alternatives (e.g., going out-of-state or using a judicial by-pass if available). Such further delays only increase the medical risks associated with the abortion procedure to a significant degree.

Even short delays could heighten a patient's emotional tension, increase the costs of the procedure, and push a teenage girl into the second trimester of a pregnancy, when the abortion procedure entails significantly greater financial cost and medical risk.[76] Any increases in the financial costs of the procedure impose heavy, even insurmountable, burdens on teenagers as a group, and fall most heavily on poor teenagers, who tend disproportionately to be members of minority groups. By imposing additional medical risks and prohibitive costs on the

abortions obtained by girls ages 15-19, and 51% of those obtained by women ages 20-24. AGI, *Teenage Pregnancy*, *supra* n. 2, at 55. Adolescents (19 and under) are twice as likely as older women to obtain abortions after twelve weeks. Cates, *supra* n. 22, at 20. One reason for delay is limited access to abortion services, particularly in rural areas, due to difficulties in travel (especially in states with great distances between clinics) and expense. In addition, many teenagers, particularly the very young, fail to recognize the early signs of pregnancy. This may be due to ignorance or because many adolescent girls ordinarily experience menstrual irregularities and therefore do not distinguish them from early signs of pregnancy. *See, e.g.*, AGI, *Teenage Pregnancy*, *supra* n. 2, at 55; *Risking*, Vol. I, *supra* n. 21, at 114; Russo, *Adolescent Abortion: The Epidemiological Context*, in *Adolescent Abortion: Psychological and Legal Issues* 40, 57 (Melton ed. 1986); Bracken & Kasl, *Delay in Seeking Induced Abortion: A Review and Theoretical Analysis*, 121 Am. J. Obstetrics & Gynecology 1008-1019 (1975).

[76] *Hodgson*, 648 F.Supp. at 762. In *Hodgson*, the District Court found as a matter of fact that the cost of abortion increases with gestational age because of the increased skill necessary to perform the procedure. *Id.* at 761. The Court cited the following fee schedule from one clinic: under 12 weeks, $225; 12-14 weeks, $275; 16-18 weeks, $450; 18-19 weeks, $550; 19-21 weeks, $650. After 21 weeks, patients are referred to a particular hospital where, at 22 weeks, the fee is $1600-1800. *Id.*

abortion choice, parental notification and consent requirements run counter to one of the primary reasons abortion was legalized sixteen years ago — to reduce the devastating health risks of illegal abortion.

4. *The Requirement That, to Avoid a Court Hearing,* Both *Parents Must Be Notified is Unduly Burdensome and Contrary to the State's Asserted Purposes in Many Family Situations.*

The two-parent notification requirement of the Minnesota statute is not even minimally rational. It contains no exception for a divorced parent or for parents who are separated or absent, or who have never married, or for dysfunctional families in which one resident parent is likely to become violent or abusive to either the young woman or the other parent upon being informed that a daughter is seeking an abortion with the other spouse's approval.[77]

The two-parent consultation requirement was *found* in Minnesota to be a significant burden on minors which undermined, rather than promoted, healthy intrafamily communication. State-mandated contact with an absent, disinterested, estranged, separated, or potentially violent second biological parent was found to be frequently detrimental to the pregnant woman and, indeed, to the one parent who has been consulted, resulting in *reduced* intrafamily communication.[78]

In Minnesota, 20-25% of minors seeking judicial authorization voluntarily consulted with or were accompanied to hearings by one parent, demonstrating the severe problems caused by requiring notice to both parents. Indeed, two-parent consultation requirements had the perverse effect of inhibiting parent-child communication: When the daughter and one parent agree that contact with the other parent will be coun-

[77] Minn. Stat. Ann. § 144.343(3).

[78] *Hodgson*, 648 F.Supp. at 769 ("[i]n these instances, the requirement that minors notify both biological parents actually *reduces* parent-child communication") (emphasis supplied).

terproductive, a legally-imposed need to notify the second parent or obtain a judicial waiver of notification "distracts the minor and her parent and disrupts their communication."[79] Voluntary communication with one parent is actually *reduced* by a requirement that only consultation with both will suffice; some minors were dissuaded from contacting even one parent when only the consent of two would obviate the need for judicial proceedings.[80]

C. *If Court Upholds Parental Notification, it Must Preserve a Judicial or Other By-Pass to Protect Minors' Privacy Rights, and the By-Pass Must Be Meaningful and Workable.*

1. *By-Pass Must Be Preserved.*

This Court has properly held that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."[81] Although *every* minor may not be competent to make the abortion decision by herself, for those who are competent, the fundamental right to decide bars the state from delegating the decision to another.

To protect all minors' privacy rights to decide to terminate their pregnancies without the forced involvement of their parents, a state must provide a by-pass procedure that allows a minor to seek the advice, counsel and support of another competent adult who can help her make the decision herself and who can determine, if the minor is not mature, whether it is in her best interests to have the abortion.[82] A judicial determination is but one, and in many cases not the best, by-pass procedure.[83]

[79] *Id.* at 778.

[80] *Id.* at 769, 778.

[81] *Danforth*, 428 U.S. at 74; *see Akron*, 462 U.S. at 439-440: *Bellotti II*, 443 U.S. at 643.

[82] Ordinarily, the determination of a minor's competence to consent to medical treatment is made by the minor's physician. In Massachusetts, for *example, the common law mature minor rule allows the physician to determine whether the minor is capable of giving informed consent to medical treatment and whether it is in the minor's best interests to notify his or her parents. Baird* v. *Attorney Gen.*, 371 Mass. 741, 754 (1977). Immature minors already require the consent of *one* parent. *Id.* at 753.

[83] Maine has just enacted a comprehensive statute that provides for parental consent or judicial by-pass, but also provides for critical and meaningful alternatives. The statute authorizes a physician to perform an abortion on a minor after the physician has received the informed written consent of that minor and the physician has ensured that the consent is truly "informed" by counseling the minor according to specific criteria and determining that the minor is mentally and physically competent to give consent. *See* An Act to Require Parental Consent to a Minor's Abortion, 1989 Maine Acts Ch. 573, § 2 ¶ 2(2), (3) (amending 22 Me. Rev. Stat. Ann. § 1597-A).

Wisconsin requires providers of abortion services to encourage minors to notify their parents unless they determine that the minor has a valid reason not to do so. In that situation, the statute provides an alternative to parental notification. The hospital or clinic personnel encourage the minor to notify another family member, a close friend, a school counselor, social worker or other appropriate person. Wis. Stat. Ann. § 146.78(5) (1989).

Without a judicial by-pass or other alternative to parental involvement in the abortion decision, four out of ten minors — those who would choose not to consult their parents — will be denied their fundamental right to choose to terminate their pregnancy in private. Some will succumb to anti-choice pressure or their parents' will that they carry to term, others will have an illegal abortion or self-abort, and others will suffer the negative, even violent, consequences that the revelation of their pregnancy or abortion decision causes.

2. *By-Pass Must Be Meaningful and Workable.*

Amici wish to emphasize that by-pass does not *cure* the burdens caused by forced parental notification or consent, particularly two-parent notification or consent. Nor do *amici* endorse the concept of judicial by-pass as the best way to protect minors' constitutional rights. Nevertheless, it is the *minimum* necessary to protect minors' constitutional rights to decide to terminate their pregnancy without an actual or *de*

facto parental veto. Accordingly, a judicial by-pass provision must be meaningful and workable.

Massachusetts has had the longest experience with judicial by-pass, initiating the procedure in 1981. Over that time the procedure has worked about as well as such a procedure could for those who have chosen to use it: Thousands of minors have petitioned the court, all but a minute handful of petitions have been granted without appeal,[84] and the average time period from the time an attorney is contacted and a hearing takes place is 4-5 days.[85] Key to the "survivable" working of the Massachusetts procedure are the Rules and Guidelines issued by the Massachusetts courts. *See* Appendix B. These Rules and Guidelines provide for the essential elements of expedition, confidentiality, appointment of counsel, and the determination of maturity or best interests. Although the Massachusetts by-pass procedure is not without its problems, this procedure is, *when the Rules and Guidelines are followed*, faithful to the teaching of *Bellotti* v. *Baird*, and, as confirmed by nearly ten years of experience, representative of what such a procedure must entail.

Time is of the essence when deciding to terminate a pregnancy, as each additional week of gestation increases the health risks from abortion. To ensure that petitions are heard expeditiously, the Rules and Guidelines specify that petitions should be heard in chambers on any day the court is in session,

[84] Between April 1981 and February 1988, 5,460 minors sought judicial consent for abortion in Massachusetts pursuant to Mass. Gen. L. ch. 112, § 12S. Only twelve petitions were denied: Of these nine were overturned on appeal within three days, one minor petitioned another court, one went out of state, and one minor obtained parental consent during appellate proceedings. PPLM, *supra* n. 68, at 2.

[85] Yates & Pliner, *supra* n. 74, at 648 (though 4.2-5.2 days was average delay, specific delays ranged from one day to 39 days). Much of the reason for expedition in Massachusetts is a combination of the efforts of *amicus* Massachusetts Judicial Consent for Minors Lawyer Referral Panel and cooperative court personnel. This Court should not be so naive as to think that lawyers and court personnel in other states would necessarily be as helpful. Moreover, by-pass causes other delays: i.e., locating an attorney initially, any appellate proceedings and scheduling the abortion procedure some time after the hearing.

expeditiously, and if possible *on the same day of filing.*[86] The Rules and Guidelines provide for waiver of fees and for court-appointed counsel, which is essential to navigate expeditiously through any court procedures. To ensure confidentiality, only a sealed affidavit contains the minor's real name. She need not state her name on any other documents or during the hearing, her name should not appear in the transcript of the proceedings, and the in-chambers hearings are to be held out of the presence of unnecessary court personnel. Moreover, statewide venue is provided so that a minor need not attend court in her neighborhood.[87]

Most importantly, and following the precise lead of *Bellotti II*, the Massachusetts Rules and Guidelines set out a two-tiered approach under which judges are to determine whether to grant the petition. First the judge must determine whether the minor is mature enough to make the decision. Only if the judge determines that she is not mature, does the judge move to the second tier of inquiry, whether the abortion would be in her best interests. The Rules and Guidelines further set forth the appropriate inquiry when making these determinations,

[86] App. B at B-3, ¶ 2. Ideally, a statute should specify very short deadlines for scheduling hearings, rendering decisions, and hearing and deciding appeals in order to avoid delays such as the potential 3-week delay wrought by the Ohio statute. Ohio allows 5 business days for scheduling the initial hearing, 4 days for docketing the appeal and 5 days for the appellate hearing, and calls for decisions "immediately" after the hearing. *Akron Center for Reproductive Health* v. *Rosen*, 633 F.Supp. 1123, 1141-1142 (N.D. Ohio 1986), *aff'd*, *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), *jurisdiction noted*, 109 S.Ct. 3239 (1989). *Compare* La. Rev. Stat. Ann. § 40:1299:35:5 (1989 Cum. Supp.) (hearings to be held within 48 hours of filing of application, for both initial petition and appeal); Nev. Rev. Stat. Ann. § 442.255.2(c) (1986) (hearing must be held within 2 days of filing and decision rendered within 1 day of hearing), *with* Maine Acts Ch. 573 § 2 ¶ 6(C) (5 days both for initial hearing and for appeal); Wyo. Stat. § 35-6-118 (1989 Cum. Supp.) (5 days for initial hearing, no guideline for appeal).

[87] App. B at B-2, ¶¶ 2-3; B-3 to B-4, ¶¶ 4-5. Contrast with the Ohio practice, which requires a minor to provide her true name and address on the complaint. *Rosen*, 633 F.Supp. at 1143-44. Yet, even with the Massachusetts guidelines, a minor's confidentiality can be breached when persons she knows recognize her at court. *See* PPLM, *supra* n. 68, at 4.

including the minor's age, school and work experience, whether the decision is her own and whether she has discussed it with others.[88]

The Rules and Guidelines specifically caution that a judge should not question a minor in such a way as to promote "a particular set of moral values." They direct judges not to inquire into the minor's or her parents views on the morality of abortion, whether the minor considers the fetus to be an "unborn child," or whether the minor believes she is destroying life.[89]

Only if the judge fails to find the minor mature, should he or she consider whether the abortion is in the minor's best interests. The Rules and Guidelines then propose that judges apply the doctrine of "substituted judgment"[90] in conducting the best interests inquiry, explaining,

> [t]hat doctrine essentially requires a court to determine what an incompetent person would choose were she fully

[88] App. B at B-4, ¶¶ 6-8.

[89] App. B at B-4, ¶ 7. Unfortunately, in Massachusetts, and one could predict elsewhere, this guideline is far from uniformly followed. *See Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459, 466 (1st Cir. 1989). Nevertheless, former Massachusetts Superior Court Judge Paul Garrity, who testified in *Hodgson* about his experience with the Massachusetts statute, admitted that he is personally opposed to abortion, yet he heeded the Guidelines' admonition not to let his personal views interfere. He found every minor who appeared before him mature enough to make the decision. Tr. at 1322-1325, *Hodgson*.

Other statutes' lack of standards for determining maturity and best interests are an open invitation for judges improperly to question the minor about her moral and religious views. For example, the Maine statute's catch-all provision that allows a judge to consider "[a]ny other evidence that the court may find useful," 1989 Maine Acts Ch. 573 § 2 ¶ 6(C)(3), opens the door to such improper inquiry. *See also In re T.W.*, 543 So.2d 837, 841 (Fla. App. 5 Dist. 1989) (Florida statute's lack of guidelines for determining maturity or best interests imposes clear danger that judges will render decision on basis of their own moral, religious or political beliefs rather than on a constitutionally permissible basis).

[90] *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 750 (1977); *Brophy* v. *New England Sinai Hosp., Inc.*, 398 Mass. 417, 431 (1986).

> competent, while bearing in mind her expressed choice and partial competency. Various considerations may be relevant to a "best interest" determination. As to this finding, the court may inquire into the minor's reasons for not seeking her parents' consent. Where the minor is accompanied by one parent who supports her petition, that support should be given great if not dispositive weight.[91]

This Guideline is, of course, critical because it ensures that a judge does not assess a minor's best interests according to the judge's moral views of abortion.[92]

If followed, rules such as the Massachusetts Rules and Guidelines can properly shield minors from harassing questions by judges, expedite the proceedings to avoid undue delay, and protect the minor's privacy and confidentiality as much as possible under the circumstances.

Conclusion

To exercise their fundamental right to reproductive choice, minors need access to reliable information about childbearing and abortion from a competent adult, including a parent, if they choose, or from trained counselors and physicians so that they may ultimately make the decision that is best for

[91] App. B at B-4 to B-5 ¶ 8.

[92] Application of the substituted judgment standard would have prevented the four-week delay in obtaining an abortion for a minor in Alabama where the judge determined that an abortion was not in her best interests because her prognosis for delivering a baby was fair! *See Ex Parte Anonymous*, 531 So.2d 901, 902-903 (Ala. 1988). The minor, 12 years old and 14-16 weeks pregnant, whose mother was in a psychiatric ward and father had left home, testified that she did not want to have the baby, could not take care of the baby or herself, and that her two aunts agreed with her decision. After finding that she was not mature, the trial judge denied her petition ruling that, at 14-16 weeks gestation, her prognosis for delivery was fair. *Id.* Although the ruling was reversed on appeal as clearly improper, four weeks elapsed during appeals to the appellate court, which remanded instead of granting the petition outright, and to the Supreme Court of Alabama.

themselves. If this Court is truly concerned with the quality of childbearing decision making by minors, it must not deter minors who will not voluntarily consult their parents from getting the counseling and health services that they desperately need for a safe abortion or a safe pregnancy. Forced parental notification or consent bars the provision of safe abortion counseling and services to those individuals who need help the most — minors who feel they cannot involve their parents in their reproductive decisions. To protect a minor's privacy, if such notification is upheld, a meaningful by-pass is required, as eight members of this Court recognized in *Bellotti* v. *Baird*. Guidelines such as those in Massachusetts provide the *minimum* essential ingredients of a meaningful, workable by-pass procedure.

For the foregoing reasons, the judgment below in *Hodgson* v. *Minnesota* should be reversed in part, and the judgment in *Ohio* v. *Akron Center for Reproductive Health* should be affirmed.

Respectfully Submitted,

JOHN H. HENN
(Counsel of Record)
NINA JOAN KIMBALL
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390
Attorneys for *Amici Curiae*

Dated: September 1, 1989

APPENDIX A

Interests of Amici

The Center for Population Options (CPO) is a national, non-profit organization dedicated to the prevention of unintended adolescent pregnancy and too-early childbearing. CPO develops programs to increase opportunities for young people through education, comprehensive health care, and access to family planning services.

Planned Parenthood League of Massachusetts, Inc. is a non-profit organization which, with others, is the certified class representative of minor women who are engaged in an ongoing challenge to the Massachusetts minors' abortion parental consent/judicial by-pass statute, Mass. Gen. L. Ch. 112, §12S, which has been in effect longer than any other such statute in the nation, and which was enacted in direct response to the striking down of the predecessor §12S by the Court in *Bellotti* v. *Baird*.*

Girls Clubs of America serves more than 250,000 girls and young women ages 6-18 nationally through programs and advocacy. Preventing adolescent pregnancy is an important goal of the organization. A major objective of its program in this area is to improve communications between parents and their daughters.

The Massachusetts Judicial Consent for Minors Lawyer Referral Panel is a volunteer association of over two hundred Massachusetts lawyers who for the last eight years have represented more than 6,000 pregnant minors seeking judicial consent for an abortion (in lieu of parental consent) under Mass. Gen. Laws ch. 112, §12S.

Mobilization for Youth Health Services, Inc. is concerned that the erosion of *Roe* v. *Wade* will lead us back to the days where social class and ability-to-pay were highly determina-

---

* 443 U.S. 622 (1979) *(Bellotti II)*. The history of the new §12S and the litigation challenging it is set forth in part in *Planned Parenthood League of Massachusetts* v. *Bellotti*, 868 F.2d 459 (1st Cir. 1989).

minative of whether choice was available and, if available, whether that choice was exercised under conditions of hygiene, care, and skill normally accepted as standard for the medical profession. Social realities being what they are, the victims of the curtailment of an essential right for women would be millions of disadvantaged and poor women in the United States.

The United States Student Association (USSA) is a nationwide non-profit membership organization which represents approximately two million students at approximately 200 colleges and universities throughout the United States. USSA has a strong commitment to ensuring access to higher education and the right to self-determination for all individuals regardless of age, gender, economic status, race, disability, sexual/affectional orientation, or veteran status.

Brooklyn YWCA (Young Women's Christian Association) is part of the oldest and largest worldwide women's membership organization dedicated to empowering women. The Brooklyn YWCA opposes any effort to restrict the access of poor and young women to quality health care services, as well as any attempt to deny them their right to reproductive freedom.

Students and Youth Against Racism is a national organization based in New York City with chapters nationwide whose women members include students and youth from many communities. It supports the right of all young women to make the decision to terminate a pregnancy through abortion, without restrictions, if they so choose. To deny safe, legal abortion would seriously harm the health of and discriminate against untold numbers of young women, especially the poor, unemployed, and Black, Latino, Asian and Native Americans, who, without the funds to obtain safe abortions, would have to resort to dangerous health-threatening procedures.

Professor William Kassen, a child psychologist at Yale University, is a member of the National Academy of Sciences and the vice chairman of the Committee on Child Development Research and Public Policy that proposed and contributed to the report *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing.*

The American Public Health Association, established in 1872, is a national nongovernmental professional society representing 55,000 members in all disciplines and specialities in public health. APHA is devoted to the universal protection and promotion of public health, and the equality of health services for all persons.

The National Family Planning and Reproductive Health Association, Inc. (NFPRHA) is a non-profit membership corporation designed to improve and expand the delivery of comprehensive family planning and reproductive health care information and services throughout the United States. NFPRHA represents over 85 percent of the agencies and organizations that operate family planning programs with funds received under Title X of the Public Health Services Act of 1970.

Abortions Rights Mobilization (ARM) is a Section 501(c)(3) organization, which uses lawsuits, education and other techniques "to implement and guarantee a women's right to legal abortion as decreed by the U.S. Supreme Court," following ARM's by-laws.

Abortion Rights Council (ARC) was founded in 1968 and currently has 5,000 members and 12,000 supporters in the State of Minnesota. It has as its sole purpose keeping abortions safe and legal for all women. ARC opposes any further restrictions on women's access to abortions and supports the principles established in *Roe* v. *Wade.*

Choices Women's Medical Center is a New York State licensed medical facility serving over 30,000 patients a year in the New York City area for family planning, abortion and prenatal care. Since its founding in 1971, Choices Women's Medical Center has been at the forefront of insuring high quality feminist women's health care to its patients and fighting politically to retain the right to choose.

Child Care Law Center in San Francisco, California is the only legal services organization in the country exclusively dedicated to expanding the supply of affordable, quality child care. It has a particular emphasis on serving the needs of low-income women, and as such it strongly supports the rights of low-income women to have equal access to health services, including abortion.

The National Organization for Women (NOW) is the largest feminist organization in the United States. Fundamental to NOW's purpose is the right of women to control their own bodies and to determine if and when to bear children. Women's right to reproductive freedom impacts not only their right to privacy, but also their health and safety.

The American Association of University Women (AAUW), a network of 140,000 college-educated women, promotes equity for women and girls. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care. AAUW believes that decisions concerning reproductive health care are personal ones, and that the right to make informed decisions should be available to *all* women.

The American Jewish Congress, an organization of American Jews founded in 1918, is fully committed to protecting the right of all women to exercise reproductive choices. While it believes that involving parents in the choices of their teenage daughters is desirable, it believes that such involvement cannot be mandated by law, because study after study demonstrates that these laws are wholly ineffective, even, in many cases, counterproductive.

The National Council of Jewish Women, founded in 1893 and numbering 100,000 members across the United States, is dedicated, in the spirit of Judaism, to advancing human welfare and the democratic way of life through a combination of social action, education and community service. It has adopted a National Resolution to work for "the protection of every female's right to choose abortion, and the elimination of obstacles that limit reproductive freedom."

The Women's Law Project (WLP) is a non-profit law firm dedicated to advancing the status and opportunities of

women. WLP believes that the right to reproductive choice is an essential component of women's ability to play an equal role with men in this society, and has engaged in extensive litigation and public education designed to protect women's legal right to abortion.

The Women's Action Alliance, Inc. in New York City works extensively with community-based organizations serving women of color, young women, and low-income women. We are keenly aware of the importance of maintaining a full range of reproductive options for these and all women. If abortion services or access to abortion were to be restricted, these women would have no alternative but to seek dangerous alternatives to safe and legal abortion.

The National Gay & Lesbian Task Force (NGLTF) is a national membership advocacy and political organization founded in 1973, to protect and advance the civil and social rights of lesbians and gay men. NGLTF strongly supports the reproductive freedom of all women and the expansion of a fundamental right to privacy of all people in the area of reproductive and sexual decision-making.

The National Gay Rights Advocates (NGRA) is a non-profit public-interest law firm founded in 1978, which engages in impact litigation throughout the country on behalf of lesbians and gay men. Preserving the constitutional rights to liberty and privacy, rights that are principal components of a woman's right to choose abortion, are of fundamental concern to NGRA's work and its membership.

Lambda Legal Defense and Education Fund, Inc., founded in 1973, is the nation's oldest and largest national legal advocacy organization working in furtherance of the rights of lesbians and gay men. As an organization representing the lesbian and gay community's belief in the constitutional right to liberty and bodily autonomy, Lambda strongly supports the position that women in our society are constitutionally entitled to make their own decisions about whether to choose abortion.

The National Council for Research on Women is an independent association of established centers and organizations that provide institutional resources for feminist research, policy analysis, and educational programs for women and girls.

The Minority Prison Project of Memphis, Tennessee works for the protection of the men, women, and children imprisoned in the United States. We work to try and regain the rights for these humans, under the Constitution, that is denied them daily.

All-Peoples Congress, based in New York City, is a national organization with chapters in communities in many major cities whose women members are Black, Latino, Asian, Native, white, students, lesbians, workers, unemployed, disabled, seniors, single heads of households and those on fixed incomes. It strongly supports a comprehensive federal program of guaranteed reproductive rights and health care for all women, which includes safe, legal, affordable abortion.

The Women's Bar Association of Massachusetts (WBA), with over 1,000 members, is committed to the advancement of women attorneys, to the protection of all women in the legal system, and has been particularly concerned with the protection of a woman's right to choice. The WBA also sponsors a panel of attorneys who represent minors seeking judicial consent for abortion (amicus Massachusetts Judicial Consent for Minors Lawyer Referral Panel).

California Women Lawyers (CWL) is an organization of several thousand women lawyers founded in 1973 for the primary purpose of improving the situation of women in the State of California. CWL is committed to all issues affecting a woman's right to choice, lobbying against various parental consent bills and working with a broad-based coalition to encourage funding and support for programs supportive of choice.

The Women's Bar Association of Illinois ("WBAI") was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women and women attorneys and

to maintain the honor and dignity of the legal profession. WBAI's 1,000 members have long campaigned for individual rights and liberties, including the right of women to make reproductive decisions free from governmental interference.

Women Lawyers' Association of Los Angeles (WLALA), founded in 1919, is the largest local bar association in the State of California emphasizing the concerns of women. WLALA has as members over 1,200 female and male lawyers, judges, and law students who are personally and professionally concerned with the importance of preserving a woman's right to choose for herself whether to terminate a pregnancy.

The New York State Coalition Against Domestic Violence is a membership organization of battered women's shelters, safe home projects, counseling and advocacy organizations and individuals committed to empowering women and helping them to lead violence-free lives. The Coalition believes in women's rights to choice and in the accessibility of services to all women, regardless of economic status. This includes every woman's right to reproductive choice and to medical assistance.

The Tucson Women's Commission was founded in late 1975 by the Mayor and Council of the City of Tucson to assist women in attaining full equality of opportunity in all aspects of life. The Tucson Women's Commission also maintains that public policy in the best interest of women will support a full range of options, information, and services so that every woman has the ability to make her own decision about when, whether, and under what conditions to bear a child.

New York Women in Criminal Justice is an organization of women whose members include police, probation, and correction officers; judges, attorneys, and social workers; others who work in the criminal justice system; inmates and ex-offenders. In furtherance of our concern that offenders who go through the system not come out worse than when they went in, we strongly support the right of a woman to choose abortion, knowing that the offspring of women in prison become the

dysfunctional children in school and often the criminals of the future.

The Missouri Women's Network is a banding together of Missouri organizations and individual women and men to facilitate communication, promote education, and to strengthen advocacy for women's issues based on the 1977 National Plan of Action for Women (adopted in Houston).

The Connecticut Women's Educational and Legal Fund, Inc., with over 400 members, is a non-profit public interest law firm advocating for women's rights. As an organization working for equality, we believe that every woman, without regard to age, religious belief, income, race or disability, must be able to control her own health and reproduction.

Hawaii Women Lawyers is dedicated to the improvement of the status of women attorneys and the support of issues of concern to all women, so as to promote the advancement of all women.

North Carolina Equity, a non-profit organization, is dedicated to the economic advancement of women. We support women's full realization and exercise of their most basic legal rights, including a woman's right to control her own body. This right must include her right to choose an abortion.

The San Francisco Women Lawyers Alliance is a progressive, activist bar organization that was founded in 1983 to provide a vehicle through which women lawyers could address women's issues and enhance the position of women in our society. One of the issues of particular concern to our membership is freedom of choice and reproductive rights for all women.

Queen's Bench of the San Francisco Bay Area, founded in 1912, is the largest bar association in the Northern California area established to promote the interests of women attorneys. Queen's Bench is concerned in maintaining a woman's fundamental right of choice to terminate a pregnancy that was established in *Roe* v. *Wade*.

Fresno Free College Foundation is a community organization with offices in Fresno, California. Its origin in 1968 is connected to an academic freedom case and, since that time, it has, in various ways, been supportive of academic freedom and the civil liberties of students, professors, and citizens.

APPENDIX B

STANDING ORDER 5-81. UNIFORM PROCEDURES REGARDING PETITIONS FOR ABORTION AUTHORIZATION UNDER G.L. c. 112, s. 12 TO INCLUDE AS AN ATTACHMENT SUGGESTED GUIDELINES, ORIGINALLY SET FORTH IN *PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS* v. *BELLOTTI*, NO. 81-124 CIVIL (SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY; LIACOS, J. SINGLE JUSTICE) (JUNE 16, 1981)

(Amended)

Applicable to All Counties

Effective August 1, 1981

(1) Upon the filing of a petition or motion (petition) under G.L. c. 112, § 12S, inserted by St.1980, ch. 240 (a copy of which is attached), the Clerk-Magistrate (clerk) shall immediately bring the matter to the attention of the Regional Administrative Justice or His/Her Designee who will either hear the petition in his/her session or, through the clerk, assign it for a hearing in another session.

In any event, the matter shall be given priority over all other cases then pending "so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman." G.L. c. 112, § 12S, inserted by St.1980, ch. 240. In this regard, the court should not decline to decide a case brought under § 12S because of any pleading omissions or other technical defects and shall assist the minor, particularly if unrepresented by counsel, in presenting relevant facts and by liberally construing the pleadings. (A copy of a form petition, which is to be made easily available to petitioners, is attached.)

If the position is filed in a county in which no session is being held, the clerk of court who received the petition shall immediately notify the Chief Justice of the Superior Court by telephone of the pending petition. The Chief Justice shall then take such action as is necessary to reach a decision promptly

and without delay so as to serve the best interests of the pregnant woman.

(2) Although § 12S permits a pregnant woman less than eighteen years of age to participate in proceedings in the Superior Court Department in her own behalf, it is preferable that the minor be represented by counsel. The statute requires that the court advise her that she has a right to court-appointed counsel and that the court shall, upon her request, provide her with such counsel.

Also, the court may appoint a guardian *ad litem* to represent the minor or may make such other orders as necessary pursuant to Mass.R.Civ.P. 17(b). The compensation for counsel and/or for the guardian *ad litem* shall be certified by the justice as an expense incident to the operation of the court. If the minor requests waiver of costs and fees, as provided by St.1980, c. 539, such costs and fees are to be waived.

(3) As provided by § 12S, all proceedings shall be confidential and all pleadings and other papers filed shall be designated anonymously. For example, the proceedings shall be titled Mary Moe, Mary Doe, etc. If the minor files papers which do not insure her anonymity, the court shall have the papers processed in a manner which will insure anonymity and shall return the defective papers to the minor or her counsel. An affidavit shall accompany the papers in the case. Such affidavit shall reveal the minor's true identity. The affidavit shall be sealed in an envelope which will be identifiable by having the docket number of the case inscribed upon it. All such envelopes shall be kept in a separate file by the clerks of the various courts. All papers in the proceeding shall be impounded.

The clerks of the various courts should undertake to insure that the minor's contact with the clerk's office is confidential and expeditious to the fullest extent practicable. For example, assistance in filing a petition should be provided in a confidential setting, such as a private office. Similarly, one or more persons in the clerk's office should be at all times available to

answer questions asked by a minor, either in person or by phone, and to assist the minor in expeditiously presenting her petition to the court. Each clerk shall designate one or more persons to receive and process § 12S petitions and shall insure that one such person is available to insure prompt treatment.

(4) All proceedings under c. 112, § 12S, shall be conducted jury-waived with a court reporter present. The statute requires the court to make in writing specific factual findings and legal conclusions supporting his or her decision and to order that a record of evidence be maintained which includes his or her own findings and conclusions.

(5) Suggested guidelines, originally emanating from a memorandum of the Single Justice for Suffolk County in *Planned Parenthood League of Massachusetts* v. *Bellotti*, No. 81-124 Civil (Supreme Judicial Court for Suffolk County; Liacos, J. Single Justice) (June 16, 1981), are attached hereto.

SUGGESTED GUIDELINES

The following guidelines for handling § 12S petitions ("petitions") are suggested to the Superior Court. These guidelines are intended to supplement amended Superior Court Standing Order No. 5-81 and not to replace it.

1. Petitions should ordinarily be heard on any day the court is in session.

2. Petitions should be heard as expeditiously as possible upon filing with the Clerk/Magistrate's office, and on the same day if practical.

3. All technical defects in the proceedings and in the pleadings and papers should ordinarily be disregarded by the Court and by the Clerk/Magistrate.

4. Hearings must be confidential and should be held in the judge's lobby except where physically impossible. The petitioner ("minor") should be permitted to have present any person she desires (social worker, counselor, parent, friend), but the judge should exclude all unnecessary court personnel or others. The minor should be free to choose whether to go forward without counsel.

5. The minor should not be required to state her true name. After explaining the impoundment procedures used to ensure confidentiality, the judge may wish to ask the minor her true first name in order to address her by it during the hearing. The transcript should not contain the minor's full true name since she will have previously stated her identity on a sealed affidavit held by the Clerk/Magistrate pursuant to Superior Court Standing Order 12-80.

6. It is contemplated that the judge will conduct the hearing on a "two-tier" basis with "maturity" determined first, and "best interest" addressed only if maturity is not found.

7. As to the "maturity" finding, inquiry may be appropriate in such areas as the minor's age and school and work experience, any history of mental illness or other treatment relating to mental competence, and whether the abortion decision is a personal decision and not one forced upon the minor by another and whether the minor has discussed her decision with other persons. In any inquiry as to the minor's maturity and her understanding of the nature, consequences and significance of her abortion choice, or in any inquiry as to her best interests, it is suggested that the judge should avoid the creation of the appearance of seeking to promote a particular set of moral values by inquiring into the minor's or her parents' views as to the morality of abortion; or into whether the minor considers a fetus to be an "unborn child," as to whether the minor believes she is in some way taking or destroying life.

8. Where the court finds a minor is not mature, it must make a determination of whether the abortion or childbirth alternative is in her "best interest". The court may be guided in making such a determination by the substantially coextensive doctrine of substituted judgment. That doctrine essentially requires a court to determine what an incompetent person would choose were she fully competent, while bearing in mind her expressed choice and partial competency. Various considerations may be relevant to a "best interest" determination. As to this finding, the court may inquire into the minor's

reasons for not seeking her parents' consent. Where the minor is accompanied by one parent who supports her petition, that support should be given great if not dispositive weight.

9. Where the court preliminarily concludes that the minor is mature, appointment of a guardian ad litem should ordinarily be unnecessary. Where the court preliminarily concludes that the minor is not fully mature, it should consider whether such an appointment is necessary to assure protection of the minor's best interest or whether it would lead to unnecessary delay, particularly if the minor is represented by counsel, or has been counseled by competent professionals, or is accompanied by a parent or other adult.

10. In view of the statutory mandate for expeditious decisions, petitions may be decided in chambers and should, in any event, be decided as promptly as possible, and ordinarily within twenty-four hours or less. The Clerk/Magistrate should inform the minor of the decision as soon as possible and in the manner which the minor requests.

11. The Judge or Clerk/Magistrate should give the minor a copy of an order under § 12S bearing the court's docket number, and a copy of her sealed affidavit bearing the same docket number. Where the decision can be made immediately, the Judge may choose to have the minor wait, deliver the order and a copy of the affidavit to her, and seal the original affidavit in her presence.

12. A petition should not be denied or a hearing delayed solely because the minor has not selected a particular clinic, hospital or doctor for performance of the abortion. If the judge authorizes an abortion for an immature minor on the "best interest" basis, he may inquire into her contemplated plans in order to assure himself that the particular course of medical treatment she intends to follow will be in her best interests.

13. Appointed counsel in § 12S proceedings should be paid for in the same fashion as in criminal cases or in such other fashion as the Chief Administrative Justice of the Trial Court finds is best suited for such proceedings.

(12) (12)

FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1125 and 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D., *et al.*,

Petitioners,

—v.—

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

—v.—

JANE HODGSON, M.D., *et al.*,

Cross-Respondents.

BRIEF FOR PETITIONERS

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(*Counsel of Record*)
RACHAEL N. PINE
LYNN M. PALTROW
JOHN A. POWELL
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

95 pp

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in failing to hold the Minnesota two-parent notification/judicial bypass statute unconstitutional, despite factual findings that after five years of operation the statute both failed to promote any legitimate state interest and impermissibly burdened minors' privacy rights.

2. Whether the Eighth Circuit erred in holding that the imposition of a mandatory waiting period of not less than forty-eight hours, and commonly seventy-two hours, after notification to both parents, was constitutional.

3. Whether the district court was correct in holding that the two-parent requirement cannot be severed from the remainder of the statute.

PARTIES TO THE PROCEEDING

Petitioners, Jane Hodgson, M.D.; Arthur Horowitz, M.D.; Nadine T., Janet T., Ellen Z., Heather P., Mary J., Sharon L., Kathy M., and Judy M., individually and on behalf of all other persons similarly situated; Diane P., Sarah L., and Jackie H.; Meadowbrook Women's Clinic, P.A., Planned Parenthood of Minnesota, a nonprofit Minnesota corporation; Midwest Health Center for Women, P.A., a nonprofit Minnesota corporation; Women's Health Center of Duluth, P.A., a nonprofit Minnesota corporation, were plaintiffs below.[1] Respondents and Cross-Petitioners, the State of Minnesota, Rudy Perpich, as Governor of the State of Minnesota; Hubert H. Humphrey, III, as Attorney General of the State of Minnesota, were defendants below.

---

1 The caption on the Petition for Certiorari differs from those used in the courts below. The lower courts erroneously failed to use the substituted caption entered by order of the district court on April 3, 1986. This order is reprinted in the Appendix to the Petition for Certiorari at 6a-7a. Citations to the Appendix to the Petition for Certiorari are in the form "__ a." Citations to the Joint Appendix are in the form "J.A. __." Cites to other parts of the record are by Exhibit (P. Ex. __) or Transcript (Tr.) page.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. History Of The Legislation	2
B. History Of The Litigation	4
C. Facts	6
1. Introduction	6
2. The Minnesota Criminal Notification Statute Seriously Harmed Minnesota Teenagers	7
a. Privacy Is Critical To Assure That Pregnant Teenagers Seek Necessary Help	7
b. Delay Is The Most Significant Risk Factor For Teenagers Who Have Abortions And The Lack Of Abortion Facilities In Minnesota Exacerbates This Risk	9
c. Minnesota's Two-Parent Notification Statute Forced Some Teenagers Into Unwanted Motherhood Which Imperiled Their Health And Stunted Their Futures	11

PAGE

d. Every Option Available To Minors Under The Statute Caused Serious Delay 13

3. Those Plaintiff Teenagers Who Seek Confidential Abortions Have Good Reasons For Not Notifying One Or Both Parents Of Their Pregnancies 16

4. Compelled Parental Involvement Was Devastating To Many Families And Was Especially Disastrous In Single-Parent Homes And Abusive Family Situations 19

5. The Judicial Bypass Was Not An Option For Many Teenagers Who Needed Confidential Abortions And The Statutory Exceptions Did Not Work 23

SUMMARY OF ARGUMENT 25

ARGUMENT:

I. MINNESOTA'S TWO-PARENT NOTIFICATION AND JUDICIAL BYPASS STATUTE IS UNCONSTITUTIONAL 27

A. The Effect Of Minn. Stat. § 144.343(2)-(6) In Operation Is Central To The Constitutional Analysis 29

B. The Minnesota Two-Parent Notice/Bypass Law Impermissibly Burdened Minors' Privacy Rights 33

C. The Presence Of A Judicial Bypass Procedure Does Not Immunize All Underlying Statutory Requirements From Constitutional Scrutiny ... 36

PAGE

II. THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE INDEPENDENT RIGHTS AND INTERESTS OF BIOLOGICAL PARENTS JUSTIFY MINNESOTA'S TWO-PARENT NOTIFICATION REQUIREMENT 38

A. Parental Authority Over Minors Is Not Independent From Or Weightier Than A Minor's Liberty And Health Interests 39

B. States Have Universally Recognized The Paramount Importance of Confidentiality To The Health And Welfare Of Minors 43

III. THE MINNESOTA STATUTE'S REQUIREMENT THAT THE MINOR WAIT FORTY-EIGHT HOURS AFTER NOTICE TO HER PARENTS IS UNCONSTITUTIONAL 45

IV. THE TWO-PARENT NOTIFICATION REQUIREMENT IS INTEGRAL TO THE STATUTE AND NOT SEVERABLE 47

CONCLUSION 49

APPENDIX:

Exhibit A, Parental Involvement Statutes A-1

Exhibit B, Plaintiffs' Expert Witnesses A-5

Exhibit C, State Statutes On Minors' Consent To Treatment For Venereal Disease or Pregnancy-Related Health Care A-8

Exhibit D, State Statutes On Minors' Consent To Drug Or Alcohol Abuse Treatment A-14

PAGE

Exhibit E, Orders of Oklahoma District Court and Oklahoma Supreme Court in *In re D.C.* A-19

Exhibit F, Excerpts From Minnesota Senate Legislative Journal A-23

Exhibit G, Excerpts From Transcript Of Remarks by Minnesota State Sen. Gene Waldorf at Minnesota Senate Session Regarding Senate File 287 (May 6, 1981) . A-26

TABLE OF AUTHORITIES

Cases: PAGE

Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945) 30, 31

Alaska Airlines v. Brock, 480 U.S. 678 (1987) 48

American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283 (3d Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986) 46

Andersen v. Andersen, 360 N.W.2d 644 (Minn. Ct. App. 1985) 36

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 33

Andros v. Andros, 396 N.W.2d 917 (Minn. Ct. App. 1986) 36

Bateman v. Bateman, 382 N.W.2d 240 (Minn. Ct. App. 1986) 36

Bellotti v. Baird, 443 U.S. 622 (1979) ..... *passim*

Bd. of Trustees of the State Univ. of New York v. Fox, 109 S. Ct. 3028 (1989) 33

Bowen v. Kendrick, 108 S. Ct. 2562 (1988) 31, 32

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985). 48

Buckley v. Valeo, 424 U.S. 1 (1976) 31

Caban v. Mohammed, 441 U.S. 378 (1979) 39, 40

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 28, 30

Chapman v. Chapman, 352 N.W.2d 437 (Minn. Ct. App. 1984) 36

PAGE

City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983).....*passim*

Craig v. Boren, 429 U.S. 150 (1976)..... 30

DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 108 S. Ct. 1392 (1988)..... 32

Doe v. Bolton, 410 U.S. 179 (1973)..... 38

Estby v. Estby, 371 N.W.2d 647 (Minn. Ct. App. 1985) 36

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). 31

Field v. Clark, 143 U.S. 649 (1892)..... 49

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)..... 30

Gillick v. West Norfolk and Wisbeck Area Health Auth., 3 All E.R. 402 (H.L. 1985). 42-43, 43

Hartigan v. Zbaraz, 108 S.Ct. 479 (1987)..... 5

H.L. v. Matheson, 450 U.S. 398 (1981). .....*passim*

Heard v. Heard, 353 N.W.2d 157 (Minn. Ct. App. 1984). 36

Horton v. Marshall Pub. Schools, 769 F.2d 1323 (8th Cir. 1985)..... 29

Huntington v. Worthen, 120 U.S. 97 (1887)..... 49

Indiana Planned Parenthood v. Pearson, 716 F.2d 1127 (7th Cir. 1983)..... 46

In re D.C., JF-81-1555 (Okla. Dist Ct. Okla Cy. Sept. 23, 1981), *aff'd* No. 57,742 (Okla. Super. Ct. Sept. 28, 1981)..... 42

In re Gault, 387 U.S. 1 (1967).....27, 30

In re Jensen, 54 Or.App. 1, 633 P.2d 1302 (1981)..... 42

In re Karwath, 199 N.W.2d (Iowa 1972)..... 42

PAGE

In re Mary P., 111 Misc.2d 532, 444 N.Y.S.2d 545 (N.Y. Fam. Ct. Queens Cty. 1981)..... 42

In re Sampson, 29 N.Y.2d 900, 328 N.Y.S.2d 686 (1972) (per curiam)..... 42

In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972).... 42

INS v. Chadha, 462 U.S. 919 (1982)..... 32

Jehovah's Witnesses v. King County Hosp., 278 F. Supp. 488 (W.D.Wash. 1967) (three-judge court), *aff'd per curiam* 390 U.S. 598 (1968). 42

Lehr v. Robertson, 463 U.S. 248 (1983).....39, 40

McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y.), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980).....11, 13

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). ...26, 33

Maxfield v. Maxfield, 439 N.W.2d 411 (Minn. Ct. App. 1989)..... 41

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)..... 30

Morgentaler v. The Queen, 44 D.L.R. 4th 385 (Can. 1988)..... 38

Morrison v. State, 252 S.W.2d 97 (Mo.App. 1952)..... 42

Mowers v. Mowers, 406 N.W.2d 60 (Minn. Ct. App. 1987)..... 41

National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989)..... 30

New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3d Cir. 1986), *cert. denied sub nom. Piscataway Township v. New Jersey Citizen Action*, 479 U.S. 1103 (1987)..... 29-30

PAGE

New York v. Heckler, 719 F.2d 1191 (2d Cir. 1983). . . . 45

Nies v. Nies, 407 N.W.2d 484 (Minn. Ct. App. 1987). . 41

Parham v. J.R., 442 U.S. 584 (1979). 41

People ex. rel Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied* 344 U.S. 824 (1952). 42

Petersen v. Petersen, 394 N.W.2d 586 (Minn. Ct. App. 1986). 41

Pierce v. Society of Sisters, 268 U.S. 510 (1925). 40

Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985). 41

Planned Parenthood Ass'n v. Matheson, 582 F. Supp. 1001 (D. Utah 1983). 45

Planned Parenthood Ass'n of Kansas City v. Ashcroft, 50 U.S.L.W. 3928 (U.S. May 25, 1982) (No. 81-1255). 31

Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983). . . . . *passim*

Planned Parenthood Ass'n of Kansas City v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980). 32

Planned Parenthood Ass'n of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983). 46

Planned Parenthood Ass'n of Utah v. Dandoy, 810 F.2d 984 (10th Cir. 1987). 45

Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976). 27, 28, 29, 40

Planned Parenthood Fed'n v. Heckler, 712 F.2d 650 (D.C. Cir. 1983). 45

PAGE

Prince v. Massachusetts, 321 U.S. 158 (1944). 40, 41

Plyler v. Doe, 457 U.S. 202 (1982). 29

Quilloin v. Walcott, 434 U.S. 246 (1975). 39

Schultz v. Schultz, 383 N.W.2d 379 (Minn. Ct. App. 1986). 41

Seagram & Sons v. Hostetter, 384 U.S. 35 (1966). 31, 32

State v. Anderson, 81 Wash.2d 234, 501 P.2d 184 (1972). 48

Stienke v. Stienke, 428 N.W.2d 579 (Minn. Ct. App. 1988). 41

Storer v. Brown, 415 U.S. 724 (1974). 29, 31

Streitz v. Streitz, 363 N.W.2d 135 (Minn.Ct.App. 1985). 3, 34

T.H. v. Jones, 425 F. Supp. 873 (D. Utah 1975), *aff'd on statutory grounds*, 425 U.S. 986 (1976). 45

Thomas v. Review Bd., 450 U.S. 707 (1981). 30

Thompson v. Oklahoma, 108 S. Ct. 2687 (1988). 33

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). 30, 35, 41

Tollefson v. Tollefson, 403 N.W.2d 857 (Minn. Ct. App. 1987). 36

Tuma v. Tuma, 389 N.W.2d 529 (Minn. Ct. App. 1986). 36

Uhl v. Uhl, 395 N.W.2d 106 (Minn. Ct. App. 1987). . . . 41

United States v. Carolene Prods. Co., 304 U.S. 144 (1938). 29

Vasquez v. Hillery, 474 U.S. 254 (1986). 30

Wolter v. Wolter, 382 N.W.2d 896 (Minn. Ct. App. 1986). 36

PAGE

Zbaraz v. Hartigan, 763 F.2d 1523 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987). 29, 46

Constitutions, Statutes and Rules:

42 U.S.C. § 300a et seq. (Supp. 1989) 45

42 U.S.C. § 1396d(a)(4)(c) (Supp. 1989) 45

Cal. Health & Safety Code § 199.27(a)(1) (West Supp. 1988). 43

Del. Code Ann. tit. 16, § 1202 (Supp. 1988). 43

Minn. Stat. § 144.343(1)-(7). ..... *passim*

Minn. Stat. § 144.346. 2

Minn. Stat. § 147.141 3

Minn. Stat. § 147.091(1)(f). 3

Minn. Stat. § 609.02(3). 3

Fed. R. Civ. P. 52(a). 33

Miscellaneous:

Adler & Dolcini, *Psychological Issues in Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986). 12

Alan Guttmacher Institute, *Teenage Pregnancy in the United States* (1989). 6, 7

American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987). 12-13

PAGE

Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. L. Rev. 6 (1924). 30

Binkin, Gold & Cates, *Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?* 14 Fam. Plan. Persp. 163 (1982). 8

1 W. Blackstone, *Commentaries* *452. 42

Brown & Truitt, *The Right of Minors to Medical Treatment*, 28 De Paul L. Rev. 289 (1979). 44

Cartoof & Klerman, *Parental Consent for Abortion: Impact of Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986). 8

Chamie, Eisman, Forrest, Orr & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982). 8

The Daily Oklahoman, Oct. 7, 1981 42

Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 Colum. L. Rev. 1251 (1980). 44

English, *Adolescent Health Care: Barriers to Access—Consent, Confidentiality, and Payment* in *Special Issue, Clearinghouse Review* 481 (1986). 44

Hart & Wechsler, *The Federal Courts and the Federal System* (1953). 30

Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-83*, 19 Fam. Plan. Persp. 5 (1987). 7

Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* (1986). 7

Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75. 30

PAGE

Katz, Schroeder & Sidman, *Emancipating Our Children: Coming of Age in Legal America*, 7 Fam. L. Q. 211 (1973). 44

Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655 (1988). 30

Principles of Pediatrics, Health Care of the Young (Hoekelman ed. 1978). 44

Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide* in *Current Issues of Adolescent Psychiatry* (J. Schoolar ed. 1973). 11

Tietze & Henshaw, *Induced Abortions: A World Review 1986*, Alan Guttmacher Institute (1986). 11

Torres, *Does Your Mother Know . . .?*, 10 Fam. Plan. Persp. 280 (1978). 8

Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980). . 8, 12

Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25 (1983). 8

Zabin & Clark, *Whey They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205 (1981). 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1125 and 88-1309

JANE HODGSON, M.D., *et al.*,
Petitioners,

—v.—

THE STATE OF MINNESOTA, *et al.*,
Respondents.

THE STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,

—v.—

JANE HODGSON, M.D., *et al.*,
Cross-Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the district court was issued on November 6, 1986. It is reported at 648 F. Supp. 756 (D. Minn. 1986). 10a-52a.

A panel of the Eighth Circuit Court of Appeals issued a decision on August 27, 1987. The decision was set for publication at 827 F.2d 1191 (8th Cir. 1987), 53a-72a, but was subsequently withdrawn by the court. 835 F.2d 1545 (8th Cir. 1987). 158a-159a. *See* 827 F.2d 1192-1202 (editor's note on withdrawal from bound volume).

The *en banc* opinion of the Eighth Circuit Court of Appeals was issued on August 8, 1988. It is reported at 853 F.2d 1452 (8th Cir. 1988). 74a-109a.

JURISDICTION

Plaintiffs' petition for writ of certiorari was filed on January 4, 1989. Defendant's cross-petition for certiorari was filed on February 4, 1989. The Petition and Cross-Petition were granted on July 3; 1989. Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Minnesota Statutes (Minn. Stat.) § 144.343(1)-(7) (1988). 1a-4a.

STATEMENT OF THE CASE

A. History Of The Legislation.

In 1971 the Minnesota legislature enacted the Minors' Consent to Health Services Act, which permits all minors to give effective consent for all medical, mental or other health services to treat pregnancy, venereal disease or drug abuse. Minn. Stat. § 144.343(1) (1988). 1a. This statute enables adolescents to obtain a wide variety of confidential medical services, including prenatal care, cesarean sections, contraceptives, and penicillin or other treatments for sexually transmitted diseases. Under the Act, the health professional treating the minor is permitted to notify parents only when a failure to do so would jeopardize the minor's health. Minn. Stat. § 144.346 (1988). 5a.

The statute at issue in this case is a 1981 amendment to the Minor's Consent Act that singles out abortion as a service requiring the health care provider to notify both of a minor's biological parents. Minn. Stat. § 144.343(2)-(7) (1988). 1a-4a; 21a. Subdivision 2 of the statute provides that no abortion may

be performed upon an unemancipated[2] minor until at least forty-eight hours after written notice has been delivered to both parents. 1a-2a.[3] There is no exception to the notification requirement for divorced or never-married parents. 21a. Even teenagers who are already mothers or married may find themselves in the anomalous situation of being able to consent to medical treatment for childbirth but not to a confidential abortion. J.A. 230-31. Subdivision 5 subjects anyone performing an abortion in violation of the statute to both criminal penalties and civil liability. 2a-3a.[4]

The statute further provides that if the two-parent notification provision of subdivision 2 is ever judicially enjoined, the statute will then be enforced with a judicial bypass as an alternative to parental notification. 3a-4a. Under the judicial bypass provision, a minor may seek a state court order permitting her to obtain an abortion without notification of both parents if she can convince a judge that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would serve her "best interests." 3a.[5]

---

2 There is no statutory definition of emancipation in Minnesota. *See Streitz v. Streitz*, 363 N.W.2d 135, 137 (Minn. Ct. App. 1985).

3 The statutory exceptions to the two-parent notice requirement are as follows: 1) where the physician certifies the minor's life is endangered such that there is no time for notification, § 144.343(4)(a); 2) where written consent is given by both of her parents, § 144.343(4)(b); and 3) where the minor is a reported victim of sexual or physical abuse, § 144.343(4)(c). 2a.

4 Violation of the statute is a misdemeanor and is also the basis for a civil action by a parent wrongfully denied notification. Minn. Stat. § 144.343(5). Conviction of a misdemeanor can be punished by up to 90 days in jail, up to a $700 fine, or both. Minn. Stat. § 609.02(3) (1988). Violation of the statute may also result in the imposition of discipline upon a physician by the Board of Medical Examiners. Minn. Stat. § 147.091(1)(f) (1988). Such discipline may include censure, reprimand, license suspension, license revocation and imposition of a civil penalty up to $10,000. Minn. Stat. § 147.141 (1988).

5 The statute further provides for a guardian *ad litem* and an attorney to be appointed by the court for the pregnant minor, § 144.343(6)(c)(ii), at 3a, for confidentiality and expedition in processing, § 144.343(6)(c)(iii), at 4a, and for expedited appeal and for access to the trial courts 24 hours a day, seven days a week, § 144.343(6)(c)(iv). 4a.

B. History Of The Litigation.

Plaintiffs[6] consist of a class of mature minors seeking abortions in Minnesota without the involvement of one or both of their parents, three divorced custodial mothers who support their minor daughters' abortion decisions and fear notice to their ex-husbands, four medical clinics in Minnesota which together perform nearly all the abortions in the state, and two physicians who provide abortion services to minors. Defendants are the State of Minnesota, its Governor, and its Attorney General. 11a-13a.

Plaintiffs challenged the statute on the ground that on its face and as applied it violated the equal protection and due process rights of minors under the United States and Minnesota Constitutions. 13a-14a. On July 31, 1981, a temporary restraining order enjoining subdivision 2, the provision requiring two-parent notice without a bypass, was granted, but section 144.343(2)-(6), establishing two-parent notice with a judicial bypass procedure, was permitted to go into effect on August 1, 1981. 14a. On March 22, 1982, a preliminary injunction was issued as to subdivision 2 but denied as to subdivision 6. 14a. On January 23, 1985, the district court granted defendants' motion for summary judgment on their claim that § 144.343(2)-(6) was constitutional on its face, but denied their claim that the statute was constitutional as applied. *Id.* Trial commenced in February 1986 after two-parent notice with a court bypass had been in effect in Minnesota for four and one-half years.

On November 6, 1986, the district court held that 1) subdivision 2, the notification requirement without bypass, was facially invalid; 2) subdivision 6, the notice/bypass requirement, was invalid to the extent that it requires two-parent notification and a forty-eight-hour waiting period instead of some shorter period; 3) the forty-eight-hour waiting period, but not the two-parent requirement, was severable; and 4) but for this Court's decision in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the district court would have found the entire statute unconstitutional as applied because it failed to serve,

6 Petitioners will be referred to in this section as "plaintiffs" and respondents as "defendants."

and indeed undermined, the state's asserted interests. 32a-51a. The district court enjoined the entire statute because of the non-severability of the two-parent notification requirement. 51a.

On August 27, 1987, a panel of the Eighth Circuit affirmed the district court's decision. The panel agreed that compelling notice to both biological parents was "almost always disastrous" to minors and their families, 62a, and that the two-parent notification requirement was not severable from the remainder of the statute. 71a.[7] The panel specifically held that the two-parent requirement could not be saved by the presence of a judicial bypass system "where, as in this case, the underlying notification requirement impermissibly burdens the minor's abortion decision." 68a.

On November 13, 1987, the panel granted defendants' request for rehearing by the panel, vacated and withdrew its prior opinion, held any further decision in abeyance pending a decision by the United States Supreme Court in *Hartigan v. Zbaraz*, 108 S. Ct. 479 (1987), and denied rehearing *en banc* as moot. 158a-159a.

After an equally divided Supreme Court affirmed the decision of the Seventh Circuit without opinion in *Zbaraz*, the Eighth Circuit *sua sponte* granted the state's request for *en banc* review and issued its *en banc* opinion on August 8, 1988. 74a. The *en banc* court agreed with the district court and with the panel that Minnesota could not constitutionally require a minor to notify her parents of her intention to have an abortion without providing a judicial bypass option. 80a-81a. Again in agreement with the panel, the court declined to find the district court's factual findings clearly erroneous. 85a. However, the court reversed the panel and district court, holding that the Minnesota notice requirement with a bypass alternative was constitutional and that the "as applied" factual findings were immaterial because the Supreme Court had previously considered such facts in upholding the facial validity of "similar statut[es]." 85a.

The *en banc* court further held that the district court had erred in finding the two-parent notification requirement uncon-

7 The panel did not reach the question of the constitutionality or severability of the mandatory 48-hour waiting period.

stitutional in the following respects: 1) the district court had not given enough weight to independent "parental and family interests," 92a-96a; 2) the district court had given too much weight to the forty-two percent of minors who do not live with both biological parents, 91a-95a; and 3) the district court had incorrectly considered the impact of the two-parent notification statute in isolation from the bypass system. 96a. Citing similar reasons, the *en banc* opinion held that the forty-eight-hour delay requirement was not a significant burden. 96a-97a.

The Minnesota statute remains enjoined, however, because the Eighth Circuit granted a stay of the mandate of its *en banc* decision pending review by this Court. 110a-111a.

C. Facts

1. Introduction

This Minnesota criminal statute, requiring notice to both biological parents of minors seeking abortions, was imposed on thousands of pregnant teenagers between August 1, 1981 and November 4, 1986. In 1985 alone, nearly 3500 young women in Minnesota between the ages of fifteen and seventeen became pregnant and, in deciding how to resolve their pregnancies, had to contend with the parental notification law.[8]

This case involved five years of preparation and study, culminating in trial testimony by over fifty-seven witnesses, including single parents, minors, abortion clinic nurses and counselors, nationally renowned physicians, psychologists, psychiatrists, reproductive epidemiologists, seven state court judges who among them had heard nearly all the bypass cases, and many of the guardians *ad litem* and public defenders involved in the judicial bypass procedure.[9] Though some Minnesota legislators may have originally believed that this law would help minors, the facts presented at trial overwhelmingly demonstrate the opposite to be true. Minnesota's parental notification law

8 *See* Alan Guttmacher Institute, *Teenage Pregnancy in the United States* 24 (Table 8) (1989) (hereinafter "Guttmacher Institute").

9 For a description of the qualifications of Plaintiffs' expert witnesses, see Exhibit B in Appendix to this brief.

demonstrably raised the teenage birthrate in Minneapolis; caused there to be more teenage mothers with stunted and dependent lives; added a new generation of unwanted children with their attendant problems; undermined communication and family integrity, particularly in single parent families; and raised the level of physical violence and fear in many families. The law compromised sound medical care by significantly delaying the provision of abortion services to minors, and by increasing the number of teenagers forced to continue an unwanted pregnancy and undergo childbirth. When this law was in effect counselors had to focus on reducing the terror and anxiety of forced notice or the court proceeding rather than on the genuine medical and emotional needs of their teenage clients.

2. The Minnesota Criminal Notification Statute Seriously Harmed Minnesota Teenagers.

a. Privacy Is Critical To Assure That Pregnant Teenagers Seek Necessary Help.

Teenage pregnancy is a disturbing reality in Minnesota and across the nation. Teenage girls do not get pregnant by design; eighty-four percent of the 1.1 million teenage pregnancies in the United States each year are unintended.[10] Furthermore, most teenage girls do not focus on the decision whether or not to bear a child or how childbearing will affect their futures until forced to do so by an unintended pregnancy. When they do find themselves pregnant, forty-two percent of all teenage girls—married or unmarried—nationally,[11] and about the same percentage in Minnesota,[12] choose to resolve their unwanted pregnancies through abortion.

10 Jones, Forrest, Goldman, Henshaw, Lincoln, Rosoff, Westoff & Wulf, *Teenage Pregnancy in Industrialized Countries* 40 (1986).

11 Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 Fam. Plan. Persp. 5, 8 (Table 5) (1987).

12 Guttmacher Institute, *supra* note 8 at 24 (of the 3470 teenagers between 15 and 17 who became pregnant in Minnesota in 1985, 1490 chose to abort).

The record of this case overwhelmingly demonstrates that concerns about privacy dictate when, how and *if* a pregnant teenager will seek help. The unrebutted evidence adduced at trial reinforces the conclusions of studies of other parts of the nation: without guaranteeing confidentiality, a significant number of minors will not seek pregnancy evaluation, family planning, or abortion services.[13] Melton Tr. at 1154. Although the majority of teenagers in Minnesota, both before and after this law went into effect, tell at least one parent of their pregnancy, significant numbers go to great lengths to hide it from one or both parents. J.A. 111, 114-16, 137, 461. The result can be death,[14] or serious self-mutilation.[15] The desperation experienced by these young women is illustrated by the fact that one-half of the teenagers obtaining abortions in Minnesota while the law was in effect underwent what was perceived by them as an extreme hardship—the court bypass procedure—in order to avoid mandatory notice to both parents, J.A. 123, 459-61, even

13 *See* Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126, 137 (1982); Torres, *Does Your Mother Know . . . ?*, 10 Fam. Plan. Persp. 280, 281 (1978); Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 288 (1980) [hereinafter Torres & Forrest]; Zabin & Clark, *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 Fam. Plan. Persp. 25, 26 (1983); Zabin & Clark, *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 Fam. Plan. Persp. 205, 213 (1981); and Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 399-400 (1986).

14 A study of 17 deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that a "desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." One who died was a 15 year-old honor student at a Roman Catholic girls' school. She was found dead in a bathroom of her home, a plastic tube in her vagina. Binkin, Gold & Cates, *Illegal-Abortion Deaths in the United States: Why Are They Still Occurring?* 14 Fam. Plan. Persp. 163, 165 (1982).

15 Dr. Hodgson testified that one of her patients, a fourteen year old, who tried to keep her pregnancy private had her friends insert a metallic object into her vagina; they tore her "several times." Her cervix was permanently injured. J.A. 462.

though many dreaded the hearing process more than the abortion procedure itself. 20a; J.A. 468.[16] The trial evidence on teenage class members' desperate need for confidentiality as a precondition for seeking help with such sensitive matters as a pregnancy is reinforced by standing legislation in all fifty states, the standards of professional health organizations, and findings by Congress, all of which support the proposition that guarantees of confidentiality are a necessary precondition for minors to avail themselves of certain critical health care services. *See* discussion *infra*, Point II(B). Indeed, Plaintiffs' counselors and doctors stressed that when a teenage patient came to the clinic with a parent, the minor's medical history had to be taken in the absence of the parent, since teenagers often will not tell the truth about their sexual history, including a previous abortion, with a parent present. J.A. 129, 439-40.

b. Delay Is The Most Significant Risk Factor For Teenagers Who Have Abortions And The Lack Of Abortion Facilities In Minnesota Exacerbates This Risk.

The district court stressed the importance of assessing the impact of the Minnesota statute against the backdrop of pre-existing hardships imposed on women needing abortions in

16 Minnesota is a large state. Many teenagers hitchhiked long distances from home under extreme weather conditions to undergo the judicial bypass procedure and obtain an abortion, coming to Duluth or the Twin Cities from the far corners of the state, northern Michigan, and Canada. J.A. 444; *see also* Welsh Tr. at 106-08. Lacking other accommodations, it was not uncommon for them to spend the night in the clinic lobby or in a car in the hospital parking lot. J.A. 137. One young woman from a small community with a particularly active anti-abortion constituency turned in desperation to a sympathetic high school counselor who arranged a school outing for her so she would not be missed at school and could spend the day going to court and having an abortion. J.A. 463-64.

Because some minors feared encountering someone at the courthouse who might recognize them, they arranged to come up a back elevator and meet with their attorneys in the bathroom. Welsh Tr. at 119-20. One felt obliged to have her hearing scheduled after regular court hours in order to protect her privacy. *Id.* at 120. Pregnant minors were so afraid of the hearing they turned mute in court, Wendt Tr. at 99, were "wringing wet with perspiration," J.A. 468, and frequently required a sedative. *Id.* Some vomited and one began to abort spontaneously during the court process. 129a.

Minnesota. 14a-16a. Virtually all of Minnesota's abortion providers are located in the two largest metropolitan areas of the state: Duluth and Minneapolis-St. Paul. 15a. Eighty-two out of eighty-seven counties in Minnesota have no readily available abortion provider, 14a, and access to information about abortion services, particularly in rural Minnesota, is limited. 15a.[17] Women often have to travel long distances to obtain abortion services,[18] and this can delay the diagnosis and treatment of pregnancy, increase the cost of obtaining an abortion, and jeopardize their privacy. 15a. These obstacles are reflected in the fact that even before the notification law went into effect, women of all ages obtained abortions later in their pregnancies in Minnesota than in the United States as a whole. 16a; J.A. 106.

Although the medical risks associated with legal abortion are relatively slight, every week of delay in obtaining abortion services increases the risk of complications and death to a statistically significant degree. 20a.[19] Minors, for a number of reasons, are more susceptible to delay than adults[20] and tend to obtain later, and therefore more dangerous, abortions. In fact,

17 In all of Minnesota's 87 counties, there are only two hospitals at which a woman can walk in and obtain an abortion. 15a.

18 Plaintiff Women's Health Center is the only abortion provider in Duluth, providing services to women in 24 counties in Minnesota, 14 counties in Wisconsin, four counties in Michigan and Ontario province in Canada. Welsh Tr. at 105-06. When one of its patients is delayed more than 15 or 16 weeks into pregnancy, she has to be sent to one of the two facilities in Minneapolis-St. Paul that is equipped to handle second trimester abortions. 119a; Welsh Tr. at 109.

19 The risk of death increases by 50% each week after the eighth week of pregnancy. J.A. 446. Morbidity also increases by 15-30% each week. Hodgson Tr., Vol. II at 21-22. But the health risks of having an abortion at any time are always less than the risks involved in carrying to term. *See* note 23, *infra*, p. 11.

20 Teenagers have little experience with the health care system, have few financial resources, and must account for an absence from home, school or work. Wendt Tr. at 24-25. Many teenagers, particularly the very young, fail to recognize early signs of pregnancy because it is common for adolescent girls to experience menstrual irregularities, which may mask initial symptoms of pregnancy. *Id.*

Dr. Willard Cates, former head of the Abortion Surveillance Branch of the United States Centers for Disease Control, has concluded that "delay [in obtaining an abortion] has the largest single effect on the risk to teenagers for complications and death from abortion." P. Ex. 6 at 20.

c. Minnesota's Two-Parent Notification Statute Forced Some Teenagers Into Unwanted Motherhood Which Imperiled Their Health And Stunted Their Futures.

Pregnant teenagers have two options: abortion or continued pregnancy and childbirth.[21] Abortion is one of the safest surgical procedures doctors perform, and generally safer for teenagers than for adult women.[22] Abortion is less risky the earlier in pregnancy it is performed, though at no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery. Hodgson Tr., Vol. I. at 65-66; P. Ex. 4.[23] Furthermore, childbearing for minors is significantly riskier

21 Suicide, tragically, is a third option. Before abortions were legal and accessible to minors under conditions of confidentiality, a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were, pregnant. *McRae v. Califano*, 491 F. Supp. 630, 676 & n.45, 683 (E.D.N.Y.) (citing Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in *Current Issues in Adolescent Psychiatry* 129, 136 (J. Schoolar ed. 1973)), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297 (1980).

22 After adjusting for the significantly later gestational age at which teenagers' abortions are performed, teenagers have generally lower morbidity and mortality rates from abortion than do adult women. P. Ex. 6 at 21-22.

23 Tietze & Henshaw, *Induced Abortion: A World Review 1986* 4, 110-11 (1986) (hereinafter Tietze & Henshaw). A woman is ten times more likely to die from childbearing than from a legal abortion through the 15th week of pregnancy. P. Ex. 3 at 196. The rate of morbidity related to childbirth is also ten times higher than for abortion through the 15th week. Tietze & Henshaw at 130. From the time abortion was legalized in Minnesota in 1973 through 1984, there were no abortion-related deaths in the state, although during that same time period, 32 women died from pregnancy and childbirth. P. Ex. 93 at 26.

than for adults.[24] The Minnesota notification law, in operation, eliminated the less risky option of abortion for a significant number of teenagers.

Dr. Ehlinger, the Director of Personal Health Services for the Minneapolis Department of Health, identified the implementation of the notification law as the most important factor causing an increase in births to fifteen to seventeen year-olds. J.A. 342-343.[25] From 1980 to 1984, the birth rate to young women age fifteen to seventeen in Minneapolis went up 38.4%, 136a, compared to only a 0.3% rise in the birth rate to teens age eighteen to nineteen years, 137a, during the same period. Under normal circumstances, these two groups generally share childbirth and abortion trends, J.A. 99-101; the notification law was the only factor that uniquely affected the fifteen to seventeen year-old age group which could explain the difference. J.A. 342-43.

Pregnancy continuation poses not only greater physical risks for teenagers, but greater psychological,[26] economic and educational consequences as well. Teenage motherhood eliminates life choices,[27] not only for the teenage mother, but for her children.[28]

24 Maternal mortality (death from pregnancy or childbirth) is 60% higher for women under 15 and 13% higher for women age 15-19 than for women age 20-24. Hodgson Tr., Vol. I at 87; D. Ex. 19 at 42. In females under age 16, continued pregnancy can deplete the nutritional reserves needed for their own growth and place them at a greater risk for other health problems. D. Ex. 19 at 42.

25 A study of the impact of mandatory parental notification corroborates Dr. Ehlinger's conclusion, showing that 23% of teenagers would not seek an abortion at a clinic which required parental notification. The research also indicates that 9% of pregnant teenagers seeking abortions would have an illegal or self-induced abortion if they could not obtain a legal abortion without their parents' knowledge, and an additional 9% would have the baby under those circumstances. Torres & Forrest, *supra* note 13, 12 Fam. Plan. Persp. at 288.

26 There are more adverse psychiatric consequences associated with carrying an unwanted pregnancy to term than with undergoing abortion; because pregnancy is more complicated for a teenager than it is for an adult, termination of an unwanted pregnancy brings even greater relief to a minor. J.A. 458-59; P. Ex. 6 at 22; *see also* Adler & Dolcini, *Psychological Issues in Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* 90 (G. Melton ed. 1986); American Psychological Association, Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion: Psychological and Legal Issues*, 42 Am. Psychologist 73, 74 (Jan. 1987). In *McRae v. Califano*, *supra* n.21, Judge Dooling found that "an unwanted pregnancy can itself be productive of mental derangement." 491 F. Supp. at 675.

The World Health Organization conducted a study of this issue and in 1978 concluded that "[t]here is now a substantial body of data reported from many countries . . . suggesting frequent psychological benefit and low incidence of adverse psychological sequelae" due to abortion. J.A. 374. A study in Hawaii of young pregnant women (15-17) found that the young women who had had abortions, postponed their first birth well beyond the second birth of teenagers who had children, raising the social, educational and economic level of their households. J.A. 373.

27 Dr. Hodgson has had 39 years of clinical obstetrical and gynecological experience treating a patient load which has been about 30% teenagers. She testified, based on her experience, that the psychological trauma of becoming mothers as teenagers is tremendous; their lives can be "literally spoiled" and their education stopped. J.A. 456.

28 Dr. Henry David testified at trial concerning the results of a study that he has been conducting for 20 years of children of women who were denied abortions in Czechoslovakia, a study funded in part by the United States National Institutes of Health. David Tr. at 2525-26. Dr. David has found that children of women denied abortions have social problems which worsen as they get older as compared to a control group of "wanted" children. 138a-140a. They experience more alcoholism, more criminality, and greater difficulty forming close relationships. 139a.

d. Every Option Available To Minors Under The Statute Caused Serious Delay.

The Minnesota notification statute was in effect for five years before it was enjoined. During that time it encumbered thousands of teenagers seeking to resolve their pregnancy dilemmas, no matter what options they ultimately chose or were chosen for them. The statute's primary effect was to impose serious delays on minors, to their great detriment. While the law was in effect, the proportion of minors who obtained second trimester abortions increased dramatically. 135a. In 1978, 18.4% of

women seventeen and under received second trimester abortions; by 1983, that figure had jumped to 23.0%, 135a, while women in adjacent age groups (18-19, 20-24, and 25+) experienced relatively stable rates for second trimester abortions. For example, in 1978, only 7.8% of women over twenty-five obtained second trimester abortions; between 1978 and 1983, this figure increased only 0.1%. 135a.[29]

While the statute was in effect, nearly one-half of all the minors seeking abortions chose to go to court. J.A. 123. Judicial bypass delayed minors by an average of two or three days just to get a court appointment, with a total delay of one week or more before their abortions. 20a. The district court found that a one-week delay in obtaining an abortion significantly increased its attendant medical risks, 18a, 20a, 23a, and that such delays were "unavoidable" under the terms of the statute. 18a.[30] It further found that the judicial bypass procedure pushed some minors into the second trimester,[31] a contingency

29 There was additional evidence that the proportion of minors receiving second trimester abortions was increasing: Meadowbrook Women's Clinic reported that as of December 1985, over 30% of their minor patients seeking abortions were in the second trimester. 130a.

30 After minors call a clinic to find out what their options are, those who choose to go to court must call the court and get an appointment. Some counties in Minnesota have no sitting judges willing to hear bypass petitions. 18a-19a. Class members Heather P. and Sharon L. had to wait two weeks and one-and-a-half weeks respectively for abortions because of delays attributable to the bypass system. 115a, 124a.

31 The cost of a first trimester abortion averaged $225 (up to 12 weeks); a delay of even a few days raised this to $275 (12-14 weeks) for plaintiff minors. 16a. Since post 15-week abortions are not available in Duluth, a delay past that time entailed the additional cost of overnight travel to Minneapolis, where second trimester abortions are performed. 119a. After 21 weeks, plaintiff Meadowbrook Clinic in Minneapolis-St. Paul refers patients to St. Paul-Ramsey Hospital, where a later abortion (22 weeks) costs $1600-1800, or to Wichita, Kansas, where a late abortion (up to 24 weeks) costs $2000. These fees, of course, do not include the cost of transportation or lodging. Minnesota will fund abortions for indigent women only if the pregnancy is the result of rape or incest, or if continuing the pregnancy would endanger the life of the woman.

which the district court found "entails significantly greater costs, inconvenience, and medical risk." 20a.[32]

In many cases, minors who sought to invoke the exception to notice due to the death of a biological parent, § 143.343(3), found this process to be a more burdensome alternative than going to court. Because the statute requires written evidence of compliance, 2a-3a, and failure to comply is a criminal violation, clinics required such minors to submit documentation of a parent's death. J.A. 120; Baker Tr. at 475-76. Obtaining death certificates or funeral home receipts resulted in delays,[33] and minors qualifying for the exception focused on the parent's death during their limited counselling time rather than on their more immediate concerns. J.A. 121.[34]

Minors from broken or dysfunctional homes also met with delays in attempting to comply with the notification law. One minor who sought to notify her natural father suffered a two-week delay because he refused to acknowledge that he was indeed her father. Finally he wrote a letter saying whether he was her father or not he would give permission for the abortion.

32 Plaintiff Cynthia J. could not get an immediate court appointment in her home town. She ultimately had to schedule an appointment in St. Paul, but had to wait almost two weeks because the court clerk was unwilling to schedule an emergency weekend appointment. J.A. 76-79. This delay resulted in a second trimester abortion. J.A. 84. Bonnie L. was unable to schedule an emergency court hearing, resulting in a second trimester abortion. J.A. 93-97. Kathy M. had to wait almost a week for her court appointment and another three days for the judge's decision. J.A. 270-72. Because of the delay, she was unable to appeal the denial, and she had her abortion in another state. J.A. 272-73. One minor was delayed *three weeks* in obtaining an abortion because she could not get a court appointment any sooner than 11 days after she visited the Meadowbrook Clinic. J.A. 138. This minor progressed from 16 to 19 weeks of pregnancy before the abortion could be performed, increasing its cost by $100. *Id.*

33 One 15-year-old who lived with her widowed mother had to send to Massachusetts for her father's death certificate, causing a three-week delay. 129a; Welsh Tr. at 219-20.

34 Teenagers who had lost a parent or parents were often traumatized by the resurrection of unpleasant memories as they prepared to have an abortion. J.A. 121. One young woman had to supply the clinic with proof of her father's death, a suicide by gunshot wound to the head, and another, of her mother's murder. *Id.*

J.A. 466. Another minor forced to notify her father experienced delay because of his objections, and the family dispute which ensued culminated in her divorced mother's firing a gun through her father's door. J.A. 128.

Mailed notice, an option chosen by few minors, J.A. 125, Welsh Tr. at 140, also caused lengthy delays. If notice is mailed, constructive delivery occurs at noon on the next regular mailing day. The forty-eight-hour waiting period commences at this point. Consequently, minors in Minnesota who chose to notify their parents by certified letter commonly waited seventy-two hours between initiating the notification process and the abortion itself. 47a; J.A. 126. One pregnant minor who came to the clinic with her mother from some distance and at considerable hardship was forced to wait four days for medical help until notice was delivered to an absent father. J.A. 125. Finally, the district court found that the delays directly attributable to the notification law were compounded by "scheduling factors such as clinic hours,[35] transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments." 22a-23a.

3. Those Plaintiff Teenagers Who Seek Confidential Abortions Have Good Reasons For Not Notifying One Or Both Parents Of Their Pregnancies.

The district court found that with or without the parental notification law in Minnesota, the same proportion of minors seeking abortions told one or both of their parents. 41a. Minors who did not want to involve one or both parents, however, had good reasons for acting independently.[36] Minor plaintiffs testi-

35 Plaintiff Women's Health Center of Duluth is not open for abortions every day because it has to import out-of-town physicians to perform them. J.A. 442-43; 128a. Thus, mailed notice in Duluth meant that their patients often waited an entire week before the abortion procedure could be performed, even when the minor had one parent's consent. 128a-129a.

36 Judge George Peterson, of Ramsey County Juvenile Court in St. Paul, heard the vast majority of bypass cases in that city. He sent a letter to a Minnesota legislator which stated in part as follows:

(*Footnote continued on following page*)

fied that their decisions not to tell one or both of their parents of their pregnancy or their intent to abort were due to: the psy-

---

I have now completed the data gathering and computations you requested on September 20 and to which I referred on September 27.

From August 1, 1981 through November 30, 1982, our Court has conducted 258 abortion-consent hearings.

In 80 of those cases, the parents of the girl were divorced. In 35 of those 80 cases, the girl discussed her abortion with her custodial parent but did not wish to notify her non-custodial parent of her desire to have an abortion.

In 20 of the 258 cases, the girl lived with both parents but wished to notify only one of them of her desire to have an abortion.

In another 48 of the 258 cases, the girl discussed the proposed abortion with an adult relative but wished not to notify either parent.

In many of the remaining cases, the girl had sought out the advice and counsel of other adults before going to professional counselors. Those adults include teachers, employers, parents of friends, parents of the potential father, ministers, priests and neighbors.

In 8 cases girls were seeking their second abortion.

Two girls already had a child at home.

Fourteen girls were living independently or were in foster homes.

. . .

The reasons they give for not wanting to tell one or both parents about the abortion are as follows:

Reason	*No.*	*Pct.*
Fear of damaging parent-child relationship:	76	29%
Parents opposed to abortion-have said would kick the girl out:	54	21
Parents opposed to abortion-would force the girl to keep the child:	14	5
Marital, financial or health problems already in home-this would aggravate:	47	18
Absent parent or parents not part of their lives and have no right to know:	35	14
Prior physical abuse feared to reoccur:	11	4
Fear of prior expressed threats:	10	4
One or both parents alcoholic:	9	4
Raped:	2	1
Totals:	258	100%

(*Footnote continued on following page*)

chiatric or physical illness of a parent;[37] chemical abuse and dependency on the part of a parent;[38] the anti-abortion stance of a parent;[39] the likelihood of a verbally, physically, or sexually abusive response by a parent[40] or the fact that the minor

---

As you might imagine, the reasons girls express for wanting an abortion are many and varied. The desire to continue one's education and have a career is expressed in over 95% of the cases. Regardless of hopes and plans for the future, some feel they are simply too young to have a child.

J.A. 380-82.

37 Sharon L. testified that her mother had been hospitalized several times for schizophrenia, a condition that made her moods wildly unpredictable; she feared that telling her mother about her abortion "could have just broken her down emotionally . . . she could have completely slipped out." J.A. 223. Dr. Hodgson testified that often the patients' refusal to communicate about the abortion with an ill or dying parent is "a matter of kindness and love; it's not a matter of being difficult . . . ." J.A. 465.

38 Heather P.'s father, an alcoholic who at the time of the abortion had not lived with her in at least eleven years, had frequently hit Heather, her mother and her siblings when he lived with them and had beaten a subsequent wife severely enough that she required hospitalization. J.A. 176. Mary J., whose relationship to her alcoholic mother was "like her babysitter," J.A. 218, was afraid that if she told her mother about her abortion, her mother would resume the self-destructive drinking patterns she was attempting to break and "crumble the bridge" of communication they were trying to build. J.A. 219-20. *See also* Welsh Tr. at 220.

39 Rather than tell her father, a local politician known to the judge and known to be opposed to abortion, one teenage class member considered suicide or leaving the area. J.A. 64-66. One young woman's father, a doctor, had discussed the issue with her previously and had told her that he "would never allow her to have an abortion." J.A. 115. Wendt testified that another teenager believed that her mother, who opposed abortion for religious reasons, would have forced her to "stay pregnant and raise the child." J.A. 114. *See also* Welsh Tr. at 226.

40 Natalie C., a minor, testified at trial that she was afraid to notify her parents because she believed her stepfather, who had physically attacked her before, would "knock [her] around." J.A. 66. Kathy M., whose father had threatened in the past to shoot her mother, was so "terrified" of her father's reaction to her decision to abort that had her only option been to tell her father, she would have instead carried the pregnancy to term. J.A. 269-70. Another adolescent believed her father would have hit her if he had been told; when angry he would lean close to her face, "show his teeth" and "get

was not in contact with the parent. J.A. 466. Minors' fears of violence in the family were well-founded.[41]

Counselors and court-appointed guardians, judges, and other court personnel, all of whom were experienced in dealing with teenagers, testified at trial that minors are both truthful and accurate in their assessment and description of the family circumstances in which they live.[42] *See, e.g.*, J.A. 161, 203-04, 232-33; 125a-126a. There was overwhelming testimony that minors tend, if anything, to understate family problems, and are particularly reluctant to reveal matters of family violence and sexual abuse. *See, e.g.*, J.A. 116, 245, 461-62; Widseth Tr. at 21-24. Thus, instead of protecting pregnant teenagers, the notification law mandated parental involvement in situations where minors correctly understood that involvement of their parents would be harmful to their interests.

4. Compelled Parental Involvement Was Devastating To Many Families And Was Especially Disastrous In Single-Parent Homes And Abusive Family Situations.

Experts with extensive clinical experience counseling families and with knowledge of family communication patterns testified

---

very violent and physical." J.A. 225-26. Ida B., the older sister of a teenaged class member, testified that she helped her younger sister through the court procedure because 20 years earlier, their father had reacted violently to Ida B.'s pregnancy, which caused Ida to marry at age 16. Ida B. Tr. at 1440-42. P.C., a minor, was forced to notify her natural mother and father—or go through the bypass procedure—even though she had been removed from her natural mother's home for sexual abuse, physical abuse and neglect, and there was a pre-existing court order forbidding her natural mother from seeing her daughter. Welsh Tr. at 154-55.

41 Extensive studies of family violence concluded that one of the specific times when violence is greatest is during pregnancy. Walker Tr. at 308-09.

42 Judge Martin testified that family violence is the "most common" reason that a minor refuses to notify one or both of her parents. He cited a case in which "the father frequently beat the petitioner and she had no doubt in her mind that the same would occur if she notified the father about her pregnancy." Similarly, a week or two before the trial, Judge Martin heard a case in which "the father had broken the petitioner's mothers [sic] wrist and had frequently abused both the mother and the petitioner." J.A. 204.

at trial that while family relationships generally benefit from voluntary and open communication, the effect of compelling communication within families is unpredictable and frequently disastrous. 21a-22a, 30a-31a; J.A. 132, 198; Benedek Tr. at 910-11, 993. Neither accidental nor coerced communication of personal information is based upon trust or the voluntary desire to share or to know, which are the hallmarks of productive communication patterns in a functional family. Benedek Tr. at 906, 930-31.

Under circumstances where trust is lacking or parents are unable to react reasonably to the news of a daughter's pregnancy, maintaining secrecy might be the most mature response on her part, as well as the one most likely to preserve and protect family relationships. Benedek Tr. at 906-09.[43] A decision not to reveal the fact of the pregnancy or abortion may avert "reintroduc[ing] [a] parent's disruptive or unhelpful participation into the family," 22a, a rupture or polarization of the marital relationship,[44] or intra-familial violence.

Indeed, the trial court found that the law did not promote, and in some cases actually inhibited, voluntarily initiated intra-family communication. 31a, 46a-47a.[45] Specifically, the court found that a sizable proportion of minors seeking abortions in Minnesota voluntarily notified at least one parent before the statute was enacted, and that there was no evidence this percentage had changed as a result of the statute's enactment.

43 Following notification that their teenage daughter is pregnant, some parents refuse to speak to her. P. Ex. 103 at 9, 12, 13 (deposition of Florence K.). Plaintiff Florence K. testified that when her father found out about her pregnancy despite her efforts to keep it from him, she and her father "didn't talk for like two or three months afterwards." P. Ex. 103 at 9.

44 Notification has also resulted in marital discord and divorce. J.A. 298.

45 Suzanne Smith, supervisor of the guardian *ad litem* program in Hennepin County, testified that some minors who would have considered telling one parent told neither because they were "absolutely sure" one parent could not be told and "they had to go to court anyway." J.A. 239.

41a.[46] It further found that some minors who ordinarily would have told one parent were "dissuaded" from doing so since they had to go to court anyway to avoid notification of the other. 31a. The Eighth Circuit panel agreed with the district court's assessment of the law's negative implications for intra-family communication: "[A]lthough family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect. It is almost always disastrous." 62a.

The district court found that compelling notification to both parents when they are divorced or separated could be especially harmful to the young woman's welfare. 30a-31a.[47] Even where the minor resides in a functional family, a non-custodial par-

46 The *en banc* court erroneously stated that under the statute parental notification had increased. 83a n. 9. This statement is not supported by the evidence and it contradicts the trial court's specific finding that no witness testified that the proportion of minors notifying their parents had changed after the statute was enacted, 41a, and that defendants failed to establish that the statute promotes either parent-child communications or the other values which it sought to promote. 29a. The evidence shows that prior to enactment of the statute "better than half" of the minors choosing abortion fully involved their parents in making their decision. Webber Tr. at 610-11; Tr. at 1586. The evidence further shows that while the statute was in effect, about half of the minors followed the judicial bypass and about half notified their parents. Hunter Tr. at 789-90; Welsh Tr. at 135. Thus, no change occurred under the statute. 41a. The trial court based its finding on the substantial evidence in the record that the statute had failed to promote family integrity or communication, 26a-27a, and the absence of contrary testimony. 41a. To the extent the *en banc* court thought there was evidence to support its contrary conclusion, it misread an ambiguous portion of the trial record, *see* J.A. 125-26, and had no basis to find the trial court's contrary interpretation of that testimony clearly erroneous. 41a. Further, as the *en banc* court itself noted, the defendants never contended that the incidents of parental notification had increased under the statute. 83a n. 9.

47 The district court found that "[r tional statistics reveal that approximately [50%] of all marriages end in divorce. There [was] no testimony [at trial] indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside with both biological parents. This figure is corroborated by one study that found that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents." 29a.

ent's sudden involvement can be disruptive to the household; in abusive or otherwise dysfunctional families, compelled notification was especially dangerous because it could provoke violent and abusive reactions. The district court found that a large percentage of families in Minnesota in particular, and the United States in general, are dysfunctional. Reports indicate that there are an average of 31,200 reported assaults on women by their partners each year in Minnesota alone, and that family violence occurs in at least two million families across the United States. 30-31a; J.A. 128.[48] Dr. Lenore Walker, a clinical psychologist and national expert on family violence, testified that there was a consensus among researchers of abusive and dysfunctional families that family violence is at its height during a family member's pregnancy, immediately following childbirth, and during children's adolescence. Walker Tr. at 296; J.A. 193-94. She testified that pregnancy triggers violent reactions in abusive dysfunctional families "like showing a red cape to a bull." J.A. 194.

The trial court found no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification. Instead, minors were often further alienated from their non-custodial parents as a result of the process. 30a. Moreover, the court found that "[t]he non-custodial parent often will reintegrate with the family in a disruptive manner." *Id.* The vast majority of voluntarily informed parents appearing in court with their daughters were divorced women, such as plaintiffs Diane P. and Sarah L., who had not seen their ex-husbands in years. 31a. The evidence showed that compelling young women either to notify a disinterested or abusive non-custodial parent or to seek court authorization not to do so was traumatic, burdensome, interfered with voluntarily initiated parent-child communication, and infringed upon the

48 Even these numbers substantially underestimate the problem because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to report violence or abuse. 30a. Whatever the actual numbers, the court found that "[m]any minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence." *Id.*

privacy of both mother and daughter. 31a, 46a-47a; *see also* 21a-22a.[49] Notice to an abusive father could be threatening to the mother of the minor as well as to the minor herself. J.A. 131-32, 166-67, 194. The district court concluded that a "regulation requiring notification of both parents when the nuclear family unit either has broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors." 46a.

In considering the impact of the law as a whole on families with pregnant minors, the court found that "[f]ive weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)-(7) . . . furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity," 29a, 41a, and that the statute had failed to improve family relations "more than it undermine[d] them." 29a.

5. The Judicial Bypass Was Not An Option For Many Teenagers Who Needed Confidential Abortions And The Statutory Exceptions Did Not Work.

In practice, the court bypass procedure was not available to many teenagers who sought abortions during the time the statute was in effect. 18a-19a. The trial court found that teenagers who were able to utilize the procedure were almost inevitably either mature or "best interest" minors. 27a.[50] The court also found that the bypass process was sufficiently daunting that some mature minors and some best interest minors could not avail themselves of the alternative procedure. 20a. Eighty-nine percent of all the minors who went to court in Minnesota were either sixteen or seventeen years old. J.A. 160. The testimony of the state court judges was that "[t]hey were typically middle to

49 For example, Jackie H., one of the three named single mother plaintiffs, testified at trial that while at state court with her daughter seeking an order under this statute, she was forced to reveal, in front of her daughter, that she had divorced her husband on account of his physical abusiveness. 117a-118a.

50 Except for a few anomalous situations, all minors who went through the bypass procedure were adjudged mature or best interests. 23a-24a.

upper-middle-class kids . . . the vast majority of them in school [with] . . . plans for the future. Typically they were white." J.A. 157, 184-85, 187.

Hardly any of the members of the plaintiff class of minors had ever been to court before their bypass hearings. The process involved revealing their personal histories to several strangers and encountering numerous other personnel in the courthouse who learned at least their first name and why they were there.[51] Upon a review of extensive testimony by witnesses involved in each aspect of implementation of the bypass procedure,[52] the district court concluded:

> [M]any minors resent having to reveal intimate details of their personal and family lives to these strangers [and] are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy.

20a. Minors who were able, nonetheless, to avail themselves of the court bypass procedure testified uniformly that they found the court procedure anxiety-provoking.[53]

---

51 These strangers included the other teenagers waiting for the bypass hearings, parents and boyfriends of other minors, secretaries, receptionists, court clerks, court reporters, the guardian *ad litem*, the public defender, the judge, and the judge's law clerk. J.A. 157, 184, 206; Honkala Tr. at 523, 526; Widseth Tr. at 35-38.

52 The public defenders, guardians *ad litem*, clinic personnel, and state judges uniformly testified at trial that court was a frightening, nerve-wracking, and traumatic experience for these young women. The director of the guardian *ad litem* program in Hennepin County, who supervised or saw 2264 minors go through the bypass procedure, testified that the teenagers were "very nervous, very scared. Some of them are terrified . . . . They are often exhausted" and "feel like a criminal." J.A. 234. Judge Sweeney, who adjudicated minors' petitions under the law, testified at trial that the level of apprehension that minors experienced was tremendous. "[O]ne young lady had her—her hands were turning blue and it was warm in my office . . . ." 26a; Sweeney Tr. at 1039.

53 Plaintiff Clara Z. described the experience as follows: "[E]verybody is pointing their finger at you saying you have done bad. It's scarey [sic]." P. Ex. 95 at 10. Rose C., another class member, said "[I]t almost made you feel that you were doing something really wrong . . . ." P. Ex. 98 at 23.

The district court found that the exception in the statute exempting abused teenagers did not work because a precondition was that such abuse be "reported." 21a.

> Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities [as this exception requires the clinics to do] creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere.

Id. Dr. Walker, an expert on such abusive or dysfunctional families, testified that it would be exceptionally difficult for minors in such families to choose and carry out the bypass procedure because the "rules of those families are secrecy . . . . Going to court would be an exposure of a risk [of more abuse] and it would be very difficult for a minor to do that." J.A. 196.

As is apparent from the foregoing discussion, the district court did not decide this case based upon hypotheses or abstract theories about what a parental notification statute could or could not accomplish. More than five weeks of trial and testimony from fifty-seven witnesses, a large number of whom had significant contact with the statute in actual operation during the preceding four-and-a-half years, created a panoramic factual setting in which the issues of this case were decided by the district court. Now this Court has the unique opportunity to consider these issues against a fully developed factual record.

SUMMARY OF ARGUMENT

Laws which impinge upon the right of a minor to choose to terminate a pregnancy are valid only where narrowly drawn to serve the state's interest in protecting immature minors. Such laws must be drafted with particular sensitivity to the privacy rights of minors.

Minnesota's two-parent notice statute is unconstitutional under these standards. No case previously addressing the constitutionality of a two-parent parental involvement law sustained such a law without exception for minors living in one- or no-parent households. *See H.L. v. Matheson*, 450 U.S. 398, 413 (1981); *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (plurality) [hereinafter *Bellotti II*]. Further, no prior case sustaining the facial constitutionality of either a one- or two-parent notice or consent requirement, did so in the presence of a comprehensive record of the actual impact of the law in operation. *See, e.g., Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. at 491-92.

The Eighth Circuit erred in sustaining the challenged statute "as a matter of law" and in failing to assess whether the law impermissibly burdened minors' constitutional rights, actually served the state's interests, or proved in fact to be narrowly tailored to promote the legitimate interests the state sought to promote. In failing to review the constitutionality of Minnesota's law in operation, the Court abdicated its judicial duty under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803), and rendered factual assumptions irrefutable.

Had the Eighth Circuit examined the evidence, it would have concluded, as the district court did, that Minnesota failed to prove Minn. Stat. § 144.343 (2)-(7) was narrowly drawn or actually served the state's purported interest in protecting pregnant minors, promoting parent-child communication, and improving family relations in any meaningful way. The Eighth Circuit's view that any unconstitutional burdens imposed by the statute are negated by the existence of a statutory judicial bypass mechanism is erroneous. This Court never intended the bypass to be an all-purpose cure for the improper infringement of minors' rights, but rather a means of determining which minors may be subjected to the inherent burdens of an otherwise constitutional notice requirement. The Eighth Circuit further erred in holding that the two-parent notice requirement was justified by unarticulated, independent rights and interests of biological parents. This Court has never treated any such

rights and interests as equal to or paramount over the fundamental privacy rights of minors.

Courts have uniformly struck down waiting periods of fixed duration before an abortion could be performed. Thus, the Eighth Circuit erred in upholding Minnesota's waiting period of forty-eight (and commonly seventy-two) hours after notification has been mailed to both parents. Finally, the Minnesota legislature deliberately chose to enact a statutory scheme which mandated notification to both biological parents. This scheme cannot be revised without eviscerating the intent of the law. Therefore, the two-parent requirement cannot be severed and the entire statute must fall.

ARGUMENT

I. MINNESOTA'S TWO-PARENT NOTIFICATION AND JUDICIAL BYPASS STATUTE IS UNCONSTITUTIONAL.

Minnesota requires a minor seeking an abortion to notify both biological parents. The statute provides no exception for minors whose parents are divorced, separated, never married, or for minors who have never even met their absent parents. Minn. Stat. § 144.343 (3),(4); Exhibit G. As such, it is one of the most restrictive laws of its type in the country. The disastrous impact of this law on the health and lives of the plaintiff class is undisputed.

This Court has repeatedly recognized that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (citations omitted); *see also Bellotti II*, 443 U.S. at 633, and cases cited therein; *In re Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). In particular, minors are guaranteed the constitutional right to choose abortion for "there are few situations in which denying a minor the right to

make [such] an important decision will have consequences so grave and indelible." *Bellotti II*, 443 U.S. at 642.[54]

No prior decision of this Court has addressed or sustained the constitutionality of a two-parent involvement requirement as drastically out-of-step with the reality of family life across this nation as Minnesota's.[55] Although this Court has held that abortion restrictions on minors' abortion rights may be justified by some "significant" state interests other than the compelling interests necessary to sustain restrictions on the abortion rights of adult women, "[t]he need to preserve [this] constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U.S. at 642. Statutes such as the notification law at issue here are permissible only if they are narrowly tailored to serve the "State's interest in protecting immature minors."[56] *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. at 490-91 (Powell, J.); *see H.L. v. Matheson*, 450 U.S. at 413 (such laws must "plainly serve[ ] important state interests [and be] narrowly drawn to

54 As this Court added "[T]he potentially severe detriment facing a pregnant woman, . . . is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." *Bellotti II*, 443 U.S. at 642.

55 Indeed, this Court has properly confined its opinions concerning the facial constitutionality of statutes requiring the involvement of both parents to situations in which "the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649; *see also H.L. v. Matheson*, 450 U.S. at 407 (holding limited to minor "(a) . . . living with and dependent upon her parents, (b) . . . not emancipated by marriage or otherwise, and (c) . . . [who has] made no claim or showing as to her maturity or as to her relations with her parents"). The two other cases concerning minors and abortion previously decided by this Court involved statutes requiring the consent of only one parent. *See City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439 (1983); *Ashcroft*, 462 U.S. at 479 n. 4. *See also* 46a.

56 The burden is on the state to show that its law restricting a minor's rights satisfies these stringent standards. *See Danforth*, 428 U.S. at 75; *Matheson*, 450 U.S. at 413; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) (plurality); *id.* at 702-03 (White, J., concurring).

protect only those interests"); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987).[57] Minnesota's law is unconstitutional under these standards.

A. The Effect Of Minn. Stat. § 144.343(2)-(6) In Operation Is Central To The Constitutional Analysis.

Minnesota's two-parent notice and judicial bypass law operated in full force for five years before it was enjoined following trial. 56a; 81a. The district court's conclusions were based on a unique and comprehensive record of the law in operation.[58] In the presence of such a record, the traditional distinction between "facial" and "as applied" analysis breaks down. The constitutionality of Minnesota's law depends, therefore, on an examination of the Minnesota experience and the trial record.

Despite the fact that this Court has never addressed the issue presented in this case, the Eighth Circuit found two-parent notification to be constitutional "as a matter of law." 85a. Yet the question of whether a statute actually burdens plaintiffs, *see Storer v. Brown*, 415 U.S. 724, 740 (1974), or serves the state's interests, *see Plyler v. Doe*, 457 U.S. 202, 228 (1982), *Horton v. Marshall Pub. Schools*, 769 F.2d 1323, 1330 (8th Cir. 1985), has always been considered one of fact. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54 (1938); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986), *cert. denied sub nom. Piscataway Township v. New Jer-*

57 States must thus allow mature minors and those whose best interests require confidentiality to choose an abortion without parental involvement. *See Akron*, 462 U.S. at 428 n.10 (1983); *Bellotti II*, 443 U.S. at 643-44; *Danforth*, 428 U.S. at 75. It is for this reason that the Court has required the sort of judicial bypass procedure provided by § 144.343(6) of Minnesota's statute. *Bellotti II*, 443 U.S. at 643-44; *see also Ashcroft*, 462 U.S. at 491 (quoting *Akron*, 462 U.S. at 439-40).

58 The district court made detailed findings of fact based on testimony by witnesses with first-hand knowledge of nearly 100% of the minors who were affected by the statute. For example, the state court judges who testified at trial collectively saw 90% of the minors who invoked the bypass, 25a, and the testimony of clinic personnel was drawn from experience with nearly every one of these minors. 26a.

sey Citizen Action, 479 U.S. 1103 (1987). *See also* Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 84.[59]

Even the legitimacy of the state's interests cannot be sustained based on "archaic and overbroad generalizations" unsupported by evidence of any kind. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1982); *see Carey v. Population Servs. Int'l*, 431 U.S. at 696 (plurality) ("attempt to justify . . . burden [on rights] . . . requires more than a bare assertion, based on a conceded complete absence of supporting evidence"); *see also Thomas v. Review Bd.*, 450 U.S. 707, 718-19 (1981); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 789-90 (1978); *Craig v. Boren*, 429 U.S. 190, 200-02 (1976). Consequently, "[n]either sentiment nor folklore . . . [have] cause[d this Court] to shut [its] eyes" to the truth. *In re Gault*, 387 U.S. at 21-22. *See also* 36a.[60]

Because application of these constitutional standards requires knowledge of the facts, this Court has never precluded a full review of the facts when assessing statutes challenged as

59 Indeed, commentators have noted that the "principal justification for giving the independent review of legislation to the judiciary lies in the ability of a court to weigh constitutional claims on the basis of experience which was not available when the legislature acted." *Karst*, 1960 Sup. Ct. Rev. at 76-77 & n. 8 (citing Hart & Wechsler, *The Federal Courts and the Federal System* 77-79, 93 (1953)). *See generally* Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 658-68 (1988), and commentators cited therein; Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. L. Rev. 6, 19 (1924) (legislative findings cannot bind courts "since this would furnish a simple means of preventing judicial review of . . . legislation").

60 This Court has emphasized the importance of a full factual record to the adjudication of constitutional claims. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 815 (1986) (O'Connor, J., dissenting); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945). *Cf. Vasquez v. Hillery*, 474 U.S. 254, 257-60 (1986). Indeed, the Court has often refused to decide constitutional questions in the absence of a sufficient factual record. *See, e.g., National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1397 (1989) (record inadequate to decide issue).

applied. For example, in *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988), this Court concluded that a federal statute did not violate the Establishment Clause on its face, *id.* at 2579, but remanded to the district court "for consideration of the evidence . . . insofar as it sheds light on the manner in which the statute is presently being administered." *Id.* at 2580. *See also id.* at 2581 (O'Connor, J., concurring). Similarly, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court sustained an election financing law but noted that facial validity of the law would not preclude a future finding of unconstitutionality based on "factual proof" that the law discriminated against "minor" political parties in operation. *Id.* at 97 n. 131; *see also Storer*, 415 U.S. at 740; *Seagram & Sons v. Hostetter*, 384 U.S. 35, 52 (1966); *McAdory*, 325 U.S. at 461-62; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).

Nowhere did the Eighth Circuit explain why it exempted this statute from these black letter principles. While the Eighth Circuit properly "recognize[d] that a statute may be facially valid, yet upon full development of a factual record be considered unconstitutional in operation," 85a (footnote omitted), it summarily failed to review Minnesota's statute as applied, concluding "that approval given to similar statutory [parental involvement] plans mandates approval in this case." *Id.* In so holding, the court of appeals ignored any distinction between "facial" and "as applied" cases and confused this Court's holding in *Ashcroft* with a proposition far broader than the case entailed.

Ashcroft neither resolved the facial constitutionality of a two-parent notice law, *see* discussion *supra*, n.55, nor addressed the constitutionality of such laws in operation. *See* 462 U.S. at 491-92. A single narrow question was before the Court: Whether the court of appeals had erred in its "interpretation" of the "plain language of [the challenged] statute." *Planned Parenthood Ass'n v. Ashcroft*, 50 U.S.L.W. 3928 (U.S. May 25, 1982) (No. 81-1255) (question presented). No previous decision by this Court reviewed a parental involvement

statute in operation.[61] "Indeed, in [those] . . . case[s], it was clear that only a facial challenge could have been considered, as the Act[s in question] had not been implemented." *Kendrick*, 108 S. Ct. at 2569; *Seagram*, 384 U.S. at 41. Evidence regarding the real operation and impact of the law was simply unavailable. *See Bellotti II*, 443 U.S. at 656 & n.4 (Stevens, J., concurring).[62]

In treating the constitutionality of Minn. Stat. § 144.343(2)-(6) as a pure "matter of law," 85a, the Eighth Circuit treated some factual assumptions as irrefutable.[63] These assumptions include (1) that the state's asserted interests in family integrity and promoting the health and decision-making of immature minors are actually served rather than undermined by Minnesota's two-parent notice/bypass statute, 86a; (2) that there is no significant difference in interference between one-parent and two-parent involvement, 89a-90a; (3) that the degree of burden from a notice/bypass scheme is determinate and fixed by law, 86a; (4) that the degree of burden of a mandatory notice statute is less than that of a consent statute, 94a; (5) that every state's

61 The statute in *Bellotti II* was judicially restrained before the statute's effective date and "never [was] . . . enforced by Massachusetts." 443 U.S. at 625 n.1. The statute at issue in *Ashcroft* was similarly enjoined before it went into effect. *See Planned Parenthood Ass'n v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980). In *Matheson*, 450 U.S. at 401, the only facts before the Court were those regarding a single named appellant, and the Opinion of the Court "primar[il]y" addressed appellant's standing to challenge the statute as applied to mature minors. *See Akron*, 462 U.S. at 440 n.30. As the district court below itself noted, "it [was] the first ever to examine a parental notification or consent substitute statute in actual operation." 39a.

62 Justice Stevens, in fact, predicted that the constitutional questions presented in *Bellotti II* would "appear quite different" in the presence of a factual record revealing the real impact of an operating bypass law. 433 U.S. at 656 n.4.

63 In facial constitutional analysis, courts generally construe a statute to be valid where possible. *See, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S. Ct. 1392, 1397 (1988); *INS v. Chadha*, 462 U.S. 919, 944 (1983). Where a statute is challenged as applied or in operation, however, the actual facts are of increased importance to the analysis and courts are more loathe to rest constitutional determination on assumptions of fact. *Cf. Kendrick*, 108 S. Ct. at 2580.

judicial bypass procedure, no matter how it is designed, provides a viable alternative for minors who need to utilize the procedure, 90a; and (6) that the promotion of biological parental authority will strengthen family integrity. 94a-95a.

To uphold Minnesota's law based on such factual assumptions disregards the district court's findings,[64] effectively freezes the premises of past decisions into constitutional law, *see Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (O'Connor, J., concurring), and abdicates the "very essence of judicial duty." *See Marbury v. Madison*, 5 U.S. at 178.

B. The Minnesota Two-Parent Notice/Bypass Law Impermissibly Burdened Minors' Privacy Rights.

Minnesota's statute failed to achieve the state interests and burdened minors and their families in a multitude of ways neither intended by the legislature nor permitted by the Constitution. In seeking, in part, to protect a hypothetical class of immature minors whose best interests require parental involvement, Minnesota's statute sweeps broadly and blindly without the sensitivity the Constitution requires.[65]

"[T]he lines drawn in a state['s] regulation [of abortion] must be reasonable." *Akron*, 462 U.S. at 438; *Matheson*, 450 U.S. at 413. There must be a " 'fit between the legislature's end and the means chosen to accomplish those ends,' . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' . . . a means narrowly tailored to achieve the desired objective." *Bd. of Trustees of the State Univ. of New York v. Fox*, 109 S. Ct. 3028, 3035 (1989) (citations and quotations omitted). Minnesota's "regulation requiring notification of both parents even when the nuclear family

64 Many of the assumptions made by the *en banc* court directly conflicted with those found by the district court. *See* Statement of Facts *supra*; *see* discussion *infra*. The Eighth Circuit, however, failed to address whether the trial court's findings were "clearly erroneous" upon examination of the record. *See* Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer*, 470 U.S. 564, 573-75 (1985).

65 These immature, non-best-interests minors are precisely the minors the statute failed to serve. 27a-28a.

unit has either broken apart or never formed is not reasonably designed to further the state's interest in protecting minors." 46a.

Minnesota's law in operation failed to provide all mature and best interests minors with a real alternative to parental involvement. Facts, *supra*, at § 5. Some carried unwanted pregnancies to term and others travelled out of state. 20a. Mature and best interest minors who did utilize the bypass were able to avoid destructive parental involvement, but were delayed, frightened and compelled to disclose the most intimate family matters to an array of public employees. Facts, *supra*, at § 5. Immature and non-best-interests minors carried to term rather than notifying their parents. 27a. Minors who voluntarily involved one parent were nevertheless compelled to obtain judicial approval for the decision not to involve a violent, terminally ill, or psychologically disturbed parent. Facts, *supra*, at § 3. Many of the fifty percent of Minnesota minors living in one- or no-parent households were compelled to involve a non-custodial or absent biological parent with whom they had no communication, trust or relationship. Facts, *supra*, at § 4. These minors frequently went to court with single parents, usually mothers with custody, who were divorced, battered, or remarried, to obtain the approval of a juvenile court judge and avoid reinvolving the second biological parent in their lives. 31a. These single mothers were forced to disclose stories about their divorces. 117a-118a.

The Minnesota legislature may indeed have intended to exempt certain minors from the burdens of both compelled notice and the judicial bypass procedure; the record demonstrated, however, that this effort also failed. While the statute purports to apply only to "unemancipated" minors, Minn. Stat. § 144.343(2), at 1a, the absence of a statutory definition of emancipation meant that minors had to go to court to be declared eligible for this exemption. *See Streitz v. Streitz*, 363 N.W.2d at 137;[66] P. Ex. 13 and 14. Similarly, minors with a deceased biological parent, while also ostensibly exempt, Minn. Stat. § 144.343(3), at 2a, were asked by providers to give written proof of the parent's death. Facts, *supra*, at § 2(d).[67] This severely upset members of plaintiff class such as G.K., and delayed their abortions. *Id.* Finally, while the legislature may have hoped to avoid imposing further burdens on minors who were already victims of sexual or physical abuse, this effort, too, was unsuccessful. Most of these minors did not reveal that they were abused, 21a, but even those who did could not both be exempt from the statute and retain their privacy because the statute requires that abuse be reported to state authorities, Minn. Stat. § 144.343(4)(c), at 2a, thus creating a substantial risk of disclosure. 21a.

Compounding the statute's far-flung burdens was its utter failure, as the district court found,[68] to achieve any of the state's legitimate aims more than it undermined them. 29a.[69] Minnesota sought to protect the health and welfare of its teenagers. Yet the statute drove them from health care, Facts, *supra*, at § 2(a), interfered with the care they obtained, 20a, and gave many no choice but unwanted motherhood. Facts, *supra*, at § 2(c). Minnesota also sought to foster communication between minors and their parents regarding their abortion choice. Yet five weeks of trial revealed no proof that communi-

---

66 Minors who were mothers, married, or living independently from their parents generally had to go to court. J.A. 230-31.

67 This is because subd. 5 of the statute requires written proof of compliance. 2a-3a.

68 The district court found that Minnesota did have one purpose, "to deter and dissuade minors from choosing to terminate their pregnancies," 25a, which may have been achieved. But since this purpose is not legitimate, *see Thornburgh*, 476 U.S. at 759, the fact that it was achieved, *see* Facts, *supra*, at § 2(c), argues against the constitutionality of the statute.

69 The district court said:

> The court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnant minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343(2)-(7) on the whole furthers in any meaningful way the State's interest in protecting pregnant minors or assuring family integrity.

29a.

cation had, in fact, increased. 41a. Moreover, the requirement that both parents be notified actually decreased the voluntary communication between some minors and their single parents. 22a. Finally, Minnesota had hoped to improve family integrity by mandating the involvement of both parents in the minor's decision. Yet in doing so, Minnesota imposed a rigid, idealized definition of family on the varied and too often dysfunctional family circumstances in which a majority of its teenaged citizens live. 29a-30a.[70]

The Eighth Circuit's response to these facts was to assert baldly that an "undue burden" on one group of minors—no matter how large—does not "render the statute unconstitutional for all." 95a. In so holding, it relied heavily on its erroneous view of the bypass option as a panacea for the statute's unconstitutional ills.

C. The Presence Of A Judicial Bypass Procedure Does Not Immunize All Underlying Statutory Requirements From Constitutional Scrutiny.

The Eighth Circuit made a fundamental error when it held, without reference to the record or to the trial court's findings, that "[a]ny added burden the two-parent notification require-

70 Courts in Minnesota themselves recognize that family structure and good communication cannot be created by judicial fiat. For example, in *Chapman v. Chapman*, 352 N.W.2d 437 (Minn. Ct. App. 1984), the Minnesota court of appeals reversed the trial court's award of joint custody, because "[a]lthough ideally the parents should make major decisions concerning their children jointly, joint legal custody should not be used as a 'legal baseball bat' to coerce cooperation" between parents who cannot "cooperate and amicably settle disputes about the children." *Id.* at 441. Minnesota law also recognizes that disputes between parents can "endanger[ ] the children's emotional well-being by placing them in the middle of a 'tug-of-war.' " *Andros v. Andros*, 396 N.W.2d 917, 922 (Minn. Ct. App. 1986). *See also Tollefson v. Tollefson*, 403 N.W.2d 857, 859-60 (Minn. Ct. App. 1987); *Heard v. Heard*, 353 N.W.2d 157, 161-62 (Minn. Ct. App. 1984); *Andersen v. Andersen*, 360 N.W.2d 644, 646 (Minn. Ct. App. 1985); *Bateman v. Bateman*, 382 N.W.2d 240, 250 (Minn. Ct. App. 1986); *Wolter v. Wolter*, 382 N.W.2d 896, 898-99 (Minn. Ct. App. 1986); *Tuma v. Tuma*, 389 N.W.2d 529, 531 (Minn. Ct. App. 1986); *Estby v. Estby*, 371 N.W.2d 647, 649 (Minn. Ct. App. 1985).

ment imposes in individual cases is negated by the judicial bypass mechanism . . . ." 93a. The statement reflected the court's unwillingness to assess the constitutionality of Minnesota's two-parent notice requirement in operation.[71]

This analysis flies in the face of prior decisions of this Court. Even with the limited facts then available, see discussion in Point I(A) *supra*, this Court in *Bellotti II* carefully analyzed the state's interests and whether the proposed statute was narrowly drawn to serve them. *See Bellotti II*, 443 U.S. at 644-50. A judicial bypass procedure was suggested by this Court in *Bellotti II* "not for the purpose of making an unconstitutional notice provision constitutional, but because even a valid notice requirement may be imposed only on minors who are immature or whose best interests would not be served by making the abortion decision without parental involvement." 102a (Lay, C.J., dissenting).

The circuit court's formulation of the bypass as an "all-purpose cure" would not only impose unconstitutional burdens on teenagers in Minnesota under this law, but could have further absurd and draconian consequences. States could require teenagers to notify the putative father of the minor's child (with or without exception for rape or incest), his parents[72] or any and all adults claiming an interest in the minor's health and welfare, such as grandparents, school officials or friends. Indeed, conditions other than notification, such as mandatory religious classes on when life begins, could be imposed.

In sum, the circuit court's analysis would drown minor's privacy rights in a hoard of regulatory measures bearing no compelling, significant or reasonable connection to the state's

71 Referring to the district court's conclusion that the two-parent requirement was unconstitutional and not severable from the remainder of the statute, the Eighth Circuit stated: "We confess some confusion as to why the district court examined the two-parent notice and the 48-hour delay requirements in isolation and applied its conclusions to invalidate the entire statutory procedure it had just approved." 92a.

72 Indeed, one early draft of Minn. Stat. § 144.343(2)-(6) proposed that both parents of the putative father be notified in addition to the pregnant minor's own biological parents. *See* Exhibit G (excerpts from Minnesota Legislative Journal).

legitimate interests. These requirements would be imposed on all minors, and for two classes of minors, they would be unavoidable: immature, non-best interest minors, and minors who are unable to navigate the judicial system. *See* Facts, *supra*, § 5. Minors, like the majority of plaintiff class members, who voluntarily confide in one or both parents, would be forced to go to court to bypass additional senseless conditions. The bypass mechanism would become a "super review board" for the abortion decision of nearly every minor who does not flee the state or carry her unwanted pregnancy to term.[73] *See generally* 104a (Lay, C.J., dissenting).

For these reasons, and because the bypass procedure together with the two-parent requirement operated to impose devastating burdens on minors, *see* Facts, *supra*, § 4 and Point I(B) *supra*,[74] the Eighth Circuit erred in upholding the constitutionality of Minnesota's two-parent notification requirement.

II. THE EIGHTH CIRCUIT ERRED IN HOLDING THAT THE INDEPENDENT RIGHTS AND INTERESTS OF BIOLOGICAL PARENTS JUSTIFY MINNESOTA'S TWO-PARENT NOTIFICATION REQUIREMENT.

After noting the substantial burdens which the district court found to have been imposed by the statute on the forty-two percent of Minnesota minors living in one- or no-parent households, 91a-92a, the Eighth Circuit nevertheless concluded that "the principles enunciated by the Supreme Court as to the parental role . . . apply to non-custodial parents as well as custodial parents," 95a, and "to both no-parent and one-parent households . . . ." 92a. In thus equating the interests of non-custodial parents with those of custodial parents and in elevating parental rights and interests above those of the minor, 92a-96a, the court of appeals plainly erred.[75]

73 Such review boards have been rejected by this Court. *Doe v. Bolton*, 410 U.S. 179, 197-98 (1973). *See also Morgentaler v. The Queen*, 44 D.L.R. 4th 385, 403-04 (Can. 1988).

74 21a-22a, 29a-31a.

A. Parental Authority Over Minors Is Not Independent From Or Weightier Than A Minor's Liberty And Health Interests.

In the area of minors' reproductive decision-making, the decisions of this Court embrace the role of parents only insofar as parents may help to insure that a minor's interests are protected. The court of appeals sustained Minnesota's two-parent notice requirement based on an unarticulated independent right of parents which it treated as paramount to the interests of the minor. 92a.[76]

75 The court of appeals found that the district court erred in failing to "consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement." 92a.

76 Whatever rights a parent may have, this Court has repeatedly emphasized that biological parenthood, without more, does not automatically carry with it a constitutionally protected right to the care and control of minor children, nor even to notice of events in their lives. Indeed, sharp distinctions have been drawn between the rights and interests of parents who are able to demonstrate a significant relationship with their children and those who are not. In a long line of cases, this Court has required more than a biological connection for the successful assertion of parental interests in the lives of children. *See Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983) (unwed biological father who never had a significant custodial, personal, or financial relationship with his daughter had no constitutional right to notice and a hearing prior to her adoption); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1975) (unwed father, who had never exercised actual or legal custody over his child, suffered no constitutional deprivation from statute denying him the right to block his child's adoption); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (to grant unwed mother, but not unwed father, the right to block an adoption by withholding consent violates equal protection on the ground that classification "discriminate[s] against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child."); *id.* at 392 ("where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of

This Court, however, has never held that parental interests carry greater weight in the constitutional analysis than the privacy interests of the mature minor. In *Danforth*, this Court found that:

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

428 U.S. at 75.[77] The subsequent decisions of this Court *extend* this principle by requiring that even immature minors be provided with a forum in which they may demonstrate that an abortion without parental involvement is in their best interests. *Ashcroft*, 462 U.S. at 490-491; *Bellotti II*, 443 U.S. at 643-44. This Court's decisions outside the privacy context are not inconsistent with these principles. The oft-cited cases of *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), do not support broad parental authority to control a minor's choice between abortion and motherhood. In *Prince*, this Court recognized the liberty interests of parents but held that the state's interest in preventing severe harm to children was of sufficient weight to override such parental interests. 321 U.S. at 165-170 (sustaining a child labor law). In *Pierce*, this Court found a compulsory public school attendance statute to "interfere with the liberty of parents and guardians to direct the upbringing and education of

---

that child"). In each of these cases, the Court has recognized the basic principle that "*[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" *Lehr*, 463 U.S. at 260 (emphasis in original) (quoting *Caban*, 463 U.S. at 397 (Stewart, J., dissenting)); *id.* at 262 (where the natural father fails to accept any responsibility for the child's future "the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie").

77 While this Court has since noted that there may be "no logical relationship between the capacity to become pregnant and the capacity for mature judgment," *Matheson*, 450 U.S. at 408, the record unequivocally supports the district court's finding that there *is* a relationship between maturity and the desire for privacy regarding the abortion choice. 28a, 42a.

children under their control." *Id.* at 534-535. Neither of these cases involved a conflict between the interests of parents and the rights of their minor children and neither involved the right of a minor to make a decision "[so] personal and intimate, [so] properly private, or [so] basic to individual dignity and autonomy," as that between pregnancy termination and unwanted parenthood. *See Thornburgh*, 476 U.S. at 772.[78]

Where, however, a conflict between parents and their children has been presented, courts have relied heavily on the language in *Prince* to the effect that "neither rights of religion nor rights of parenthood are beyond limitation." 321 U.S. at 166.[79] If parental rights and interests were not thus limited, forcing the risks of pregnancy and childbearing on a pregnant teenager, *see*

---

78 Indeed, in the highly personal and individual decision regarding which parent should have custody of a child, Minnesota courts, for example, have accorded considerable weight to the child's choice even above and beyond the preferences of natural parents. A leading custody case, *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985), sets up a custody preference for the "primary caretaker" and later cases have consistently held that "*Pikula* directs that the child's preference be of significant weight if the child is old enough." *Stienke v. Stienke*, 428 N.W.2d 579, 582 (Minn. Ct. App. 1988); *Nies v. Nies*, 407 N.W.2d 484, 487 (Minn. Ct. App. 1987); *Peterson v. Peterson*, 394 N.W.2d 586, 588 (Minn. Ct. App. 1986); *Mowers v. Mowers*, 406 N.W.2d 60, 63-4 (Minn. Ct. App. 1987). The court has further stated that not only is the child's preference an important factor, but may be "in close cases *a deciding factor* as to which parent will have custody of the child." *Uhl v. Uhl*, 395 N.W.2d 106, 109-10 (Minn. Ct. App. 1986) (emphasis added) (citing *Schultz v. Schultz*, 383 N.W.2d 379, 382 (Minn. Ct. App. 1986)). *See also Maxfield v. Maxfield* 439 N.W.2d 411, 414-15 (Minn. Ct. App. 1989).

79 In *Parham v. J.R.*, 442 U.S. 584 (1979), however, this Court upheld a statute that granted parents the right to voluntarily commit their child to a state mental hospital. Although the Court affirmed the presumption "that natural bonds of affection lead parents to act in the best interests of their children," *id.* at 602 (citation omitted), the presumption was premised on the presence of some level of functional family relationship between the child and the parents. It strains belief to suggest that the Court in *Parham* contemplated commitment of a minor by a biological parent who has never met her over the objections of the minor and/or her custodial parent. *See id.* at 604. Note also that *Parham* involved a decision to commit a child which, unlike a decision to compel pregnancy, childbirth or motherhood, is revocable. Indeed, the Court in *Parham* specifically required subsequent review of the parental decision. *Id.* at 607.

Facts, *supra*, § 2(b) would be a parental prerogative,[80] as would the similarly invasive acts of forcing an abortion,[81] preventing life-saving medical treatment,[82] or preventing medical treatment not necessary to save the life of the minor.[83]

The rule emerging from these decisions is not new. Blackstone already recognized that "[t]he *power* of parents over their children is derived from . . . their duty." 1 W. Blackstone, *Commentaries* *452. Following an exhaustive analysis of Blackstone on this point, the British House of Lords recently upheld the discretion of a physician to provide contraceptives to a minor without parental knowledge or consent. *Gillick v. West Norfolk and Wisbech Area Health Authority*, 3 All E. R. 402

80 For example, in an Oklahoma case, a 12-year-old girl was raped by three teenagers and, as a result, contracted VD and became pregnant. Her mother sought to prevent her from having an abortion. The district court of Oklahoma found that the life of the minor was endangered as a result of the pregnancy, ordered that the girl be made a ward of the court and authorized the abortion and any other necessary medical treatment. The state Supreme Court affirmed. *In re D.C.*, JF No. 81-1555 (Okla. Dist. Ct. Okla. Cty., Sept. 22, 1981), *aff'd*, No. 57,472 (Okla. Sup. Ct. Sept. 28, 1981), reprinted in Exhibit E. Subsequently, the girl decided that she no longer wanted the abortion, and the district court order was dissolved. *See* The Daily Oklahoman, Oct. 7, 1981, at 1.

81 In *In re Mary P.*, 111 Misc. 2d 532, 444 N.Y.S.2d 545 (N.Y. Fam. Ct. Queens Cty. 1981), for example, a mother sought to have her 15-year-old daughter adjudged "a person in need of supervision" because the minor refused to have an abortion. The court not only rejected this attempt by the parent to interfere with the minor's choice, but issued an order prohibiting future interference with the minor's "determination to deliver her child." 111 Misc. 2d at 536, 444 N.Y.S.2d at 548; *see also In re Smith*, 16 Md. App. 209, 295 A.2d 238 (1972).

82 *See, e.g., People ex. rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952) (ordering blood transfusion over parents' objection); *Morrison v. State*, 252 S.W.2d 97 (Mo. App. 1952) (same); *cf. Jehovah's Witnesses v. King Cty. Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967) (three-judge court), *aff'd*, 390 U.S. 598 (1968) (per curiam) (dismissing constitutional challenge to state statute authorizing blood transfusions to children over objection of parents).

83 *See In re Jensen*, 54 Or. App. 1, 633 P.2d 1302 (1981); *In re Karwath*, 199 N.W.2d 147 (Iowa 1972); *In re Sampson*, 29 N.Y.2d 900, 901, 328 N.Y.S.2d 686, 687 (1972) (per curiam).

(H.L. 1985). Lord Fraser stated that the "parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and are justified only in so far as they enable the parent to perform his duties towards the child, and towards other children in the family." *Id.* at 410.[84]

There is, thus, no support in either present law or history for the broad assertion of parental interests employed by the court of appeals to sustain Minnesota's law.

B. States Have Universally Recognized The Paramount Importance Of Confidentiality To The Health And Welfare Of Minors.

States have uniformly elected to protect the confidentiality of minors seeking health care. All fifty states have enacted statutes that protect the confidentiality of a minor's decision to seek health care for medical problems related to sexual activity. *See generally* Exhibit C. For example, every state but one specifically allows minors to consent to medical treatment[85] for what they label as either sexually transmitted diseases (twelve states), venereal disease (thirty-six states), or diseases which must be reported to government health officials (one state). *Id.*[86] Indeed, a majority of states specifically authorize minors to consent to pregnancy-related health care such as pregnancy test-

84 Analyzing Blackstone further, Lord Fraser wrote:

> The principle [in Blackstone] is that parental right or power of control of the person and property of the child exists primarily to enable the parent to discharge his duty of maintenance, protection and education until he reaches such an age as to be able to look after himself and make his own decisions . . . the [basic] principle [is] that parental right endures only so long as it is needed for the protection of the child.

Id. at 421. *See also id.* at 410-413.

85 South Carolina, the exception, permits older minors to consent to any medical treatment except operations. *See* Exhibit C.

86 In a recent trend, states have also begun to enact statutes permitting minors to consent to testing for AIDS. *See, e.g.*, Cal. Health & Safety Code § 199.27(a)(1) (West Supp. 1989); Del. Code Ann. tit. 16, § 1202 (Supp. 1988).

ing, prenatal care, cesarean sections and other delivery services (twenty-seven states). *Id.* Moreover, a total of forty-three states specifically insure the confidentiality of minors seeking drug and/or alcohol treatment. *See* Exhibit D. Even where states do not specifically grant to minors a right to consent to medical treatment, it is widely accepted that parents may not make health care decisions if those decisions will jeopardize the life or health of their children. *See* cases cited *supra* at Point II(A). Finally, the majority of states permit emancipated minors, "mature minors," or older minors to consent to all medical treatment.[87]

The statutory trend affording minors the right to consent to medical treatment reflects a legislative judgment that parental involvement in medical decisions is unnecessary due to the overall competence of minors to make medical decisions in consultation with health professionals. *See* Facts, *supra*, § 2(a). It is also a recognition that parental involvement in health care decisions can be abusive.[88] Finally, and of quintessential importance, it is a recognition that minors will be deterred from seeking critical medical care if confidentiality is not guaranteed.

87 *See* English, *Adolescent Health Care: Barriers to Access—Consent, Confidentiality, and Payment* in *Special Issue, Clearinghouse Review* 481, 483 (1986) (footnotes omitted); Brown & Truitt, *The Right of Minors to Medical Treatment*, 28 De Paul L. Rev. 289, 294, 305 (1979); *Principles of Pediatrics, Health Care of the Young* 525 (Hoekelman ed. 1978); Katz, Schroeder & Sidman, *Emancipating our Children: Coming of Legal Age in America*, 7 Fam. L. Q. 211 (1973).

88 As Judge Nanette Dembitz of New York State Family Court observed:

> [parents] who have opposed their unmarried daughters' efforts to secure abortions variously have expressed a vengeful desire to punish the daughter for her sexual activity by making her suffer the unwanted child, a fervor to impose a religious conviction the mother has failed to instill in her daughter, a hope of caring for her daughter's baby as her own because of an inability or unwillingness to bear another child herself, a defensive or resentful attitude because [the mother of the pregnant minor] bore illegitimate children without seeking or being able to secure an abortion, or a general distaste for abortion. None of these parental reasons for objecting relates to the daughter's well-being—only to that of the mother.

Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 Colum. L. Rev. 1251, 1255 (1980). *See* Facts, *supra* at § 3.

The Eighth Circuit's elevation of parental interests would threaten to invalidate a large number of these confidentiality statutes as well as the very statute of which Minnesota's two-parent notification requirement is a part. *See* Minn. Stat. § 144.343(1). 1a.[89] Indeed, to the extent the state would argue that this is not true, the state's asserted interests appear disingenuous. For if a legislature can dispense with parental involvement in health care decisions, particularly health decisions involving contraception and the treatment of pregnancy, these same parental interests cannot provide an independent constitutional basis for parental involvement in the abortion decision alone.

III. THE MINNESOTA STATUTE'S REQUIREMENT THAT THE MINOR WAIT FORTY-EIGHT HOURS AFTER NOTICE TO HER PARENTS IS UNCONSTITUTIONAL.

A waiting period of at least forty-eight and commonly seventy-two hours between written notification and the abor-

89 Federal statutes recognizing these same considerations would be jeopardized as well. *See, e.g.*, cases construing Title X, Public Health Service Act, 42 U.S.C. § 300(a) et seq. (Supp. 1989): *Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 659-61 (D.C. Cir. 1983) ("Thus Congress made clear that confidentiality was essential to attract adolescents to the Title X clinics; without such assurance, one of the primary purposes of Title X—to make family planning services readily available to teenagers—would be severely undermined"); *New York v. Heckler*, 719 F.2d 1191 (2d Cir. 1983); *Planned Parenthood Ass'n v. Matheson*, 582 F. Supp. 1001 (D. Utah 1983); and cases construing Title XIX of the Social Security Act ("Medicaid") 42 U.S.C. § 1396d(a)(4)(c) (Supp. 1989): *T.H. v. Jones*, 425 F. Supp. 873, 878 (D. Utah 1975) ("The legislative history of the 1972 amendments bears out Congress' concern that AFDC and Medicaid family planning services be provided to sexually active minors who desire them on a confidential basis; in this way Congress has sought to stem the rising number of births out of wedlock . . ."), *aff'd mem. on statutory grounds*, 425 U.S. 986 (1976); *Planned Parenthood Ass'n of Utah v. Dandoy*, 810 F.2d 984 (10th Cir. 1987).

tion procedure is mandated by Minn. Stat. § 144.343(2).[90] The circuit court's approval of this requirement contradicts the decisions of nearly every other court that has considered the constitutionality of a waiting period, including this Court's decision in *Akron*.[91] 462 U.S. at 450 (twenty-four hour waiting period was unconstitutional because the city "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period"). *See also Zbaraz*, 763 F.2d at 1537-38 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S.Ct. 479 (1987); *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984), *aff'd on other grounds*, 476 U.S. 747 (1986); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1142-43 (7th Cir. 1983).

The circuit court found that the waiting period was justified by "Minnesota's interest in ensuring that notification results in parental involvement." 97a (footnote omitted). Though this

---

90 The statute prohibits the abortion from being performed "until at least forty-eight hours after written notice of the pending operation has been delivered." Minn. Stat. § 144.343(2), at 1a. When the notice is mailed, "time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing." Minn. Stat. § 144.343(2)(b) at 1a-2a. If notice were mailed just prior to midnight, slightly more than 60 hours would pass between mailing and the time the abortion could be performed. However, the district court found, and the circuit court agreed, that minors who notified their parents by mail "commonly waited 72 hours between initiating the notification process and the abortion itself," 22a, 96a, reflecting the fact that most such mail is sent during the business day. Although the statute permits notice by personal delivery, Minn. Stat. § 144.343(2)(a), the personal delivery option was in practice confused with a consent requirement. *See* J.A. 287-88.

91 Although *Akron* involved a waiting period after informed consent by an adult woman, the Minnesota statute's waiting period applies both to mature minors capable of informed consent who choose to notify their parents rather than go through the bypass procedure and to emancipated minors who have the legal status of adults. More importantly, the Court's decision in *Akron* seems to be based less on the fact that the woman was capable of informed consent than on the arbitrariness of the requirement. 462 U.S. at 450-51.

state interest may be legitimate, it does not follow that an "arbitrary and inflexible" forty-eight hour waiting period is narrowly tailored to serve that state interest. As the district court noted, "a shorter waiting period would effectuate that interest as completely" as a full three-day period. 49a; *see also* 32a. Further, the burden imposed by the inflexibility of the waiting period is clearly demonstrated in situations where a minor who has fully consulted with both her parents about the abortion must nonetheless wait three days after formal mailed notice or two days after personal notice. Therefore, the Minnesota forty-eight hour waiting period is not narrowly drawn to serve the state's interest in fostering parental involvement,[92] and should be held unconstitutional by this Court.

IV. THE TWO-PARENT NOTIFICATION REQUIREMENT IS INTEGRAL TO THE STATUTE AND NOT SEVERABLE.

The district court correctly ruled that the statute's two-parent definition of "parent," 2a, was "inseparably intertwined within Minn. Stat. § 144.343(2)-(7)," and enjoined the statute in its entirety. 51a.[93] The appellate panel agreed, but the *en banc*

---

92 The circuit court's suggestion that the minor could avoid the 48-hour waiting period by resorting to the bypass, 96a-97a, distorts the purpose of the bypass. *See* Point I(C) *supra*. A minor otherwise willing to notify her parents about her abortion choice should not be deterred from seeking parental involvement or channelled into the judicial system in order to avoid an arbitrary waiting period. Further, it is frequently the case that the bypass procedure takes longer than 48 hours, so there would be no time saved by taking the bypass route. 18a, 20a.

93 The district court wrote that:

> The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice. More importantly, the remainder of the statute cannot be given effect without the offending language. . . . In addition, this court is ill-situated to determine what alternative definition the legislature would employ to remedy the constitutional infirmity identified in this decision. . . . Any [such alternatives], however, would leave Minn. Stat. 144.343(2)-(7) with little resemblance to the program actually intended by the Minnesota legislature.

51a.

court did not reach the issue. Should this statute's two-parent requirement be invalidated, the district court's holding on severability should be affirmed.[94]

The trial court's construction of a state statute is entitled to deference unless "clearly erroneous." *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 & n.9 (1985). The district court properly applied the test required by this Court for determining severability: "whether the statute will function in a *manner* consistent with the intent of [the legislature]." *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987). Since severance of the two-parent definition of parent would eviscerate the intent of the statute, the entire statute must fall if the two-parent notice requirement is found unconstitutional.

An essential goal of the Minnesota legislature was to provide both biological parents with notice. *See* Exhibit G. Severance of that requirement would render the statute "incapable of accomplishing the legislative purposes." *Brockett*, 472 U.S. at 506 (quoting *State v. Anderson*, 81 Wash.2d 234, 236, 501 P.2d 184, 185-186 (1972)). Indeed, the statute itself recognizes in subd. 6 that the provision for two-parent notice without bypass might be enjoined, and provides as an alternative two-parent notice with bypass. But either alternative requires notice to both biological parents as its central feature.[95]

Judicial rewriting of the statute is made impossible by the language of § 144.343(6)(c)(i). While subd. 3 defines the singular "parent" to mean "both parents," subd. 6(c)(i) uses the plural "parents" not once, but twice. Severing or editing subd. 3 would not solve the problem this choice of words creates. Eliminating the word "parents" from either or both places in subd. 6(c)(i) would render its operative provisions meaningless. The only solution would be to change the plural word "parents" to the singular word "parent." To do that would be to create a new statute which indisputably conflicts with the language and intent of the law as passed by the legislature. Thus,

94 If this Court invalidates this statute on grounds other than the two-parent requirement alone, this case should be remanded for full briefing on all issues of severability.

95 Subd. 3, defining "parent" as "both parents of the pregnant woman if they are both living," applies to both subd. 2 and subd. 6.

the district court was correct in concluding that it was "ill-situated" to choose between the many possible ways of rewriting the statute. 51a.[96]

CONCLUSION

Petitioners respectfully request this Court to reverse the judgment of the Eighth Circuit Court of Appeals and to declare that Minn. Stat. § 144.343(2)-(6) is unconstitutional.

Respectfully submitted,

WILLIAM Z. PENTELOVITCH
REBECCA A. PALMER
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

JANET BENSHOOF
(Counsel of Record)
RACHAEL N. PINE
LYNN M. PALTROW
JOHN POWELL
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

SIMON HELLER
On The Brief

ROBERT S. HICKS
Minnesota Civil Liberties Union
1021 West Broadway
Minneapolis, Minnesota 55411
(612) 522-2423

96 When unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887); *accord Field v. Clark*, 143 U.S. 649, 695-96 (1892).

APPENDIX

Exhibit A

Thirty-one states have parental notification or consent statutes[1] which are either in effect, under judicial review, or facially unconstitutional and generally not enforced.[2]

1. *NOTIFICATION*—eleven states

ARKANSAS: 1989 Ark. Acts 270; **GEORGIA:** Ga. Code Ann. § 15-11-112 (Supp. 1988); **IDAHO:** Idaho Code § 18-609(6) (1987); **ILLINOIS:** Ill. Ann. Stat. ch. 38 para. 81-64.4 (Smith-Hurd Supp. 1988); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-103 (1987); **MINNESOTA:** Minn. Stat. § 144.343(2)-(6); **MONTANA:** Mont. Code Ann. § 50-20-107 (1987); **NEVADA:** Nev. Rev. Stat. § 442.255 (1987); **OHIO:** Ohio Rev. Code Ann. § 2919.12 (Anderson 1987); **UTAH:** Utah Code Ann. § 76-7-304 (1978); **WEST VIRGINIA:** W. Va. Code § 16-2F-3(a) (1985).

A. *Enforced*—two states

ARKANSAS, WEST VIRGINIA

B. *Enjoined*—five states

GEORGIA: *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988) (preliminary injunction); **ILLINOIS:** *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S. Ct. 479 (1987) (*per curiam*); **MINNESOTA:** *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and withdrawn*, 835 F.2d 1545 (8th Cir. 1987) (*per curiam*), *reh'g en banc granted*, 835 F.2d

---

1 The Maine statute, Me. Rev. Stat. Ann. ch. 22, § 1597A (1989), is excluded from this list because it contains a provision for the physician to obtain consent solely from the minor.

2 This list does not contain those state laws which have been permanently enjoined and are not currently on appeal.

1546 (8th Cir. 1987), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), *stayed pending appeal*, Nos. 86-5423, 5431 (8th Cir. Oct. 7, 1988) (*en banc*) (110a), *cert. granted*, 109 S. Ct. 3240 (1989); **NEVADA:** *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985) (preliminary injunction); **OHIO:** *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986) (permanent injunction), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom. Ohio v. Akron Center for Reproductive Health*, 109 S. Ct. 3239 (1989).

C. *Facially Unconstitutional, Generally Not Enforced*[3]—four states

IDAHO: Idaho Code § 18-609(6) (Supp. 1987); **MARYLAND:** Md. Health-Gen. Code § 20-103(a-c) (1987);[4] **MONTANA:** Mont. Code § 50-20-107(1)(b) (1987); **UTAH:** Utah Code Ann. § 76-7-304(2) (1978).

II. *CONSENT*—twenty states

ALABAMA: Ala. Code § 26-21-1 to 26-21-8 (Supp. 1988); **ALASKA:** Alaska Stat. § 18.16.010(a)(3) (1986); **ARIZONA:** Ariz. Rev. Stat. Ann. § 36-2152 and 36-2153 (Supp. 1988);[5] **CALIFORNIA:** Cal. Health & Safety Code § 25958 (Supp. 1988); **DELAWARE:** Del. Code Ann. tit. 24 § 1790(b)(3) (1987); **FLORIDA:** Fla. Stat. Ann. § 390.001(4)(a) (West 1986); **INDIANA:** Ind. Code Ann. § 35-1-58.5-2.5 (West Supp. 1988); **KENTUCKY:** Ky. Rev. Stat. Ann. § 311.732 (Baldwin Supp. 1988); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1299.35.5 (West Supp. 1988); **MASSACHUSETTS:** Mass. Gen. Laws Ann. ch. 112,

3 Unless otherwise indicated, these laws are presumed unconstitutional because they lack a judicial bypass. *Bellotti v. Baird*, 443 U.S. 622 (1979).

4 Unconstitutional per Opinion of the Attorney General, No. 85-035 (Dec. 31, 1985).

5 On May 22, 1989, Arizona enacted a new parental consent statute; § 36-2152 and 36-2153 (1989). This new statute will go into effect on September 15, 1989.

§ 12S (West 1983); **MISSISSIPPI**: Miss. Code Ann. § 41-41-53 (Supp. 1988); **MISSOURI:** Mo. Ann. Stat. § 188.028 (Vernon Supp. 1989); **NEW MEXICO:** N.M. Stat. Ann. § 30-5-1(c) (1984); **NORTH DAKOTA:** N.D. Cent. Code § 14-02.1-03.1 (Supp. 1987); **PENNSYLVANIA:** 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); **RHODE ISLAND:** R.I. Gen. Laws § 23-4.7-6 (1985); **SOUTH CAROLINA:** S.C. Code Ann. § 44-41-30(b) (1985) (unmarried women under the age of 16); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23A-7 (1986); **TENNESSEE:** Tenn. Code Ann. § 37-10-303 (Supp. 1988); **WYOMING:** Wyo. Stat. § 35-6-118 (1989).[6]

A. *Enforced*—nine states

ALABAMA, INDIANA, KENTUCKY,[7] LOUISIANA, MASSACHUSETTS, MISSOURI, NORTH DAKOTA, RHODE ISLAND, WYOMING

B. *Enjoined or Declared Unconstitutional*—six states

ARIZONA: *Roe v. Collins*, No. CIV. 85-2118 PHX CLH (D. Ariz. August 14, 1987) (permanent injunction); **CALIFORNIA:** *American Academy of Pediatrics, California District IX v. Van de Kamp*, No. 884574 (Calif. Super. Ct., San Francisco Cty. Dec. 28, 1987) (preliminary injunction); **FLORIDA:** *In Re: T.W.*, No. 89-893 (5th Dist. Fla. Ct. App. May 13, 1989); **MISSISSIPPI:** *Barnes v. Mississippi*, No. J86-0458(W) (S.D. Miss. July 24, 1986) (preliminary injunction); **PENNSYLVANIA:** *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988) (preliminary injunction); **TENNESSEE:** *Planned Parenthood Association of Nashville v. McWherter*, No. 3:89-0520 (M.D. Tenn. June 30, 1989).

6 This law requires the notice and consent of one parent for all minor women seventeen or under.

7 The district court partially enjoined the law, but upheld it as modified. *See Eubanks v. Wilkinson*, No. C82-0360-L(A), slip op. at 35-36 (W.D. Ky. Aug. 23, 1988), *appeal docketed*, No. 88-6085 (6th Cir. Sept. 22, 1988), No. 89-5353 (6th Cir. Mar. 21, 1989).

C. *Facially Unconstitutional, Generally Not Enforced*[8]— five states

ALASKA: Alaska Stat. § 18.16.010(a)(3) (1986);[9] **DELAWARE:** Del. Code Ann. tit. 24 § 1790(b)(3) (1987);[10] **NEW MEXICO:** N.M. Stat. Ann. § 30-5-1(c) (1984); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23A-7 (1986); **SOUTH CAROLINA:** S.C. Code Ann. § 44-41-30(b) (1985).

8 Unless otherwise indicated, these laws are presumed unconstitutional because they lack a judicial bypass. *Bellotti v. Baird*, 443 U.S. 622 (1979).

9 Unconstitutional per Opinion of the Attorney General, No. 8 (Feb. 10, 1978).

10 Policy of nonenforcement announced by the State Attorney General on March 24, 1977, and reprinted in *Delaware Women's Health Org. v. Wier*, 441 F. Supp. 497, 499 n.9 (D. Del. 1977).

Exhibit B

For the convenience of the Court, plaintiffs provide this brief description of their expert witnesses:

Dr. Stanley Henshaw testified about the effect of the notification laws on teen pregnancy and abortion rates and on the need for abortion services. He is the Deputy Director for Research and Planning of the Alan Guttmacher Institute, where he directs research on abortion studies including periodic surveys of all abortion providers in the United States, the availability of abortion services throughout the country and the number of abortions which take place each year in each geographical area of the United States. In addition, Dr. Henshaw is the author or co-author of eighteen publications, including a study of teenage pregnancy in the United States and the developed countries. *See* P. Ex. 26 (resume); Henshaw Tr. at 2.

Dr. Lenore Walker testified about the effect of forced notification on abusive and dysfunctional families. Dr. Walker is licensed to practice psychology in Colorado and New Jersey. Dr. Walker has published extensively in the area of family violence, and is the sole author of five books, and the contributing author of several other books. In addition, she has written articles in professional journals, and has presented approximately 100 papers at various professional meetings and conferences. *See* P. Ex. 36 (resume); Walker Tr. at 289.

Dr. Steven Butzer testified with regard to issues of adolescent sexuality and decision making. He is a board certified psychiatrist and faculty member of the Department of Psychiatry at the University of Minnesota, School of Medicine. Dr. Butzer also has a large clinical practice in which roughly a quarter of his patients are adolescents. Dr. Butzer has served as staff psychiatrist at the Naval Regional Medical Center in Oakland, California and at St. Paul-Ramsey Medical Center, St. Paul, Minnesota where he was also Director of In-Patient Psychiatry Service. *See* P. Ex. 37 (resume); Butzer Tr. at 1335.

Dr. Gary Melton testified as to the ability of adolescents to consent to abortion procedures and on the psychological effects of the Minnesota statute. He is currently a Professor of Psychology and Law and Director of the Law/Psychology Program at the University of Nebraska. Dr. Melton has also been in private practice since 1980. He has extensive experience in the area of child and family psychology. Part of Dr. Melton's position entails running periodic workshops, mostly under the auspices of the National Council of Juvenile and Family Court Judges. In addition, Dr. Melton has published over 100 articles, books and papers, including a book, *Adolescent Abortion: Psychological and Legal Issues* (1986). Dr. Melton has acted as consultant to the National Council of Juvenile and Family Court Judges and the American Academy of Judicial Education. *See* P. Ex. 38 (resume); Melton Tr. at 1104.

Dr. Elissa Benedek is a nationally recognized expert in the areas of child and adolescent psychiatry. She is the Director of Research and Training at the Center of Forensic Psychiatry in Ann Arbor, Michigan, Clinical Professor of Psychiatry at the University of Michigan Medical Center, and is Associate Clinical Professor of Psychiatry at both Wayne State Medical Center in Detroit and Michigan Medical Center in Lansing. Prior to her present position, Dr. Benedek worked at a residential treatment center for children and adolescents. Dr. Benedek has published four books and 37 articles in scientific journals; contributed chapters in 20 books; written 34 book reviews and over 100 abstracts, papers and panel discussions. *See* P. Ex. 40 (resume); Benedek Tr. at 849.

Dr. Jane Hodgson, one of the plaintiffs, provided testimony on the issues of abortion safety, teen pregnancy and decision making. Her patient load is about 30 percent teenagers. She has personally counseled several thousand minors about their pregnancies. Dr. Hodgson has had over 45 years of experience as an obstetrician and gynecologist. She is a founding fellow of the American College of Obstetrics and Gynecology. In 1983 she was nominated woman Physician of the Year by the Medical Women of Minnesota. She was Director of the Fertility Control Clinic at St. Paul-Ramsey Hospital from 1973-1979 and Medical Director of Planned Parenthood of Minnesota from 1980-1983, directing the work of three clinics during this period. Dr. Hodgson has published over 47 pregnancy-related articles. *See* P. Ex. 1 (curriculum vitae); Hodgson Tr., Vol. I at 1.

Dr. Henry David testified about reproductive behavior and psychological sequelae following abortions. He is a psychologist with a subspecialty in international and domestic adolescent and adult abortion behavior. Dr. David is Director of the Transnational Family Research Institute and Associate Clinical Professor of Psychology in the Department of Psychiatry at the University of Maryland Medical School. In 1963, Dr. David became Associate Director of the World Federation for Mental Health and a Consultant for the World Health Organization. Dr. David has done original research and published extensively in the area of adolescent and adult reproductive behavior and psychological sequelae. *See* P. Ex. 123 (resume); David Tr. at 2522.

Dr. Edward Ehlinger testified on the effect of the notification statute on teen pregnancy and abortion rates in the City of Minneapolis. He is the Director, Division of Personal Health Services, Minneapolis Health Department. The division includes Maternal and Child Health, Dental Health, Nutrition, Health Education, and Public Health Laboratory. Dr. Ehlinger is a board certified physician in both pediatrics and internal medicine. He is also a Clinical Assistant Professor, Program in Maternal and Child Health, at the School of Public Health, University of Minnesota, and an Instructor, Department of Pediatrics, at the School of Medicine, University of Minnesota. *See* P. Ex. 115 (curriculum vitae); Ehlinger Tr. at 2017.

Exhibit C

Every state has enacted a specific statute allowing minors themselves to consent to health services for venereal disease or sexually transmitted diseases, or has enacted a general medical treatment consent statute.

Venereal Disease:

ALABAMA: Ala. Code § 22-8-6 (1984) (medical, health or mental health services to determine the presence of, or to treat venereal disease); **ALASKA:** Alaska Stat. § 09.65.100(a) (4) (1983) (diagnosis and treatment of venereal disease); **ARIZONA:** Ariz. Rev. Stat. Ann. § 44-132.01 (1987) (hospital or medical care related to diagnosis or treatment of venereal disease); **ARKANSAS:** Ark. Stat. Ann. § 20-16-508(a)(1) (1987) (medical or surgical care or services for venereal disease); **COLORADO:** Colo. Rev. Stat. § 25-4-402(4) (1982) (diagnostic examination, prescription and treatment for venereal disease); **CONNECTICUT:** Conn. Gen. Stat. § 19a-216 (1989) (examination and treatment for venereal disease); **GEORGIA:** Ga. Code Ann. § 31-17-7(a) (1985) (medical or surgical care or services for venereal disease); **HAWAII:** Hawaii Rev. Stat. § 577A-2 (1985) (medical care and services for venereal disease); **ILLINOIS:** Ill. Ann. Stat. ch. 111, § 4504 (Smith Hurd Supp. 1989) (medical care or counseling related to the diagnosis or treatment of venereal disease); **INDIANA:** Ind. Code Ann. § 16-8-5-1 (Burns 1983) (any person may consent to medical or hospital care or treatment for venereal disease); **IOWA**: Iowa Code Ann. § 140.9 (West 1989) (diagnosis or treatment for venereal disease); **KANSAS:** Kan. Stat. Ann. § 65-2892 (1985) (diagnostic examination and treatment for venereal disease); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185(1) (Bobbs-Merril Supp 1988) (diagnostic examination and treatment for venereal disease); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1065.1(A) (West 1977) (medical or surgical care or services for venereal disease); **MAINE:** Me. Rev. Stat.

Ann. tit. 32, § 3292 (1988) (medical care for treatment of venereal disease); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-102(c)(3) (1987) (treatment for or advice about venereal disease); **MASSACHUSETTS:** Mass. Gen. Laws Ann. ch. 111, § 117 (West 1983) (physical examination and treatment of venereal diseases); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.5257(1) (West 1980) (medical or surgical care, treatment, or services for venereal disease); **MINNESOTA:** Minn. Stat. § 144.343(1) (1989) (medical, mental and other health services to determine presence of or to treat venereal disease); **MISSISSIPPI:** Miss. Code Ann. § 41-41-13 (1981) (medical care for treatment of venereal disease); **MISSOURI:** Mo. Ann. Stat. § 431.061(1)(4)(b) (Vernon Supp. 1989) (surgical, medical or other treatment or procedures for venereal disease); **MONTANA:** Mont. Code Ann. § 41-1-402(1)(c) (1987) (prevention, diagnosis or treatment for venereal disease); **NEVADA:** Nev. Rev. Stat. § 129.060 (1987) (examination or treatment, or both, for venereal disease); **NEW JERSEY:** N.J. Stat. Ann. § 9:17A-4 (Supp. 1989) (medical or surgical care or services for venereal disease); **NEW MEXICO:** N.M. Stat. Ann. § 24-1-9 (1986) (examination and treatment for venereal disease); **NORTH CAROLINA:** N.C. Gen. Stat. Ann. § 90-21.5(a)(i) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of venereal disease); **NORTH DAKOTA:** N.D. Cent. Code § 14-10-17 (Supp. 1989) (14 or older may consent to examination or treatment of venereal disease); **OHIO:** Ohio Rev. Code Ann. § 3709.24.1 (Baldwin 1980) (diagnosis or treatment of venereal disease); **OKLAHOMA:** Okla. Stat. Ann. tit. 63, § 1-532.1 (West 1984) (examination and treatment for venereal disease); **OREGON:** Or. Rev. Stat. § 109.610 (1987) (hospital, medical or surgical care for diagnosis or treatment of venereal disease); **PENNSYLVANIA:** Pa. Stat. Ann. tit. 35, § 521.14a (Purdon 1977) (treatment of venereal disease); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34-23-16 (1986) (diagnostic examination and treatment for venereal disease); **VERMONT:** Vt. Stat. Ann. tit. 18, § 4226 (1982)

(12 or older may consent to medical treatment and hospitalization for venereal disease); **VIRGINIA:** Va. Code § 54.1 2969 (D)(1) (Supp. 1989) (medical or health services needed to determine the presence of or to treat venereal disease); **WEST VIRGINIA:** W. Va. Code § 16-4-10 (1985) (examination, diagnosis, or treatment for venereal disease); **WYOMING:** Wyo. Stat. § 35-4-131(a) (1988) (examination and treatment for venereal disease).

Sexually Transmitted Diseases:

CALIFORNIA: Cal. Civ. Code § 34.7 (West 1982) (12 or older may consent to hospital, medical and surgical care related to the diagnosis or treatment of sexually transmitted diseases); **DELAWARE:** Del. Code Ann. 16 § 710 (1981) (12 or older may consent to diagnostic, preventive, medical or surgical treatment for any sexually transmitted diseases); **FLORIDA:** Fla. Stat. Ann. § 384.30(1) (West Supp. 1989) (diagnostic examination and treatment for sexually transmissible diseases); **NEBRASKA:** Neb. Rev. Stat. § 71-504 (Supp. 1988) (examination and treatment for sexually transmitted disease); **NEW HAMPSHIRE:** N.H. Rev. Stat. Ann. § 141-C:18 (II) (Supp. 1988) (14 years or older may consent to medical diagnosis and treatment for a sexually transmitted disease); **NEW YORK:** N.Y. Pub. Health Law § 2305(2) (Consol. 1987) (diagnosis or treatment for sexually transmissible disease); **RHODE ISLAND:** R.I. Gen. Laws § 23-11-11 (Supp. 1988) (examination and treatment for sexually transmitted disease); **TENNESSEE:** Tenn. Code Ann. § 68-10-104 (Supp. 1987) (examination, diagnosis or treatment for sexually transmitted diseases); **TEXAS:** Tex. Fam. Code Ann. § 35.03(a)(3) (Vernon Supp. 1989) (diagnosis and treatment of reported diseases including all sexually transmitted diseases); **UTAH:** Utah Code Ann. § 26-6-18(1)(2) (Supp. 1989) (medical care or services for sexually transmitted disease); **WASHINGTON:** Wash. Rev. Code Ann. § 70.24.110 (Supp. 1989) (14 or older may consent to hospital, medical and surgical care related to the diagnosis or

treatment of a sexually transmitted disease); **WISCONSIN:** Wis. Stat. Ann. § 143.07(1m) (West Supp. 1989) (treatment, examination and diagnosis for sexually transmitted disease).

General Medical Treatment Consent Statutes:

IDAHO: Id. Code § 39-3801 (1985) (14 or older may consent to hospital, medical or surgical care related to diagnosis or treatment of any reportable infectious disease); **SOUTH CAROLINA:** S. C. Code Ann. § 20-7-280 (Lawyers Co-op 1985) (16 or older may consent to health services other than operations).

Pregnancy-Related Health Care:

Twenty-seven states have minor consent statutes specifically authorizing minors to consent to pregnancy-related health services, including pregnancy testing, prenatal care and delivery services:

ALABAMA: Ala. Code § 22-8-6 (1984) (legally authorized medical, health or mental health services to determine the presence of, or to treat pregnancy); **ALASKA:** Alaska Stat. § 09.65.100(4) (1983) (diagnosis, prevention or treatment of pregnancy); **ARKANSAS:** Ark. Code Ann. § 20-9-602(4) (1987) (any surgical or medical treatment or procedures recommended by physician in connection with pregnancy or childbirth); **CALIFORNIA:** Cal. Civ. Code Ann. § 34.5 (West 1982) (hospital, medical, surgical care related to the prevention or treatment of pregnancy); **DELAWARE:** Del. Code Ann. tit. 13, § 708 (a), (b) (1981) (minor twelve or older may consent to diagnostic, preventive, lawful therapeutic procedures, medical or surgical care and treatment, including X-rays); **FLORIDA:** Fla. Stat. Ann. § 743.065(1) (West 1986) (medical or surgical care or services relating to her pregnancy); **GEORGIA:** Ga. Code Ann. § 31-9-2(a)(5) (1985) (surgical or medical treatment or procedures not prohibited by law for pregnancy); **HAWAII:** Hawaii Rev. Stat. § 577A-2 (1985) (medical care and services by

hospital, clinic or physician); **KANSAS:** Kan. Stat. Ann. § 38-123 (1986) (hospital, medical or surgical care related to pregnancy where no parent or guardian available); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185(1) (Bobbs-Merril Supp. 1988) (diagnostic examination and treatment regarding pregnancy); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1299.53 (e) (West 1977) (surgical or medical treatment or procedures including autopsy in connection with pregnancy or childbirth); **MARYLAND:** Md. Health-Gen. Code Ann. § 20-102 (c)(4) (1987) (treatment for or advice about pregnancy); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.9132 (West Supp. 1989) (provision of prenatal and pregnancy related health care); **MINNESOTA:** Minn. Stat. § 144.343(1) (1989) (medical, mental and other health services to determine the presence of or to treat pregnancy and related conditions); **MISSISSIPPI:** Miss. Code Ann. § 41-41-3 (i) (Supp. 1988) (surgical or medical treatment or procedures not prohibited by law, in connection with pregnancy or childbirth); **MISSOURI:** Mo. Stat. Ann. § 431.061(1)(4)(a) (Vernon Supp. 1989) (any surgical, medical or other treatment not prohibited by law for pregnancy); **MONTANA:** Mont. Code Ann. § 41-1-402 (1)(c) (1987) (medical or surgical care or services for the diagnosis, prevention and treatment of pregnancy); **NEW JERSEY:** N.J. Stat. Ann. § 9:17A-1 (West 1976) (hospital, medical or surgical care and procedures related to her pregnancy or her child); **NEW MEXICO:** N.M. Stat. Ann. § 24-1-13 (1986) (examination and diagnosis by licensed physician for pregnancy); **NEW YORK:** N.Y. Pub. Health Law § 2504(3) (Consol. 1987) (medical, dental, health and hospital services relating to prenatal care); **NORTH CAROLINA:** N.C. Gen. Stat. § 90-21.5(a)(ii) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of pregnancy); **OKLAHOMA:** Okla. Stat. Ann. tit. 63, § 2602(A)(3) (West 1984) (services by health professionals for prevention, diagnosis and treatment of pregnancy. Health professional must also assume responsibility for counseling minor); **PENNSYLVANIA:** Pa. Stat. Ann. tit. 35, § 10103 (Purdon 1977) (medical and health services to determine the presence of or to treat pregnancy); **TENNESSEE:** Tenn. Code Ann. § 63-6-223 (1986) (examination, diagnosis and treatment for purpose of prenatal care); **TEXAS:** Tex.

Fam. Code Ann. § 35.03(a) (4) (Vernon Supp. 1989) (hospital, medical or surgical treatment related to her pregnancy); **UTAH:** Utah Code Ann. § 78-14-5(4)(F) (1987) (any female regardless of age, any health care not prohibited by law in connection with pregnancy or childbirth); **VIRGINIA:** Va. Code Ann. § 54.1-2969(D)(2) (Supp. 1989) (medical or health services required for pregnancy).

Exhibit D

Thirty-one states have minor consent statutes specifically covering health services related to both drug abuse and alcohol abuse and dependency; ten states have statutes covering health services related to drug abuse but not alcohol abuse; and two states have statutes covering health services related to alcohol abuse but not drug abuse.

Drug and Alcohol Abuse:

ALABAMA: Ala. Code § 22-8-6 (1984) (medical health or mental health services to determine the presence of, or treat drug dependency or alcohol toxicity); **ARIZONA:** Ariz. Rev. Stat. Ann. § 36-2024(A) (Supp. 1988) (an alcoholic may apply for evaluation and treatment; if the applicant is a minor, he, parent, or legal guardian shall make such application); Ariz. Rev. Stat. Ann. § 44-133.01 (1987) (any minor aged 12 or older who is found to be under the influence of a dangerous drug or narcotic by a licensed physician is to be regarded as having consented to hospital or medical care for treatment); **CALIFORNIA:** Cal. Civ. Code § 34.10 (a-c) (West 1982) (minor aged 12 years or older may consent or medical care and counseling to the diagnosis and treatment of a drug or alcohol related problem); **COLORADO:** Colo. Rev. Stat. § 13-22-102 (1987) (examination, prescription, and treatment of a minor addicted to drugs); Colo. Rev. Stat. § 25-1-308(1) (1982) (an alcoholic, including a minor, may apply for voluntary treatment directly to an approved treatment facility); Colo. Rev. Stat. § 25-1-309(1) (1987) (intoxicated person or person intoxicated or incapacitated by alcohol, including a minor, may voluntarily admit himself to an approved treatment facility); **CONNECTICUT:** Conn. Gen. Stat. § 19a-382 (Supp. 1989) (minor may request treatment and rehabilitation for drug dependence); Conn. Gen. Stat. § 17-155t(a)(d) (Supp. 1989) (an alcoholic minor may apply for voluntary treatment directly to a public treatment facility; request for discharge from an

inpatient facility shall be made by a parent, legal guardian or minor if he was applicant); **FLORIDA:** Fla. Stat. Ann. § 397.099 (West 1986) (rehabilitative or medical treatment for drug abuse or dependency); Fla. Stat. Ann. § 396.082(1) (West 1986) (treatment for alcoholism); **GEORGIA:** Ga. Code Ann. § 37-7-8(b) (1982) (medical or surgical services for treatment of drug abuse); Ga. Code Ann. § 37-8-31(a) (1986) (an alcoholic minor may make application for voluntary treatment of alcoholism; for a discharge from an inpatient facility, a written request shall be made by a parent, legal guardian or by the minor if he was the original applicant); **HAWAII:** Haw. Rev. Stat. § 577-26(e) (1985) (diagnosis, counseling and related activities for alcohol and drug abuse); **IDAHO:** Idaho Code § 37-3102 (1977) (minors aged 16 or older may consent to treatment or rehabilitation for drug addiction or dependency); Idaho Code § 39-307(1)(4) (Supp. 1989) (alcoholic or addict, including minors, may apply for voluntary treatment directly to any approved treatment facility; if minor leaves facility, request for discharge may be made by parent, guardian, or minor if he were (sic) the original applicant); **ILLINOIS:** Ill. Ann. Stat. ch. 111, para. 4504 (Smith-Hurd Supp. 1989) (minor 12 years or older who is determined to be an addict, alcoholic, or an intoxicated person may consent to medical care or counseling related to the diagnosis and treatment of drug use or alcohol consumption); **INDIANA:** Ind. Code Ann. § 16-13-6.1-23 (Burns 1983) (treatment for alcoholism, alcohol abuse, or drug abuse); **IOWA:** Iowa Code Ann. § 125.33(1) (West 1987) (treatment or rehabilitation services for alcohol or drug/chemical dependency); **KENTUCKY:** Ky. Rev. Stat. Ann. § 214.185 (Baldwin Supp. 1988) (diagnostic examination, prescription, advice and treatment for alcohol or other drug abuse or addiction); **MAINE:** Me. Rev. Stat. Ann. tit. 22, § 1823 (Supp. 1988) (treatment for drug or alcohol abuse in a hospital); Me. Rev. Stat. Ann. tit. 32, § 3292 (1988) (medical care for treatment of drug or alcohol abuse); **MICHIGAN:** Mich. Comp. Laws Ann. § 333.6121(1) (West 1980) (substance

abuse related medical or surgical care, treatment or services); **MINNESOTA:** Minn. Stat. § 144.343(1) (medical, mental and other health services to determine the presence of or to treat conditions associated with alcohol or drug abuse); **MISSISSIPPI:** Miss. Code Ann. § 41-41-14 (1981) (minors aged 15 or older may consent to treatment relating to mental or emotional problems caused by or related to alcohol or drugs); **MISSOURI:** Mo. Ann. Stat. § 431.061 (1)(4)(c) (Vernon Supp. 1989) (surgical or medical treatment for alcohol and drug abuse); Mo. Ann. Stat. § 631.115 (Vernon 1988) (a minor may apply for admission to treatment facility to receive treatment or rehabilitation for drug or alcohol abuse); **MONTANA:** Mont. Code Ann. § 41-1-402(c) (1987) (provision of medical or surgical care or services for drug and substance abuse, including alcohol); **NEBRASKA:** Neb. Rev. Stat. § 71-5041 (1986) (alcohol or drug abuse counseling or treatment); **NEW JERSEY:** N.J. Stat. Ann. § 9:17A-4 (West Supp. 1989) (a minor who is suffering from the use of drugs or is a drug dependent person may consent to treatment for drug use or drug abuse); N.J. Stat. Ann. § 26:2B-15 (West 1987) (any person who is an alcholic may voluntarily apply for treatment); **NORTH CAROLINA:** N.C. Gen. Stat. § 90-21.5(a)(iii) (Supp. 1988) (medical health services for the prevention, diagnosis and treatment of abuse of controlled substances or alcohol); **NORTH DAKOTA:** N.D. Cent. Code § 14-10-17 (Supp. 1989) (minor aged 14 or older may consent to examination, care, or treatment for alcoholism or drug abuse); **OHIO:** Ohio Rev. Code Ann. § 3719.012(A) (Baldwin 1989) (diagnosis or treatment by a physician for abuse of drugs, beer or intoxicating liquor); **OKLAHOMA:** Okla. Stat. Ann. tit. 63, § 2602(A)(3) (West 1984) (services for prevention, diagnosis and treatment of drug and substance abuse or abusive use of alcohol); **RHODE ISLAND:** R.I. Gen. Laws § 14-5-4 (Supp. 1988) (parent consent not required for non-invasive non-custodial treatment of substance abuse or chemical dependency if in the judgment of a qualified professional, such consent would be deleterious to the minor voluntarily

seeking treatment); R.I. Gen. Laws § 40.1-4-9(1)(4) (Supp. 1988) (a minor may apply for voluntary treatment for alcoholism; a request for discharge from a treatment facility shall be made by a parent, guardian or the minor if he was the original applicant); **SOUTH CAROLINA:** S.C. Code Ann. § 44-52-20 (Law. Co-op. Supp. 1988) (minor aged 16 years or older may apply for admission to a treatment facility for treatment of chemical dependency on alcohol or other drugs); **SOUTH DAKOTA:** S.D. Codified Laws Ann. § 34.20A-50 (1986) (minor may make application to an accredited facility for treatment of drug and alcohol abuse); **WASHINGTON:** Wash. Rev. Code Ann. § 69.54.060 (1985) (minor aged 14 years or older may consent to counseling, care, treatment or rehabilitation for drug or alcohol abuse); **WEST VIRGINIA:** W. Va. Code § 60A-5-504(e) (1989) (examination, diagnosis, and treatment for any addiction to or dependency upon the use of a controlled substance); W. Va. Code § 60-6-23 (1989) (examination, counseling, diagnosis, and treatment for any addiction to or dependency upon the use of alcoholic liquor or non-intoxicating beer); **WISCONSIN:** Wis. Stat. Ann. § 51.47(1) (West 1987) (preventive, diagnostic, assessment, evaluation or treatment services for the abuse of alcohol or other drugs).

Drug Abuse:

KANSAS: Kan. Stat. Ann. § 65-2892a (1985) (examination and treatment for drug abuse, misuse, or addiction); **LOUISIANA:** La. Rev. Stat. Ann. § 40:1096(A) (West 1977) (drug treatment and medical or surgical treatment); **MASSACHUSETTS:** Mass. Gen. Laws Ann. ch. 112, § 12E (West 1983) (minor aged 12 years or older may consent to hospital and medical care related to diagnosis or treatment of drug dependency); **NEVADA:** Nev. Rev. Stat. Ann. § 129.050(1)(a)(b) (Michie Supp. 1989) (hospital, medical, surgical or other care for the treatment of drug abuse or related illnesses); **NEW HAMPSHIRE:** N.H. Rev. Stat. Ann. § 318-B: 12-a (1984) (minor aged 12

or older may voluntarily submit himself to treatment for drug dependency or any problem related to drug use); **NEW MEXICO:** N.M. Stat. Ann. § 26-2-14(A) (Supp. 1987) (drug abuse treatment); **OREGON:** Ore. Rev. Stat. § 109.675(1) (Supp. 1988) (minor 14 years or older may consent to outpatient diagnosis or treatment of chemical dependency, excluding methadone maintenance); **PENNSYLVANIA:** Pa. Stat. Ann. tit. 71, § 1690.112 (Purdon Supp. 1989) (medical care or counseling related to diagnosis or treatment for use of any controlled or harmful substance); **TENNESSEE:** Tenn. Code Ann. § 63-6-220(a) (1986) (treatment for drug abuse by physician); **TEXAS:** Tex. Fam. Code Ann. § 35.03(6) (Vernon Supp. 1989) (examination and treatment for chemical addiction, chemical dependency, or any other condition related to chemical use); **VIRGINIA:** Va. Code Ann. § 54.1-2969(D)(3) (Supp. 1989) (medical or health services needed for treatment and rehabilitation for substance abuse).

Alcohol Abuse:

DELAWARE: Del. Code Ann. tit. 16, § 2210(b) (1983) (minor aged 12 or over may consent to voluntary treatment of alcoholism); **NEW YORK:** N.Y. Mental Hyg. Law § 21.11(c) (McKinney 1988) (parental involvement and consent not required for treatment of alcoholism on minor if such involvement and consent would be detrimental to minor's treatment or if such treatment is in best interests of minor).

Exhibit E

IN THE
DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

JF NO: 81-1555

IN THE MATTER OF: D C

AN ALLEGED CHILD IN NEED OF SUPERVISION

JOURNAL ENTRY

Now on this 23rd day of September, 1981, this cause comes on for hearing.

Whereupon, the Juvenile's answer and cross-petition as a DEPRIVED child was presented with arguments of counsel. The State of Oklahoma confessed the cross-petition and the matter was heard as a DEPRIVED action.

Whereupon, all parties were advised o. .ieir statutory and constitutional rights; and no demand having been made for jury trial, witnesses were sworn and testimony taken.

The Court, after reviewing the files, hearing sworn testimony, receiving evidence, and being fully advised in the premises, finds:

That the material allegations set forth in the cross-petition on file herein are true; that the said cross-petition should be sustained by reason of testimony; and that said child should be made a ward of the Court as DEPRIVED under the provisions of 10 OSA 1101 (d).

Further the Court finds that said child is twelve (12) years of age; in the first trimester of pregnancy; that said pregnancy occurred as a result of rape; that said child desires an abortion;

that the life of the said child is endangered by this pregnancy as well as the life of the unborn fetus; and that said child had a venereal disease.

Further the Court finds that the respondent Mother of this Juvenile opposes abortion on religious grounds and desires that Juvenile continue her pregnancy to full term.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that said child be and is hereby made a ward of the Court as DEPRIVED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the custody of said child should be and is hereby placed with the Department of Human Services with the authority to place and with the authority to consent to any medical treatment necessary for pre-natal care, venereal disease or any other medical treatment which may be required by said child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that said pregnancy of said child be terminated by surgical procedure at the earliest possible date commensurate with the health and best interest of said child.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the termination of pregnancy BE STAYED temporarily pending certification of this Order to the Supreme Court of the State of Oklahoma.

Certification of this Order is requested most urgently due to the finality of said Order should it be carried out; said question raised by this Order has not previously been addressed by the Supreme Court of Oklahoma; statutory provisions are nil; there is no case law in this State nor has the question been squarely addressed in other jurisdictions including the Supreme Court of the United States.

IT IS FURTHER ORDERED that this matter be set down for Disposition on a day certain subsequent to a decision by the Supreme Court of Oklahoma on the certification of the Order before this honorable court.

Donald C. Manning /s/
JUDGE OF THE DISTRICT COURT

I, Donald C. Manning, Judge of the District Court of Oklahoma County, do hereby certify to the Supreme Court the above question is one which has not been heretofore answered by the Oklahoma Supreme Court and that the import of the above question is one which needs an immediate decision due to the nature of the circumstances.

Donald C. Manning /s/
JUDGE OF THE DISTRICT COURT

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

No. 57,472

RE: D.C., a Child under Eighteen (18) years of age

ORDER

On consideration of the Mother's appeal from order declaring D. C., a child twelve (12) years of age, to be a deprived child and from one directing that her pregnancy be terminated,

THE COURT FINDS the evidence undisputed in support of the trial court's finding that her life is endangered by the pregnancy, and that the termination of her pregnancy is hence necessary.

The trial court's orders are not against the clear weight of the evidence and are affirmed.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 28th day of September, 1981.

PAT IRWIN /s/
CHIEF JUSTICE

Exhibit F*

JOURNAL of the SENATE

STATE OF MINNESOTA

SEVENTY-SECOND LEGISLATURE

INCLUDING FIRST AND SECOND SPECIAL SESSIONS

1981

February 9, 1981

[880] Mr. Solon from the Committee on Health, Welfare and Corrections, to which was referred

S.F. No. 287: A bill for an act relating to health; prescribing procedures for notification of parents, guardians, and conservators prior to performing abortions on certain persons; providing a penalty; amending Minnesota Statutes 1980, Section 144.343.

Reports the same back with the recommendation that the bill be amended as follows:

Delete everything after the enacting clause and insert:

"Section 1, Minnesota Statutes 1980, Section 144.343, is amended to read:

* An authenticated copy of these relevant excerpts from the official Minnesota Senate Legislative Journal has been lodged with this Court by counsel for Petitioners. Each house of the Minnesota legislature is constitutionally required to keep a journal of its proceedings. Minn. Const. art. IV, § 15. *See also* Minn. Revisor's Office, *Minnesota Revisor's Manual with Styles and Forms* 34 (1984).

144.343 [PREGNANCY, VENEREAL DISEASE AND ALCOHOL OR DRUG ABUSE.]

Subdivision 1. **[MINOR'S CONSENT VALID.]** Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required.

Subd. 2. **[NOTIFICATION CONCERNING ABORTION.]** *No abortion operation shall be performed upon a minor or upon a woman for whom a guardian or conservator has been appointed pursuant to sections 525.54 to 525.551 because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.*

(a) If the pregnant woman is unmarried and is living with her parent, the notice shall either be delivered personally to her parent and the putative father's parent or be delivered to the parents' usual places of abode and left with a person of suitable age and discretion residing therein other than the pregnant woman or the putative father.

(b) If the pregnant woman is unmarried and is not living with her parent, the notice shall either be delivered personally to her parent and the putative father's parent or be delivered to the parents' usual places of abode and left with a person of suitable age and discretion residing therein.

In lieu of the delivery required by clauses (a) and (b), notice may be made by **[881]** *certified mail receipted for by the persons specified for delivery in clauses (a) and (b).*

Subd. 3. **[PARENT; DEFINITION.]** *For purposes of this section, "parent" means both parents of the pregnant woman, or both parents of the putative father, as applicable, if they are both living, one parent of the pregnant woman, or one parent of the putative father, as applicable, if only one is living or if the second one cannot be located through reasonably diligent*

effort, or the guardian or conservator, if the pregnant woman, or the putative father, as applicable, has one.

Subd. 4. **[LIMITATIONS.]** *No notice shall be required under this section if:*

(a) *The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time for providing the required notice; or*

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

Subd. 5. **[PENALTY.]** *Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification. A person shall not be held liable for failure to deliver required notice if the person relied in good faith upon the representations of the pregnant woman regarding information necessary to deliver notice as required by this section or if the person has attempted with reasonable diligence to deliver notice but has been unable to do so."*

And when so amended the bill do pass. Amendments adopted. Report adopted.

Exhibit G**

Excerpt from Transcript of Remarks by
Minnesota State Sen. Gene Waldorf
at Minnesota Senate Session Regarding Senate File 287
(May 6, 1981)

CHAIR: Senator Waldorf has moved that when this Committee do arise that Senate File 287 be recommended to pass. Senator Waldorf.

WALDORF: On page 1 of the bill, the first new language is in subdivision 2, which deals with the notification requirements. It says "no abortion operation shall be performed on a minor—upon a minor or upon a woman for whom a guardian or conservator has been appointed without a 48 hour waiting period after written notice has been provided." And then it [sic] Clause A it deals with the unmarried woman who is living with their [sic] parents. Subclause B deals with [a] pregnant woman who is unmarried and not living with her parent. And then finally, an alternate form of delivery, rather than the personal delivery by the physician or his [sic] assistant. The language on lines 10-12 offer the opportunity to make notice by way of certified mail. Subdivision 3 defines a parent for purposes of this section. "Parent means both parents of the pregnant minor or both parents of punitive [sic] father." The punitive [sic] father, for those of you that don't know what that means, punitive [sic] means presumed or alleged father. That language was added by amendment in committee and I intend to remove that language with

** A copy of relevant portions of transcripts of tapes of Minnesota Senate Committee hearings, including the contents of this Exhibit, has been lodged with this Court by counsel for Petitioners.

one of my amendments. And it goes on to describe those who should be notified.

Subdivision 4 is an important one in that it provides some exclusions from this notification requirement. Those exclusions are: if the attending physician certifies that the woman—in the pregnant woman's medical record that the abortion is necessary to prevent her death and there is insufficient time for providing notice; if the abortion has already been authorized in writing by the parent; and finally, if the pregnant minor woman declares that she is a victim of sexual abuse, neglect or physical abuse as defined in our statutes, then notice does not have to be given, but in that particular section of law there is a very specific and prescribed requirement that the Welfare Department or two other agencies be notified that the declaration has been made so that they can bring into play the normal investigation which goes on in all cases of alleged child abuse. But in that case the abortion could be performed without notification.

Finally, subdivision 5 is a penalty and that penalty is the criminal penalty of a misdemeanor that would be charged against the person who was not—I mean who should have notified, and that would be the physician who performed the abortion who did not make an attempt or proper attempt to notify the parent and also includes civil action by the parent who was wrongfully denied notification. And finally, there is a—the last part to that subdivision deals with the definition of what is a reasonable attempt at notification and also what standard may be used for the information provided to the doctor who is going to perform abortion by the minor. In the case where the minor would present some false information and it was reasonably prudent on

his [sic] part to accept that information then, of course, he would not probably be found guilty by the court.

Mr. Chairman, that is the extent of the bill as it exists now.

* * *

WALDORF: This bill does not deal with consent, but I think that the legal staff who have looked at this agrees that, should the question come to the courts of a minor who is living at home but may be considered mature if she objected to the notification provisions, that there may have to be some sort of court override, or process by which she can appeal to the court that her parents should not be notified. And that's also in the bill.

Those are the three major provisions in the bill. There are some other smaller provisions which relate to delivery, but that's the effect of this amendment. I urge your support and, Mr. Chairman, I think I may as well call for a roll call vote on this.

CHAIR: The chair recognizes Sen. Bergland.

BERGLAND: Mr. Chairman and Sen. W. It really would have been a lot easier to follow this if you have had a strick [sic] everything amendment, but since we don't I have some questions. Are you maintaining in Subd. 3, the definition of "parent" meaning both parents of the pregnant woman?

CHAIR: Sen. W.

WALDORF: Mr. Chairman, Sen. Bergland, is that one the bill?

BERGLAND: Yeah, it's in the bill, on page 2. Under definition of parent.

WALDORF: Mr. Chairman, it means both parents, if they're both living. One parent if only one is living and the—or if the second one cannot be located through reasonably diligent effort. So in the case of a divorce the parents in two different locations, an attempt should be made to locate the second parent but only with reasonable diligence.

CHAIR: Sen. B.

BERGLAND: Mr. Chairman, Sen. W., then if the pregnant woman agrees to have one of her parents notified but not both of them, then your remedy is that she would be going to court, is that what the amendment does?

CHAIR: Sen. W.

WALDORF: Mr. Chairman, I believe that would be the case, yes.

BERGLAND: And, Mr. Chairman and Sen. W., the reason you're offering this amendment is because you believe it will make the bill constitutional? that what you said?

CHAIR: Sen. W.

WALDORF: Mr. Chairman and Sen. B., that's what we're trying to do is to make the bill constitutional. I am not aware of any court decisions, supreme court [sic] decisions that would not give status to the natural parent who is divorced.

No. 88-790; No. 88-805; Nos. 88-1125, 88-1309.

IN THE

Supreme Court of the United States

October Term, 1989

Supreme Court, U.S.
FILED
SEP 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

BERNARD J. TURNOCK, M.D., M.P.H., Director of the Illinois Department of Public Health, et al.,

Appellants,

v.

RICHARD M. RAGSDALE, M.D., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, an Ohio Corporation, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JANE HODGSON, M.D., et al.,

Appellants,

v.

STATE OF MINNESOTA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, B'NAI B'RITH WOMEN, CATHOLICS FOR A FREE CHOICE, AND WOMEN'S AMERICAN ORT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN NOS. 88-790 AND 88-805 AND APPELLANTS IN NOS. 88-1125 AND 88-1309

KENNETH J. BIALKIN,
Counsel of Record
PEGGY L. KERR
DAVID C. MARCUS
919 Third Avenue
New York, New York 10022
(212) 735-3000

Of Counsel:
MEYER EISENBERG
RUTH LANSNER
JUSTIN J. FINGER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
JILL L. KAHN
LIVIA D. THOMPSON
Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, New York 10017
(212) 490-2525

QUESTIONS PRESENTED

1. Do the Illinois, Minnesota and Ohio statutes at issue violate the establishment clause by endorsing one religious theory of when life begins?

2. Do the Illinois, Minnesota and Ohio statutes at issue impose an impermissible burden on a woman's free exercise of religion by restricting her fundamental religious interest in deciding whether to continue a pregnancy?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	2
STATEMENT OF THE CASE	4
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. ABORTION IS AN ISSUE IMPLICATING DEEPLY HELD RELIGIOUS BELIEFS AND IS THE SUBJECT OF ONGOING RELIGIOUS DEBATE	6
II. THE STATUTES AT ISSUE VIOLATE THE ESTABLISHMENT CLAUSE	12
A. The Establishment Clause Requires Government Neutrality Concerning Religion	12
B. The Statutes At Issue Establish Religion	13
III. THE CHALLENGED STATUTES IMPOSE AN IMPERMISSIBLE BURDEN ON A WOMEN'S FREE EXERCISE OF RELIGION	18
A. For Many Women, the Decision Whether To Terminate a Pregnancy Is an Issue of Fundamental Religious Belief	19
B. Statutes Regulating Abortion Affect Fundamental Religious Interests And Are Subject To Strict Scrutiny	20
C. The Challenged Statutes Significantly Burden the Free Exercise of Religion	21
D. The Challenged Statutes Do Not Serve Any Compelling State Interests Which Would Justify Incursions in Religious Liberty	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES:	PAGE
Aguillard v. Edwards, 107 S. Ct. 2573 (1987)	16
Akron Center for Reproductive Health v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988)	15, 16, 25
Allegheny County v. Greater Pittsburgh ACLU, 109 S. Ct. 3086 (1989)	2, 12, 15, 17, 18
Bellotti v. Baird, 443 U.S. 622 (1979)	22
Bowen v. Kendrick, 108 S. Ct. 2562 (1988)	3
Carey v. Population Services International, 431 U.S. 678 (1977)	19
City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	19, 21, 22
Eisenstadt v. Baird, 405 U.S. 438 (1972)	19, 20
Engel v. Vitale, 370 U.S. 421 (1962)	17
Epperson v. Arkansas, 393 U.S. 97 (1968)	17
Everson v. Board of Education, 330 U.S. 1 (1947)	12, 18
Frazee v. Illinois Dept. of Employment Security, 109 S. Ct. 1514 (1989)	3
Grand Rapids School District v. Ball, 473 U.S. 373 (1985)	17
Griswold v. Connecticut, 381 U.S. 479 (1965)	18, 20
Hazelwood v. Kuhlmeier, 108 S. Ct. 562 (1988)	23
Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987)	20, 21, 22
Hodgson v. State of Minnesota, 648 F. Supp. 756 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988)	15, 16, 22, 23, 25
Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982)	17
Lemon v. Kurtzman, 403 U.S. 602 (1971)	12, 16
Lynch v. Donnelly, 465 U.S. 668 (1984)	12, 13
Maher v. Roe, 432 U.S. 464 (1977)	4
McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980)	9, 10
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976)	23
Ragsdale v. Turnock, 625 F. Supp. 1212 (N.D. Ill. 1985), *modified*, 841 F.2d 1358 (7th Cir. 1988)	14, 16, 22, 26
Roe v. Wade, 410 U.S. 113 (1973)	*passim*
Roemer v. Board of Public Works, 426 U.S. 736 (1976)	16

PAGE

CASES:

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 12, 18
Sherbert v. Verner, 374 U.S. 398 (1963) 20, 21
Skinner v. Oklahoma, 316 U.S. 535 (1942) 20
Stanford v. Kentucky, 109 S. Ct. 2969 (1989) 23, 24
Texas v. Johnson, 109 S. Ct. 2533 (1989) 4, 21
Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) 20, 21
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 3, 19
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 23
United States v. Ballard, 322 U.S. 78 (1944) 18
Wallace v. Jaffree, 472 U.S. 38 (1985) ... 13, 14, 16, 18, 20
Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) ..... *passim*
Wisconsin v. Yoder, 406 U.S. 205 (1972) 20, 22

OTHER AUTHORITIES:

M. D. Bial, *Liberal Judaism At Home: The Practices Of Modern Reform Judaism* (rev. ed. 1971) 9
J. D. Bleich, *Contemporary Halakhic Problems* (1977) .. 8
Cates, *Legal Abortion: The Public Health Record*, 25 Science 1587 (1982) 6
Catholics For A Free Choice, Brief *Amicus Curiae*, *Webster v. Reproductive Health Services* 11
Covenant And Creation: Theological Reflections On Contraception And Abortion (adopted by the 195th General Assembly of the Presbyterian Church) (1983) .. 11
The Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith of November 18, 1974 (issued by the Roman Catholic Church) 11
Declaration on Religious Liberty (Vatican II *Dignitatis Humanae* 7, December 1965) 3
H. Donin, *To Be A Jew: A Guide To Jewish Observance In Contemporary Life* (1972) 7
D. Feldman, *Birth Control In Jewish Law: Marital Relations, Contraception and Abortion* (1968) 7, 8
Freedom of Choice Concerning Abortion (adopted by the General Synod of the United Church of Christ) (June, 1971) 10

PAGE

CASES:

Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 2nd Sess. 335 (March 24, 1976) 8, 9
C. Jacquet, ed., *Yearbook of American and Canadian Churches* (1984) 7
S. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984) 6, 19
Letter from Ann Smith, Office of the Presiding Bishop and the Executive Council of the General Convention, the Episcopal Church Center (March 6, 1989) 10
Maguire, *The Catholic Legacy And Abortion*, 114 Commonweal 657 (1981) 11
National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancies and Childbearing* (1987) 24
A Priest on Abortion: Women as the Proper Moral Agent, Los Angeles Times, August 6, 1989, Part V, at 1, col. 1 25
A Statement On Abortion (issued by the Social Justice Committee of the Rabbinical Assembly) (July, 1989) .. 9
United Church of Christ, *Abortion: A Resolution Of The 12th General Synod Of The United Church Of Christ* (Public Policy Pamphlet 12GS-12) (1979) 10

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment I ..... *passim*

No. 88-790; No. 88-805; Nos. 88-1125, 88-1309.

IN THE

Supreme Court of the United States

October Term, 1989

BERNARD J. TURNOCK, M.D., M.P.H., DIRECTOR OF THE ILLINOIS DEPARTMENT OF PUBLIC HEALTH, ET AL.,

Appellants,

v.

RICHARD M. RAGSDALE, M.D., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, AN OHIO CORPORATION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JANE HODGSON, M.D., ET AL.,

Appellants,

v.

STATE OF MINNESOTA, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, B'NAI B'RITH WOMEN, CATHOLICS FOR A FREE CHOICE, AND WOMEN'S AMERICAN ORT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN NOS. 88-790 AND 88-805 AND APPELLANTS IN NOS. 88-1125 AND 88-1309

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent are being filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

This consolidated Brief *Amici Curiae* is submitted in support of appellees Richard M. Ragsdale and Akron Center for Reproductive Health, and appellant Jane Hodgson.

The Anti-Defamation League of B'nai B'rith ("ADL") is a national Jewish human relations organization dedicated to principles of religious and individual liberty including the right to privacy. ADL views abortion as an issue of personal and religious freedom. Accordingly, it believes that a woman's decision to have an abortion is constitutionally protected, with due regard for the right of women to exercise freely their own religious beliefs and not be constrained by the religious beliefs of others which have been given the sanction of state law. ADL recognizes that various religious faiths and denominations hold divergent views about abortion. In light of this multiplicity of views, ADL believes that no single religious group's beliefs should be legislatively established. Rather, individuals should be permitted broad latitude in deciding for themselves, in accordance with their own religious and moral convictions, whether to continue a pregnancy to term. Thus, ADL views most forms of government interference with an individual's exercise of religious conscience on the question of procreative choice, before viability, including those here at issue, to be unconstitutional under the First and Fourteenth Amendments. For these reasons, ADL supports the principles established in *Roe v. Wade*, 410 U.S. 113 (1973), and opposes erosion of the fundamental rights secured by that decision. ADL believes the Minnesota and Ohio parental notification requirements and Illinois' licensing scheme violate constitutionally protected principles of privacy, free exercise and establishment.

ADL has previously filed briefs in this Court in numerous cases dealing with First and Fourteenth Amendment principles, including *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086

(1989); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988); *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989); and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). Thus, the Anti-Defamation League is able to bring its special expertise relating to religious liberty and its experience advocating religious freedom to the issues raised on these appeals.

B'nai B'rith Women is an organization of 120,000 Jewish women who, since 1968, have advocated the right of women to choose for themselves on matters of reproduction. As members of a minority religion, BBW members are especially sensitive to keeping the state from restricting religious freedom, and as women BBW members have particular concerns about preserving their rights. Basic to the rights of every woman is that of deciding when and whether to have children, and so BBW firmly supports upholding these rights as outlined in *Roe v. Wade*.

Catholics for a Free Choice is an independent national membership organization established in 1974. One of CFFC's objectives is to protect the legal right of all women and girls to act as moral agents in decisions related to sexuality and reproductive health care without coercive legal or quasi-legal interference by religious institutions. As Catholics, CFFC members support policies of strict separation of church and state based not only on the U.S. Constitution but also on the Roman Catholic *Declaration on Religious Liberty* (Vatican II *Dignitatis Humanae* 7, December 1965) which declares:

> [T]he civil authority must see to it that the equality of the citizens before the law, which is itself society, is never violated either openly or covertly for religious reasons and that there is no discrimination among its citizens.

Women's American ORT has long held a pro-choice position on the issue of reproductive freedom, and believes that any erosion of the rights articulated in *Roe v. Wade* will be corrosive to fundamental individual liberties. Women's American ORT, and its 145,000 members, believe that when and whether to bear a child is a woman's private decision and opposes attempts to narrow the opportunity for women to control their own lives and be free from all levels of governmental intervention.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by the appellees in *Turnock v. Ragsdale*, No. 88-790 and *State of Ohio v. Akron Center for Reproductive Health*, No. 88-805, and by appellants in *Hodgson v. State of Minnesota*, Nos. 88-1125 and 88-1309.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to continue a pregnancy to term. The doctrine of *Roe v. Wade* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher v. Roe*, 432 U.S. 464, 473-74 (1977). *Roe v. Wade* and its progeny effectuate the constitutional guarantee that in making critical, private decisions, a woman must be permitted to exercise her personal and religious conscience without state interference.

Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), does not, by its terms, overrule *Roe v. Wade*. However, as Justice O'Connor expressly noted in her concurring opinion, and as the plurality indicated, while the Court deliberately chose not to overrule *Roe*, the various opinions are clearly an effort to reexamine its constitutional validity. *Webster*, 109 S. Ct. at 3060 (O'Connor, J., concurring). Moreover, by upholding the state statute challenged in *Webster*, this Court has dangerously narrowed the principles set forth in *Roe v. Wade*. Further, the various opinions have created uncertainty as to the appropriate standard of review.

Amici believe that the Court's decision in the three cases before it today will determine whether the constitutional guarantees recognized in *Roe v. Wade* will retain any vitality. As this Court has recognized, most recently in *Texas v. Johnson*, 109 S. Ct. 2533 (1989), the Constitution requires the Court to apply a strict scrutiny analysis to all cases impinging on First Amendment rights. Under this principle, the statutes at issue are unconstitutional under both the establishment and free exercise clauses.

These statutes place significant and direct burdens upon the exercise of the right to have an abortion and directly contravene the principles of *Roe v. Wade*. The Illinois statutory and regulatory scheme sets forth complex and oppressive regulations for the operation of private clinics in which abortions may be performed, and effectively regulates such clinics out of business. Parental notification statutes, such as the Minnesota and Ohio statutes, are designed to frustrate the decision to terminate a pregnancy and cause teenagers to delay abortions. This statutorily-imposed postponement of the abortion decision until a later, more dangerous time, and the concomitant creation of greater emotional turmoil and stress, impermissibly burden the right to choose whether to terminate or continue a pregnancy.

Although the protections in *Roe v. Wade* are grounded in the constitutionally-based right of privacy, the 7 to 2 majority in *Roe* recognized the religious nature of the abortion decision. *See Roe*, 410 U.S. at 150. More recently, Justice Stevens acknowledged the religious component in *Webster*, when he argued that the establishment clause of the First Amendment is also implicated by any state-imposed burden upon a woman's right to make, and implement, her own choice with respect to the termination of a pregnancy. 109 S. Ct. at 3081-82 (Stevens, J., concurring in part and dissenting in part). Any erosion of the principles articulated in *Roe v. Wade* damages not only the privacy interests at stake but also implicates religious freedoms.

Clearly, a woman's religious beliefs often play a major role in shaping her views about abortion. The religious component of the decision—and of the debate surrounding whether abortion should be allowed or not—is attested to by the fact that 67 religious organizations submitted their views as *amici curiae* in *Webster*. When a state creates significant obstacles to abortion, it effectively establishes one view on abortion, and unduly burdens the free exercise of religious conscience by those holding other views. The First Amendment does not permit such an establishment or tolerate such undue burdens absent a compelling state interest; in the conflict between dictates of law and dictates of conscience, freedom to pursue religious practice must prevail. As *Amici* will demonstrate below, freedom of religion is predicated on protecting matters of

individual conscience such as whether or not to terminate a pregnancy.

In Section I of this brief, *Amici* establish the religious nature of the abortion decision and demonstrate the multiplicity of religious views on abortion. Section II demonstrates that the Illinois, Ohio and Minnesota statutes promote a particular religious view, without advancing an articulable secular purpose, thus violating the establishment clause. Section III argues that these statutes also violate the free exercise clause because they cut deeply into fundamental religious rights, while failing to advance any of the interests they were purportedly designed to serve. For these and other reasons, these statutes are unconstitutional.[1]

ARGUMENT

I. ABORTION IS AN ISSUE IMPLICATING DEEPLY HELD RELIGIOUS BELIEFS AND IS THE SUBJECT OF ONGOING RELIGIOUS DEBATE

The decision to terminate a pregnancy is profoundly personal. An unwanted pregnancy affects every aspect of a woman's life, from her physical health and emotional well-being to her social relationships and economic standing. Moreover, the physical burdens imposed by pregnancy may also affect a woman's ability to provide emotional and financial care to her family. Accordingly, a woman's abortion decision must be guided by her unique personal circumstances, and not by the government. *See* S. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1017 (1984); Cates, *Legal Abortion: The Public Health Record*, 25 Science 1587, 1589 (1982).

For many women, religious beliefs pervade the decision whether to continue or terminate a pregnancy. When life begins is a theological question—a matter of belief and personal conviction. As this Court recognized in *Roe*,

[1]*Amici* are aware that both the parties and certain other *amici* briefs filed on the same side develop the privacy analysis at great length, and therefore *Amici* note their support for the position taken in those briefs. *Amici* submits this brief limited to a discussion of an issue about which it has special expertise and interest—the impact of the Court's decision in these three cases on freedom of religion.

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

410 U.S. at 159. No uniform theological view exists on the question of when human life begins or on the morality of abortion. Indeed, "the intensely divisive character of much of the national debate over the abortion issue reflects the deeply held religious convictions of many participants in the debate." *Webster*, 109 S. Ct. at 3085 (Stevens, J., concurring in part and dissenting in part). In the United States alone, there are over 200 religious groups and denominations, a majority of whom have a position on the morality of abortion. *See* C. Jacquet, ed., *Yearbook of American and Canadian Churches* (1984).

The Anti-Defamation League, B'nai B'rith Women and Women's American ORT, whose constituents represent different religious views on the issue of abortion, bring a personal interest and knowledge about Jewish positions on this issue to the debate. According to Jewish law, the fetus is not considered a human being and has no juridical personality until after its birth. For this reason, many Jews do not equate abortion with murder. Indeed, in certain circumstances, Jewish law views abortion not only as a permissible choice for a woman, but also as her religious and moral duty. *See* H. Donin, *To Be A Jew: A Guide to Jewish Observance in Contemporary Life* 140-141 (1972) ("[a]ll halakhic scholars agree that therapeutic abortions—namely, abortions performed in order to preserve the life of the mother— are not only permissible but mandatory."); D. Feldman, *Birth Control In Jewish Law: Marital Relations, Contraception And Abortion* 284 (1968) ("therapeutic abortion. . . is mandated by the Mishnah. . ."). [2]

Beyond this general consensus, however, different branches of Judaism, and different groups within each branch, disagree about the legal and moral status of abortion and about the specific circumstances under which it is permitted or required. Within the different

[2]The *Mishnah* is a compilation of oral Jewish law collected about A.D. 200 into a work known as the *Talmud*.

strands of Orthodox Judaism, for example, debate persists about the permissibility of therapeutic abortions in situations deleterious to the health of the mother, but not life-threatening, and in situations where there is a grave risk to her mental health. *Id.* at 284-294.

Most Orthodox Jewish groups have traditionally opposed abortion except in pressing situations, such as the endangerment of the mother's life. *Id.* at 275-283. Still other Orthodox Jews emphasize the physical and mental health of the woman as the paramount concern. "[T]he woman's pain 'comes first'. . . considered ahead of the husband's interest in his future child *and* ahead of the potential life of the child itself." *Id.* at 291 (emphasis in original). These groups believe that "insanity constitutes a danger to life and accordingly permit[ ] an abortion when it is feared that the mother may otherwise become mentally deranged." J.D. Bleich, *Contemporary Halakhic Problems* 363 (1977). Further, they counsel that an abnormal fetus may constitute "a grave necessity" in certain instances which would mandate an abortion (for example, if the possible abnormality of the fetus causes great mental anguish to the mother). *Id.* at 367. Finally, such Orthodox groups permit abortion when the pregnancy is the result of rape. D. Feldman, *supra*, at 287.

The Conservative, Reform and Reconstructionist branches of Judaism view abortion differently from many of their Orthodox counterparts and from each other. These branches sanction a woman's decision to terminate a pregnancy and endorse the holding of *Roe v. Wade*. Rabbi Balfour Brickner, Senior Rabbi of the Stephen Wise Free Synagogue and former director of the New York Federation of Reform Synagogues, notes that Reform Jewish thought is in accord with *Roe v. Wade*'s holding that: "The Constitution does not define 'person' in so many words. The use of the word is such that it has application only post-natally." *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2nd Sess. 335 (March 24, 1976) (Rabbi Brickner, statement on behalf of the Religious Coalition for Abortion Rights) (citing *Roe v. Wade*, 410 U.S. at 157).

Similarly, the official Conservative Jewish position paper, recently issued, endorses the *Roe v. Wade* guarantees:

> Conservative Judaism continues to affirm its strong support for the 1973 Supreme Court decision of *Roe v. Wade*. Any weakening, limitation, or withdrawal of the *Roe v. Wade* decision is sure to produce tragic consequences. In light of the recent Supreme Court decision, we must be diligent in our efforts to safeguard and preserve the full personal and religious freedom given to the American people.

A Statement On Abortion (issued by the Social Justice Committee of the Rabbinical Assembly) (July, 1989).

Even among these Jewish groups, however, there is disagreement on the rationale for upholding a woman's right to terminate a pregnancy. Under certain circumstances, such as when a pregnancy threatens a woman's life, as the Orthodox view counsels, or where necessary to preserve a woman's health, Jewish law may compel termination of a pregnancy. *See McRae v. Califano*, 491 F. Supp. 630, 696 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980) (citing testimony of Rabbi David Feldman). Others would protect a woman's right to choose an abortion as the exercise of her own religious and moral convictions. See M.D. Bial, *Liberal Judaism At Home; The Practices Of Modern Reform Judaism* 13 (1971).

Many Reform Jews base their support of a woman's right to have an abortion before a fetus is viable on the belief that a woman should have control over her body. *Id.* at 13. Others stress a woman's physical, psychological and emotional well-being in support of her right to choose an abortion. *Id.* at 12-13. Finally, some view abortion as necessary to safeguard the right of a couple to produce only that number of children for whom they can properly provide. *See* Statement of Rabbi Brickner, *supra*, at 337.

Like the Jewish community, Christians have diverse and often sharply opposing views on abortion. Thus, for example, among the Baptist churches, there is no distinct moral or theological view on the subject of abortion. Denominational pronouncements reflect the views and guidance of elected representatives, but are not considered binding positions. Some authorities within the Baptist Church support liberty of conscience and the exercise of individual moral judgment, and advocate a public policy which guarantees the right of each woman to make her own decision with respect to abortion.

See McRae v. Califano, 491 F. Supp. at 697 (citing statement of Dr. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs). However, the Southern Baptist Convention opposes "abortion on demand," and advocates legislative restrictions on abortion. *Id.* at 699 (citing 1976 and 1977 Resolutions of the Southern Baptist Convention).

The Episcopal Church, USA has consistently supported a woman's right to choose abortion and maintain control over her body. At its 1988 General Convention, the Church declared support for the " 'termination of pregancy' particularly in those cases where 'the physical and mental health of the mother is threatened seriously, or where there is substantial reason to believe that one child would be badly deformed in mind or body, or where the pregnancy has resulted from rape or incest'. . . . Termination of pregnancy for these reasons is permissible." Letter from Ann Smith, Office of the Presiding Bishop and the Executive Council of the General Convention, the Episcopal Church Center (March 6, 1989).

The General Synod of the United Church of Christ supports the legality of abortion, in recognition that "life is less than perfect and the choices that people have to make are difficult." United Church of Christ, *Abortion: A Resolution Of The 12th General Synod Of The United Church Of Christ* (Public Policy Pamphlet 12GS-12) (1979). The United Church of Christ thus sanctions a woman's right to consider abortion as an expression of her personal conscience, stressing only that she "act faithfully" when making such a decision. *Id.* In 1971, the Church sanctioned the weighing of such considerations as the "welfare of the whole family, its economic condition, the age of the parents, their view of the optimum number of children consonant with their resources and the pressures of population" when deciding whether to bear a child. *Freedom Of Choice Concerning Abortion* (adopted by the General Synod of the United Church of Christ) (June, 1971).

Other religious denominations respect a woman's right to choose precisely because of the diversity of views held by their members. For example, in its policy statement, the Presbyterian Church noted that it "exists within a very pluralistic environment. [The Church's] own members hold a variety of views. It is exactly that plurality of beliefs that leads us to the conviction that the decision regarding

abortion must remain with the individual, to be made on the basis of conscience and personal religious principle free from governmental interference." *Covenant And Creation: Theological Reflections On Contraception And Abortion* at 51 (adopted by the 195th General Assembly of the Presbyterian Church) (1983).

Canonical and theological history establishes that no unanimous tradition on the question exists within the Catholic Church. *See* Maguire, *The Catholic Legacy And Abortion*, 114 Commonweal 657 (1981). Furthermore, as *Amicus* Catholics for a Free Choice poignantly demonstrate, committed Catholics do not all agree on the subject of abortion. *See also* Brief *Amicus Curiae* of Catholics For A Free Choice, *Webster v. Reproductive Health Services*. Many Catholics view the abortion decision as one which must be evaluated by the individual with reference to theology, church tradition and individual prayer. *Id.* at 27.

The current official doctrine of the Roman Catholic Church sharply conflicts with that of many Jewish groups and Protestant denominations. *The Declaration on Abortion of the Sacred Congregation for the Doctrine of the Faith of November 18, 1974*, the current text on the teachings of the Roman Catholic Church, states that life begins at fertilization, and that abortion is immoral, although it does not take a position on the commencement of moral or legal personhood.

By passing legislation which restricts the rights of women to choose whether to continue their pregnancies, Illinois, Minnesota and Ohio have intruded into an area where the First Amendment's protection of religious freedom requires that women be allowed to follow the dictates of their individual consciences. These states have made it impossible for women to decide, in keeping with their sincere religious beliefs about when life begins and when termination of a pregnancy is appropriate, whether to have an abortion or continue a pregnancy. Abortion must remain a legal option for women so that they are free to consult their own conscience and beliefs in making a choice.

The establishment clause and the free exercise clause of the First Amendment require government neutrality and reasonable accommodation in the face of competing religious claims. These constitu-

tional principles simply do not allow states to set conditions for the termination of a pregnancy which effectively burden a woman's freedom of choice in such a way as to require her to follow the religious doctrine of a particular sect or sects and conform her conduct accordingly, even though she holds no such religious beliefs. "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).

II. THE STATUTES AT ISSUE VIOLATE THE ESTABLISHMENT CLAUSE

A. The Establishment Clause Requires Government Neutrality Concerning Religion

The First Amendment's establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). Last term, this Court reaffirmed that "government may not promote or affiliate itself with any religious doctrine or organization." *Allegheny County v. Greater Pittsburgh ACLU*, 109 S. Ct. 3086, 3099 (1989).

The Court has established a three-prong test to determine whether a statute violates the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation omitted).

The *Lemon* test was further refined in *Allegheny*, 109 S. Ct. at 3101, where the Court described the establishment clause protection as follows:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

A law will not pass constitutional muster if the purported secular purpose is a "sham". *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring). Thus, the "mere existence of some secular purpose" is not enough. *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). The stated purpose must be "sincere." *Wallace v. Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring).

As *Amici* argue below, while the purported purpose behind legislation restricting a woman's choice whether to continue her pregancy to term may be secular (*e.g.*, family harmony, protection of a woman's health), closer inspection reveals that these statutes are in fact animated by the religious beliefs of the legislators as to when life begins and when abortions should be permissible under their theological scheme. Although the majority in *Webster* did not address this First Amendment component of the attack on the Missouri statute, Justice Stevens faced this issue directly, concluding that the Missouri statute was an unconstitutional endorsement of one religious theory of when life begins. *Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part).

As this Court continues to review statutes which restrict women's right to choose whether to carry a pregnancy to term, the concerns raised by Justice Stevens in *Webster* arise with renewed urgency. Indeed, if the Illinois, Minnesota and Ohio statutes are permitted to stand, especially when coupled with *Webster*, the cumulative effect would be a serious erosion of establishment clause principles. As Justice Blackmun emphasized, writing for the Court in *Allegheny*, "we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference'. . . in keeping with 'the unwavering vigilance that the Constitution requires' against any violation of the Establishment Clause." 109 S. Ct. at 3109 (citations omitted).

B. The Statutes At Issue Establish Religion

The Illinois, Ohio and Minnesota statutes violate the establishment clause in several ways. First, they fail to serve or further the purportedly secular purposes identified by the states. Rather, they promote the religious view that life begins at conception, and are a thinly-veiled attempt to block access to abortion. "That fact alone compels a conclusion that the statute[s] violate[ ] the Establishment

Clause." *Webster*, 109 S. Ct. at 3082-83 (Stevens, J., concurring in part and dissenting in part), citing *Wallace v. Jaffree*, 472 U.S. at 56.

Illinois has argued that its rigid regulation of outpatient abortion clinics has a medical purpose—the protection of women's health. *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1230 (N.D. Ill. 1985), *modified*, 841 F.2d 1358 (7th Cir. 1988). The record is to the contrary: Illinois was unable to present any evidence that the particular regulations at issue here were enacted to further that purported purpose. *Ragsdale*, 625 F. Supp. at 1230. In fact, the legislative history demonstrates the legislators' concern with the status of the fetus—a religious concept—and not the health of the woman or the safety of the clinics. The Illinois General Assembly intended to obstruct women's access to abortions when it created the challenged statutory scheme in 1973. *See Ragsdale*, P. Jt. App. at A4-A5[3] ("We must make the best of a very sorry situation by at least regulating that procedure so that the Abortion Mills will not proliferate") (statement of Rep. Hyde). This underlying impermissible purpose has been very successfully served by the Illinois statute—many private clinics have had to close since the statute went into effect, and there are vast areas of the state where there are no facilities available to women seeking to terminate a pregnancy. *Ragsdale*, 625 F. Supp. at 1227.

After reviewing the legislative history, the Illinois district court found that the regulatory scheme did not advance the purported secular legislative purpose. *Id.* (defendants failed to produce "any evidence at all" that the "statutes and regulations are medically necessary"). Indeed, the Seventh Circuit found that the Illinois legislature made the regulations at issue applicable to all clinics rather than clinics that perform abortions alone in "an effort to save the statute from unconstitutionality." *Ragsdale*, 841 F.2d at 1369.

The lack of any plausible secular explanation for the intrusive regulatory scheme and the legislators' focus on the nature of the fetus and not on the well-being and health of the woman involved demonstrates that the Illinois statute was intended to endorse the

[3]The proceedings of the Illinois House of Representatives General Assembly are included in plaintiffs' joint appendix.

sectarian position that life begins at conception. The establishment clause does not allow government to mandate one religious view. *See Allegheny*, 109 S. Ct. at 3104-05.

Minnesota's and Ohio's parental notification statutes similarly impose one religious view about abortion on their citizens. Both Minnesota and Ohio have argued, like Illinois, that the statutes have a valid secular purpose—the protection of the well-being of minors by encouraging them to discuss the abortion decision with their parents. *Hodgson v. State of Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988). *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd sub nom. Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988). A careful analysis of the legislative history, however, leads to the inescapable conclusion that the states were actually motivated by a non-secular purpose—preventing minors from having abortions in order to further the legislators' beliefs about when life begins. *Hodgson; Akron*.

The Minnesota legislators made little attempt to disguise the fact that they were motivated by their belief that life begins at the moment of conception and abortions should be strongly discouraged if not outlawed. *Hodgson*. Influential supporters of the legislation said they hoped, by encouraging minors to continue their pregnancies, to "save lives." *Id.* The Minnesota trial court found that the Minnesota legislature was motivated by "a desire to deter and dissuade minors from choosing to terminate their pregnancies." *Id.* Significantly, although the Eighth Circuit reversed the legal conclusions of the district court with regard to the constitutionality of the parental notice provision, the appellate court did not contradict the factual finding that the legislators were motivated by improper religiously-based purposes.

Both the district court and the Sixth Circuit apparently accepted, at face value, Ohio's assertion that the statute's purpose was to facilitate parental involvement in child rearing. *See Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. at 1130-1131, *aff'd*, 854 F.2d at 863. However, as the above discussion of *Hodgson* and *Ragsdale* indicates, it is probable that at least some of the legislators were seeking to advance their religious view of when life begins, an impermissible government purpose. Both the district and appellate

courts *did* conclude that Ohio could not present any legitimate state interest behind its onerous bypass procedures, *Akron v. Rosen*, 633 F. Supp at 1137; *Akron v. Slaby*, 854 F.2d at 863, presumably because the only reason for such a cumbersome process was to make it more difficult for minors to terminate their pregnancies.

Because the Illinois, Minnesota and Ohio statutes do not advance the interests they purportedly were designed to serve, the only plausible reason for such legislation is to further the belief that life begins at conception. Of course, this non-secular belief, unsupported by medical knowledge, may not be established by state law. *See Webster*, 109 S. Ct. at 3082 (Stevens, J., concurring in part and dissenting in part). *See also Aguillard v. Edwards*, 107 S. Ct. 2573, 2582 (1987) ("The Legislative history documents that the [creation science] Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine . . . ."); *Wallace v. Jaffree*, 472 U.S. at 57-61.

The challenged statutes also fail under the 'effect' prong of the *Lemon* test. The Illinois regulatory scheme, which imposes onerous regulations unrelated to health concerns, *Ragsdale*, 625 F. Supp. at 1230, has a perceived and actual effect of advancing the non-secular aims of certain religions. The regulations essentially endorse the religious belief that life begins at conception, to the detriment of those who do not share it. *See Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976) ("[t]he State must confine itself to secular objectives, and neither advance nor impede religious activity").

The Ohio and Minnesota statutes fail under the second prong of the *Lemon* test as well. While Minnesota had asserted that its parental notice statute sought to encourage intra-family communication, no witnesses involved in the statute's implementation testified that the statute had a beneficial effect on the minors whom it was presumably intended to assist. *Hodgson*, 648 F. Supp. at 775. What the requirements of parental notification or judicial permission have done is to tell teenage girls that the state endorses the religious view that abortions are wrong. The placement of burdensome barriers, *see, e.g., Akron v. Rosen*, 633 F. Supp. at 1137; *Hodgson*, 648 F. Supp. at 764, in the way of young women seeking abortions conveys

the unmistakable message that abortion must be discouraged. This "symbolic union of church and state" cannot be allowed to stand. *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-127 (1982).

In each case, the statute's message that abortion is wrong promotes "one religion or religious theory against another or even against the militant opposite" in contravention of the First Amendment. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). A woman from either Minnesota, Ohio or Illinois whose sincere religious beliefs have led her to decide to terminate a pregnancy has been ostracized by her state government and given an unmistakable message—not only does the state believe abortions are morally reprehensible, but also that the State will prevent her from acting on her religious beliefs. As this Court held last term in *Allegheny*, such favoritism is unconstitutional. 109 S. Ct. at 3101.

The three state statutes also violate the entanglement prong of the *Lemon* test, and will lead to the kind of religious and political divisiveness condemned by this Court in *Engel v. Vitale*, 370 U.S. 421, 436 (1962). State enforcement of restrictions on abortions, whether relating to the availablity of clinics (Illinois) or the requirement of parental notice (Minnesota and Ohio), put state governments in the position of aiding those religions and religious groups which believe abortion is wrong, to the detriment of those who believe decisions about terminating a pregnancy should be left to individual choice. As the weeks since this Court issued its *Webster* opinion have demonstrated, the tension between these two approaches has become a major political issue at the state and local level. There will be no end to the political controversy, and to the involvement of various religious groups in that controversy, unless this Court properly places a barrier between government and the individual choice to decide whether to continue a pregnancy.

Permitting the state to communicate the religious message that abortion is morally reprehensible flouts the guarantees of the establishment clause. The First Amendment prohibits the fusion of government and religion which occurs whenever government endorses or supports the theological tenets of one religion or several, over others. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. at 389 (when

the government "conveys a message of governmental endorsement or approval of religion, a core purpose of the establishment clause is violated"). *See also Everson*. As this Court has said:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of government and religious functions or a concert of dependency of one upon the other to the end that official support of the state or federal government would be behind the tenets of one or of all orthodoxies; this is what the Establishment Clause prohibits.

School Dist. of Abington v. Schempp, 374 U.S. 203 at 222. *See also Allegheny*, 109 S. Ct. at 3099-3105.

The Illinois, Minnesota and Ohio statutes have placed government "behind the tenets" of some religions, to the detriment of *Amici* and other religious groups. This imposition violates the very core of the establishment clause.

III. THE CHALLENGED STATUTES IMPOSE AN IMPERMISSIBLE BURDEN ON A WOMAN'S FREE EXERCISE OF RELIGION

The three statutes before this Court purport to address a variety of state interests, including the mother's health, potential human life, and intra-family communication. As discussed above, these purported purposes merely provide a legislative cover for the real objective of the statutes, which is to impose such burdens on women seeking to terminate pregnancies that they are deterred from doing so. However, it is well established that states may not vindicate even legitimate interests in a manner which unduly infringes upon individuals' free exercise rights. *See School Dist. of Abington v. Schempp*, 374 U.S. at 222. The free exercise clause was designed to prohibit governmental interference with the individual's right to act in accordance with the dictates of her own conscience in matters of religion. *Wallace v. Jaffree*, 472 U.S. at 52. *See also United States v. Ballard*, 322 U.S. 78, 87 (1944).

Nowhere is this principle of government neutrality more important than in the highly controversial and emotional issue of reproductive rights. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *See*

also Eisenstadt v. Baird, 405 U.S. 438 (1972); S. Law, *supra* at 1023. Because, for many women, the abortion decision necessarily implicates a woman's religious beliefs, restrictions on a woman's decision may interfere with the exercise of religious conscience by imposing one view (opposing abortion) and by stifling individual choice.

A. For Many Women, the Decision Whether To Terminate a Pregnancy Is an Issue of Fundamental Religious Belief

In *Roe v. Wade*, the Court held that a woman's right to decide whether to terminate her pregnancy was "fundamental." 410 U.S. 113, 152. *See also Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977) ("[t]he decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitutionally protected choices"). Since *Roe v. Wade* was decided, the Court "repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 420 n.1 (1983). Moreover, as this Court has noted, "[t]he States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986).

The plurality opinion in *Webster* tries to beg the question by claiming that "there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion . . . a 'limited fundamental constitutional right'. . . or a liberty interest protected by the Due Process Clause . . . ." *Webster*, 109 S. Ct. at 3058. However, as the *Webster* dissent correctly points out, the Court's failure to renew its commitment to protecting the fundamental privacy and First Amendment interests at stake has already led to an increasingly hostile and divisive political debate. 109 S. Ct. at 3079 (Blackmun, J., concurring in part and dissenting in part).

Amici urge the Court, in the three cases before it today, to reaffirm a half century of decisions holding that the right to make an individual decision regarding childbearing free from government

coercion—and to the exercise of one's religious beliefs and conscience free from governmental endorsement or disapproval—is a fundamental right. *See Wallace v. Jaffree; Roe v. Wade; Eisenstadt v. Baird*; *Griswold v. Connecticut; Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Amici believe that this fundamental right is grounded in both privacy rights and freedom of religious conscience. State statutes regulating abortion restrict a woman's ability to exercise freely her private religious beliefs. Requiring a woman to conform her actions to the government's view of when life begins is repugnant to the protections of the free exercise clause.

This Court must not allow Illinois, Ohio and Minnesota to prevent women from exercising their religious freedom.

B. Statutes Regulating Abortion Affect Fundamental Religious Interests and Are Subject to Strict Scrutiny

As this Court has repeatedly acknowledged, the government may not burden the free exercise of religion unless it can establish that "an inroad on religious liberty. . . is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). *See also Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987). The Court has further emphasized that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (when evaluating free exercise claims, the Court must consider "whether some compelling state interest . . . justifies the substantial infringement of [a] First Amendment right").

This First Amendment standard of review is applicable whether unemployment benefits are at stake, *see Hobbie*, or schooling for children, *see Yoder*, or the right to decide whether to continue a pregnancy, as in *Roe v. Wade*. The plurality decision in *Webster* failed to address the First Amendment component to the rights implicated by the Missouri abortion statute. For this reason, the plurality's suggestion that restrictions on abortion may be evaluated

under a lesser standard of review is unpersuasive. Indeed, the Court itself recently reiterated that statutes which implicate First Amendment rights must be strictly scrutinized. *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (applying the strict scrutiny test to strike down a state court conviction for desecration of the American flag).

Justice O'Connor's effort in *Webster* to respond to the uncertainties of the plurality opinion nevertheless failed to address the First Amendment aspect of the abortion debate. *Webster*, 109 S. Ct. at 3058-64 (O'Connor, J., concurring). It is this constitutional dimension—which only Justice Stevens addressed in his partial concurrence and partial dissent — that requires this Court to apply the very highest standard of review to any statute, including those regulating abortion, which restrict the enjoyment of rights guaranteed by the First Amendment.

Under this standard, as properly applied, only a compelling state interest justifies state infringement on fundamental free exercise rights. *See, e.g., Hobbie*, 480 U.S. at 141-42; *Thomas*, 450 U.S. at 718; *Sherbert*, 374 U.S. at 406. In keeping with these cases and consistent with this Court's logic, the statutes at issue must be evaluated under a strict scrutiny standard. *See Thomas*, 450 U.S. at 718; *City of Akron*, 462 U.S. at 427.

As demonstrated below, the instant statutes profoundly burden women's rights to the free exercise of their religious choices about childbearing. Moreover, Illinois, Minnesota and Ohio have failed to demonstrate that the statutes further a compelling state interest.

C. The Challenged Statutes Significantly Burden the Free Exercise of Religion

Illinois, Minnesota and Ohio have burdened women's free exercise rights by making it impossible for them to carry out their religious beliefs regarding a uniquely personal and moral decision. Although a woman in any of these states is still able to decide, on the basis of her personal religious beliefs or convictions, that she wishes to terminate her pregnancy, she may be prevented from implementing her decision. This Court has repeatedly held that state regulations which prevent someone from exercising his or her reli-

gious beliefs, without a compelling state interest, are unconstitutional. *See, e.g., Hobbie; Yoder.*

The Illinois licensing scheme virtually regulates private facilities out of existence, thus making it extremely difficult, if not impossible, for a woman in that state to obtain an abortion. As the district court judge found, "the challenged statutes and regulations do place a very real and a very heavy burden on the right of a woman to decide to terminate her pregnancy. The effect of the statutory and regulatory scheme is to increase the cost of abortions and decrease their availability." *Ragsdale*, 625 F. Supp. at 1227. Thus, the clear effect of the Illinois statute is to block the ability of Illinois women to obtain abortions. *Id.* at 1227 ("as a result of the scheme . . . the only outpatient abortion facility in northwest Illinois, will close . . . .").[4]

The Minnesota and Ohio statutes also place serious barriers in the way of a woman's access to abortion, requiring a young woman to endure a sometimes insurmountable obstacle course of regulations before she can obtain an abortion.[5] The Ohio statute requires the attending physician personally to notify the parent, which impinges upon the minor's right to privacy, leads to intra-family conflict, and requires violation of the physician/patient privilege. It is also directly in conflict with the holding in *City of Akron*, 462 U.S. at 448, that states may not require physicians personally to obtain informed consent from parents of a minor:

Further, although there is a judicial bypass procedure, its burdensome pleading requirements and standard of proof vitiate any protection the legislature intended to accord young women. This Court has held that a bypass proceeding must assure "anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained . . . ." *Bellotti v. Baird*, 443 U.S. 622, 644

[4]Moreover, since *Webster* appears to allow states to forbid the use of public facilities for abortions, upholding the restrictions on private facilities in the Illinois statute would mean that a state could virtually legislate abortion facilities out of existence.

[5]Amici refer to appellees' briefs in *Ragsdale* and *Akron Center for Reproductive Health* and appellant's brief in *Hodgson* for a fuller explanation of the burdens imposed by the statutes.

(1979). The potential three week wait for a judicial decision in Ohio does not comply with any notion of expediency. By requiring a woman to disclose her name and address, the Ohio statute fails to guarantee a woman's anonymity.

The Minnesota statute provides that a minor seeking an abortion must notify both of her parents and may not thereafter have an abortion for forty-eight hours. This mandatory two parent notification, which does not take into account whether the minor is living with both of her parents (or one or neither), amounts to an "absolute, and possibly arbitrary, veto" deemed unconstitutional in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). As with the Ohio statute, Minnesota's legislation will only promote family strife and subject the minor to additional emotional distress during an already difficult time. *Hodgson*, 648 F. Supp. at 763-64. Minnesota, like Ohio, has a judicial bypass provision which, because of its cumbersome procedures and built-in delays, is also unduly burdensome. *Hodgson*, 648 F. Supp. at 776.

The fact that these two statutes are directed at minors, in whose protection states may have a heightened interest, does not eliminate the constitutional concerns. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Danforth*, 428 U.S. at 74. Indeed, this Court has recognized minors' First Amendment rights in a number of contexts. *See, e.g., Tinker v. Des Moines Indep. Comm. Sch. Dist.* 393 U.S. 503, 506 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988).

Like adult women, many teenage girls have sincere religious beliefs which are protected by the free exercise clause. They face the same difficult choices as mature women in deciding whether to continue a pregnancy and should not have to overcome greater obstacles in effectuating that decision. Any contrary conclusion ignores this Court's recent decision in *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989). There, the Court held that minors and adults are equally responsible for their criminal activity and that minors, like adults, can be put to death for murder. The majority held that minors are "mature enough to understand that murdering another human

being is profoundly wrong, and to conform [their] conduct to that most minimal of all civilized standards." *Id.* at 2977. *Amici* do not necessarily endorse the Court's view that the Constitution allows the government to put minors to death. However, if minors can be presumed mature enough to appreciate the consequences of their actions and to be sentenced to death, it surely follows that they are mature enough to make and carry out decisions about procreation.

D. The Challenged Statutes Do Not Serve Any Compelling State Interests Which Would Justify Incursions in Religious Liberty

Any purportedly permissible state interest claimed by Illinois, Ohio and Minnesota in support of their legislation dissipates upon careful analysis. The purported state interest underlying the Illinois law is the preservation and protection of a patient's health. However, the Seventh Circuit found that: (1) "many of the physical plant requirements . . . have 'no medical justification whatsoever' when applied to first and early second trimester abortions"; and (2) the certificate of need proceeding requirement does not serve any articulable interest. *Ragsdale*, 841 F.2d at 1373-74. The record before this Court in these cases and many others establishes, without contradiction, that the health effects of unwanted pregnancies and delays in securing abortions are devastating. *See* National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancies, and Childbearing* (1987).

The state interest underlying the Minnesota and Ohio statutes is purported to be the fostering of intra-family communication and protection of the well-being of pregnant minors. However, neither of these statutes effectuates the state's interest in maternal health; nor does either further intra-family communication. Indeed, intra-family communication, if poor, is unlikely to be improved by legislatively-mandated communication. Far from protecting minors, the notice/bypass statutes force minors into situations that can only increase their fear and anxiety, causing them to postpone the abortion until a later, more dangerous time. The statutes may also coerce a young woman into continuing a pregnancy against her personal wishes, religious beliefs and best interests, an equally unacceptable alternative.

The district court in *Hodgson* found that the Minnesota statute "fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors." 648 F. Supp. at 775. Similarly, the Ohio district court found that the Ohio statute overstresses parental interests and thus "misperceives" the permissible interest a notification statute may serve—the protection of minors. *Akron v. Rosen*, 633 F. Supp. at 1137. The Ohio district court found no compelling state interest to justify the burdensome notice/bypass scheme there. *Id.* Moreover, the Sixth Circuit concluded that "the State of Ohio has presented no legitimate justification for imposing its pleading requirement which . . . is a 'procedural trap.'" *Akron v. Slaby* at 862-63. As the lower courts have already determined, these statutes are not even rationally related to the advancement of the purported state interests.

The challenged statutes have been animated by the religious view that abortion is morally wrong and that life begins at conception. They impose that view on women who, as a matter of religious conscience, believe differently. Because these statutes conflict with the rights guaranteed by the First Amendment, they must fall.

Amici concur with the views of an Episcopal priest, who recently said:

> Whether pro-choice or anti-abortion, you do not have the right in this diverse, pluralistic society to force beliefs and opinions on others. There can never be a just law requiring uniformity of behavior on the abortion issue.[6]

Indeed, the First Amendment stands as a bulwark against government-enforced uniformity in exercising and implementing religious convictions.

---

[6] *A Priest on Abortion: Women as the Proper Moral Agent*, Los Angeles Times, August 6, 1989, Part V, at 1, col. 1.

CONCLUSION

For the foregoing reasons, the decisions of the Courts of Appeal for the Sixth and Seventh Circuits should be affirmed and the decision of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

KENNETH J. BIALKIN,
Counsel of Record

PEGGY L. KERR
DAVID C. MARCUS
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for *Amici Curiae*
August, 1989

Of Counsel:

MEYER EISENBERG
RUTH LANSNER
JUSTIN J. FINGER
JEFFREY P. SINENSKY
STEVEN M. FREEMAN
JILL L. KAHN
LIVIA D. THOMPSON

Anti-Defamation League of B'nai B'rith
823 United Nations Plaza
New York, New York 10017
(212) 490-2025

Supreme Court, U.S.
FILED
AUG 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

Case No. 88-1309

Supreme Court Of The United States

October Term 1989

STATE OF MINNESOTA, Rudy Perpich as Governor of the State of Minnesota, Hubert H. Humphrey, III, as Attorney General of the State of Minnesota.,

Petitioners,

vs.

JANE HODGSON, M.D., et al

Respondent.

On Appeal from
the United States Court of Appeals
For the Eighth Circuit

BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONERS

JAMES JOSEPH LYNCH, JR.
Attorney at Law
P.O. Box 15766
Sacramento, CA 95852
(916) 448-7871

Attorney for *Amicus Curiæ*

QUESTIONS PRESENTED

By *Amicus Curiæ*:

(1) Should *Roe v. Wade*, 410 U.S. 113 (1973) be reconsidered and discarded in favor of finding that a fetus is a member of Posterity, and therefore a person in the Constitutional sense, and thus entitled to the protection of the Constitution?

As framed by the parties (57 LW 3625):

(2) May state constitutionally require physician to attempt with reasonable diligence to notify parents of unemancipated minor under age of 18 at least 48 hours before performing abortion on their daughter?

Table of Contents

QUESTIONS PRESENTED i

Table of Contents ..... (ii)

Table of Authorities ..... (iv)

INTEREST OF AMICUS CURIÆ 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I *STARE DECISIS* IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE 6

II A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION 8

A. Introduction - Roe v. Wade Did Not Consider Posterity. 8

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created 9

C. The Constitution was Established "By The People" 9

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity" 11

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations 12

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition. 13

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers. 14

H. Posterity, including a fetus, has Presently Enforceable Rights 17

I. A fetus is life within the meaning of the 5th Amendment 19

III A STATE HAS AN INTERNATIONAL AND CONSTITUTIONAL OBLIGATION TO PROTECT HUMAN LIFE, AND THEREFORE THE REGULATIONS UNDER SCRUTINY ARE CONSTITUTIONAL 21

CONCLUSION 24

APPENDIX, Excerpts from Farrands, The Constitutional Debates A1

Table of Authorities

CASES

Adams v. Storey, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141 (1817) 10

Alamo School District v. Jones, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960) 14, 15

Anderson v. United Realty Co., 79 Ohio St. 23, 86 N.E. 644 16

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) 10

Barber v. Pittsburgh, F.W. & C.R. Co., 166 U.S. 83, 17 S.Ct. 488, 41 L.Ed. 925 16

Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) 23

Bellotti v. Baird (Bellotti I), 428 U.S. 132 (1976) 23

Bolling v. Sharpe, 347 U.S. 497 (1954) 7

Bowers v. Hardwick, 478 U.S. 186 (1986) 9, 22

Breckenridge v. Denny, 71 Ky (8 Bush.) 523 13

Brown v. Bd. of Education, 349 U.S. 289 ..... 7, 23

Brown v. Bd. of Education (Brown III), 347 U.S. 483 (1954) 7, 23

Brown v. United States, 256 U.S. 335 (1921) 22

Coggs v. Berherd, 2 Ed.Raym. 909 ..... 17, 18

Ex Parte Garland, 4 Wall. 333 (1867) 7

Field v. Clark, 143 U.S. 649, 691 (1891) 6

Flash v. Cohen, 392 U.S.83 19

Furman v. Georgia, 408 U.S. 238 (1972) 21

Gannon v. Albright, 183 Mo. 238, 81 S.W. 1162 16

Gay v. Scates, 37 Pa 31 16

Gibbons v. Ogden, 22 U.S. (9 Weat.) 1 (1824) 10, 11

Haward v. Howe, 12 Gray (Mass.) 49 16

Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409 16

Hockett v. State Liquor Licensing Board, 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7 9

Hodgson v. Minnesota, 853 F.2d 1452 (1988) 3

Katz v. United States, 389 U.S. 347 (1967) 22

Knowlton v. Moore, 178 U.S. 87 (1900) 10

Larew v. Larew, 146 Va. 134, 135 S.E. 819 16

Locke v. New Orleans, 71 U.S. (4 Wall) 172 (1866) 10, 11

McIntosh v. Dill, 86 Okla. 1, 205 P. 917 ..... 18, 19, 21

Mullane v. Central Hanover B&T, 339 U.S. 706 (1950) 20, 21

People v. Emery, 314 Ill. 220, 145 N.E. 349 16

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 22

Plessy v. Ferguson, 163 U.S. 537 (1896) 7

Roe v. Wade, 410 U.S. 113 (1973) ..... i, 6, 7, 8, 24

Scott v. Sanford, 60 U.S. (19 How.) 404 (1857) 9, 11, 12, 14

Sinkler v. Kneale, 401 Pa 267, 164 A.2d 93, 94 (1960) 14, 19

United States v. Block, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877) 10, 11

United States v. Boyer, 85 F.425 (D.C., Mo., 1898) 9

United States v. Classic, 313 U.S. 299 (1941) 10

United States v. Cruikshank, 92 U.S. (2 Otto) 542, 550 (1876) 8, 9, 11, 12, 14, 21

United States v. Harris, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866) 10, 11

Veazie Bank v. Fenno, 75 U.S. (8 Wall) 533 (1869) 10, 11

Webster v. Reproductive Health Services, 88-605 (July 3, 1989) 1, 9, 23

Witters v. Washington Dept of Social Svcs for the Blind, 474 U.S. 481 (1986) 13

White v. Hart, 80 U.S. (13 Wall.) 646, 650 15

Wright v. United States, 302 U.S. 583 (1938) 10
CONSTITUTIONS
United States
Preamble 8, 11, A8
Art. I, § 2, cl 3 ..... 9, 11
Art. I, § 3, cl. 2 16
Art. I, § 8, cl. 17 16
Art. III, § 3, cl. 2 16
Art. IV, § 2, cl. 1 16
Art. VI, cl 2 22
1st Amendment 13
2nd Amendment 22
3rd Amendment 16
4th Amendment 16, 22
5th Amendment 8, 16, 19, 21
13th Amendment 9, 11
14th Amendment 8, 9, 21
22nd Amendment, § 1 18
22nd Amendment, § 2 18
CODES AND STATUTES
Minnesota
Minn.Stat.Ann. 144.343 (1981) 4, 5, 24
England
13 Edw. I, c. 1 17
Halsbury's Statutes of England, vol. 10, (4th Ed) Constitutional Law, 25 Edw 1 (Magna Carta)(1297), p. 14, Notes, ¶ 2 21
Statute of De Donis 17
Y.B. 12 Edw. IV, Mich., fo 14 b, pl, fo 19a, 25 17
MISCELLANEOUS
Acquinas, Summa Theologiæ, 1, q. 76, a. 5 and q. 118, a. 2 13
American Declaration of Independence 15

American Jurisprudence (2nd) vol. 28, Estates, § 53 16
Aristotle, Politics, VII, 1335b, 24-26 13
Blackstone at Book IV, p. 198 14
Case & Steirs, Biology: Observation & Concept (1971) 20
Chitty on Contracts (23rd ed, 1968) 134 ..... 17, 18
Colquhounn in Commentaries on the Thames, ix, 284 (1800) 13
Corpus Juris Secundum, vol. 31, Estates § 4 16
Edge, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967) 18
Encyclopaedia Britannica (1971) 14
Exodus, Book 21, verse 22 13
Farrand, The Constitutional Debates, vol. 2 17
Foster, Crown Law (1762) 22
Gray, The Rule Against Perpetuities (4th Ed.) 14, 15, 19
Halbury's Laws of England, vol. 17, (1st ed, 1911) Infants ¶¶ 132, 135 ..... 19, 21
Hamilton, The Federalist Papers, No. 84. 11
Hobb, Leviathan (1651) 17
International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984 22
Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93 20
Johnson, Samuel, "Idler No. 3", p. 5 13
Kings, Book I, verse 1-2 10
Landmark Briefs and Arguments of the Supreme Court of the United State, vol. 75 8
Laqueur, The Human Rights Reader 17
Locke, Second Treatise of Government

(1690) 17
Magna Carta (1215), Article 54 ..... 10, 14
McKechnie, Magna Carta 21
Noonan, Contraception, 86-88 (Harv. U. Press, 1965) 13
Oxford English Dictionary, Compact Edition (1971) 12, 13
Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852) 11
Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852) 10
Restatement (1st) Contracts § 77 ..... 17, 18
Restatement (2nd) Torts §§ 63, 64, & 65 22
Rotunda, Treatise on Constitutional Law, vol. 3, § 23.33, p. 512 (1986) 6
Rotunda, vol. 3, op cit, p. 663, note 1 17
Rotunda, vol. 3, pp. 663-64, note 1 13
Rotunda, vol. 3, op. cit., p. 688, ... 18
Samuel, Book I, verse 16 10
Samuel, Book II, Chap. 5, verse 9-20 10
Schwartz, The Bill of Rights, A documentary history 15
Stephens Commentaries, vol. 2 (1841) 18, 19, 21
Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937) 18, 21
Id, *Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966) 18, 21

Case No. 88-1309

Supreme Court Of The United States

October Term 1989

STATE OF MINNESOTA, Rudy Perpich as Governor of the State of Minnesota, Hubert H. Humphrey, III, as Attorney General of the State of Minnesota.,

Petitioners,

vs.

JANE HODGSON, M.D., et al

Respondent.

On Appeal from
the United States Court of Appeals
For the Eighth Circuit

BRIEF OF JAMES JOSEPH LYNCH, JR., AS *AMICUS CURIÆ* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIÆ*

Amicus is an attorney admitted to practice law in the highest court of the State of California, and a member of the Bar of this Court. He has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, down trodden, and oppressed. He also presented a similar *Amicus Curiæ* Brief in *Webster v. Reproductive Health Services*, No. 88-605, decided in this court on July 3, 1989, in support of appellant, and has been granted permission to file

a similar brief in behalf of one other state.[1]. He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written and copy righted one article on Abortion entitled *Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy*. He lived four years in England where he engaged in a self directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

This case touches and concerns the continuing validity of *Roe v. Wade*, and its progeny, and, as such, a decision herein will affect not only the Laws of the State of Ohio, but the State of California wherein *amicus* resides, because it effects the rights of persons residing in California, the liability of the state, and its taxpayers, may, or may not, be liable for damages depending upon the scope of rights belonging to a fetus, which in *amicus*' belief constitutes human life protected by the Constitution. It must be remembered that under Nazi Germany, nearly 9 million innocent lives were lost in a holocaust because no one, at the outset had the courage to say no.[2]. If, as contended here, a fetus is a human life, then *amicus* has an interest as a taxpayer to insure that his state's procedures are neither *contra bono mores*, nor illegal.

Amicus is also concerned about the rights of that class of persons recognized in the Preamble of the Constitution denominated "posterity", and its subclass "fetus" and is concerned, and has been concerned for some time, that fetuses,

[1] *Ragsdale v. Turnock*, No. 88-790.

[2] It is certain that the atrocities began at least as early as 1938. 6 Enclopædia Britanica 253a (1971). World War II did not start until September 1, 1939, by the Nazi, with United States entry on December 8, 1941 and then only because of events in Hawaii. 22 Id 681b, following.

have been unrepresented or under-represented in any court in the years of litigation which has followed since *Roe v. Wade* was decided in this court in 1973. *Amicus* was convinced then, and remains convinced, that the court was misled as to the meaning of personhood in that arguably a fetus is a member of Posterity found in the Preamble of the Constitution, and that it is imperative, for the preservation of a basic respect for human life, and the values enshrined in the Constitution of the United States that fetuses be recognized as a member of Posterity, but, until *Webster*, due to the inherent nature of our adversary process, has been limited to writing articles concerning the topic.

It is *amicus*' desire, *pro bono publico*, to present to this court, from the fetus' point of view, the rights of the fetus, as it appears to be found in the term Posterity in the Preamble of the Constitution of the United States of America.

STATEMENT OF THE CASE

Minnesota Statute §§ 144.343(2),(7) (1987) requires a minor to notify both parents at least 48 hours before a planned abortion or demonstrate to a court in an expedited confidential proceeding either that she is "mature and capable of giving informed consent" or that the performance of an abortion witout such notification would be in her "best interests." The district court held that the judicial by-pass procedure was unconstitutional because the two-parent notice requirement failed to serve the state's interest in protecting pregnant minors or promoting family communication and that the 48-hour waiting period requirement was unreasonable under conditions existing in Minnesota. A panel of the Eighth Circuit affirmed, and the Eighth circuit granted a hearing *en banc*. The court, en banc, held that the notice by-pass provisions were constitutional, but left in tact the holding that the 48 hour provision was unconstitutional.[3] *Hodgson v.*

[3] Plaintiffs, respondents in this court, have cross petitioned in *Hodgson*

Minnesota, 853 F.2d 1452, 1453 (1988)

The statute, Minn.Stat.Ann. 144.343 (1981) deals with a minor's consent to treatment for pregnancy, venereal disease, and alcohol and drug abuse. Subd. 2 provides that no abortion may be performed upon an unemancipated minor until at least 48 hours after written notice to her parents, and provides the mechanics for giving notice. Subd. 6 provides that if the notification procedures of subd. 2 is restrained by judicial order, then a pregnant minor has the choice of either providing notice in subd. 2 or submitting to a court by-pass procedure. The by-pass procedure provides for an expedited procedure wherein a judge may authorize an abortion without consent to the parent if the judge determines that "the pregnant woman is mature and capable of giving informed consent," or or an abortion without notice would be in her "best interests." "Parent" is defined in subd. 3 as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living, or if the second one cannot be located through reasonable diligent effort, or the guardian or conservator if the pregnant woman has one." Subd. 5 is a penalty provision wich subjects one performing an abortion in violation of the statute to criminal penalties and civil libility. There are exceptions to the notice requirement and a severability provision.

The statute was to become effective on August 1, 1981, but enjoined on July 30, 1981 by the trial court at the request of Plaintiffs, respondents in this court, which consist six class action minors seeking abortions who claim to be mature and that notification of one or both of their paretns of their desire to have an abortion would not be in their best interests; a mother of one of the minor plaintiffs alleging that notification of the father was not in the minor's best interests; and four clinics and two physicians performing abortions in Minnesota.

---

v. Minnesota, 88-1125.

The court of appeals upheld the trial court's finding that subd. 2 was unconstitutional because an alternative to parental notification was required by precedents of this court, but that the judicial by-pass procesures were good. 853 F.2d, at 1456, citing principally *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 633-39 (1979) and *Planned Parenthood v. Ash-croft*, 462 U.S. 476, 490-93 (1983). Turning to the trial court's finding that the two-parent notification requirement was burdensome, and therefore the statute as a whole was unconstitutional, the court of appeals reversed finding that while the two-parent notification requirement was somewhat of a burden, the burden was relieved by the judicial by-pass procedures, and therefore valid. 853 F.2d at 1462. Similarly, the court of appeals rejected the trial court's finding that the 48-hour waiting period resulted in too long a wait, up to a week, by noting that most abortions are not scheduled for at least two or three days, and there was no limitations on sending the notice the same date that an abortion is scheduled. 853 F.2d 1465.

Minnesoto seeks review of that portion of the opinion invalidating subd. 2 which requires the physician to give parental notice at least 48-hours in advance without the availability of an alternative by-pass on the basis that the statute does not give the parent a veto power, it only requires notification, and therefore a judicial by-pass to obtain consent is not necessary.

SUMMARY OF ARGUMENT

1. This Court has recognized that unconstitutional conduct which has been widespread and in long use cannot stand, and that with respect to the Constitution, *stare decisis* is of less importance than in other cases, and therefore the holding of *Roe v. Wade* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. While the Preamble of the Constitution does not create

any rights, it defines for whom the rights were created - Ourselves and Our Posterity, and a construction that Posterity includes fetuses is consistent with the intent of the framers and the common law understanding that a fetus was a person in being, such that a fetus is a person in the Constitutional sense, and because this was not brought to this Court's attention in *Roe v. Wade*, *Roe v. Wade* must be overruled as unsound and contrary to the intent of the framers.

3. Because a fetus is human life and a person in the constitutional sense, and the state has a valid and legitimate right to protect human life, recognized as an international duty, and imposed as a duty in the Constitution of the United States, subdivion 2 is reasonably necessary by the state for the protection of both the mother and the fetus by insuring there exists a mechanism for compelling the report of statutory rape or incest.

Based upon the foregoing, this court should *overrule Roe v. Wade*, 410 U.S. 113 (1973) prospectively, *reverse* the decision of the Eighth Circuit at 853 F.2d 1452 as to the constitutionality of subdivsion 2 of Minnesota Statute §§ 144.343 (1987), and remand for further proceedings not inconsistent with this Court's opinion.

ARGUMENT

I

STARE DECISIS IS LESS BINDING ON THIS COURT ON CONSTITUTIONAL ISSUES EVEN IN THE FACE OF LONG STANDING AND WIDESPREAD PRACTICE

Statutes or practices inconsistent with the Constitution, however numerous, can create neither a power which the Constitution does not bestow nor furnish a construction which the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649, 691 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This court, with characteristic good grace, invalidated its own Rules of Court, in part, based on a Congressional Statute requiring attorney's to take an oath with respect to their activities before the civil war, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the Constitutionality of "separate but equal facilities, a practice in existence throughout the south for nearly 60 years, and sanctioned by this Court, this Court *overruled*, and rightfully so, *Plessy v. Ferguson*, 163 U.S. 537 (1896) in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown III*). *Accord*, *Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved once and for all, this court has not allowed the fact that some issues were not properly addressed in the courts below from ordering further argument on the omitted issues so that the continuing controversy could be settled. *Brown III*, 347 U.S., at 488-89, 496 (1953); *Brown v. Board of Ed.*, 349 U.S. 289, 294, 298 (Nature of remedy to be utilized).

Such is the case at bench. This court can judicially notice its own docket, which has been impacted by abortion cases. Similarly, it is common news that throughout the country, abortion controversy has led to disorder in the streets.[4]

This court, with the characteristic good grace it exhibited in *Garland*, should now recognize, for reasons which will become apparent hereinafter, that in *Roe v. Wade*, 410 U.S. 113 (1973) it was misled, *overrule* it prospectively,[5] and remand for

---

[4] It is not suggested that the disorder is the reason for overruling Roe. Quite the contrary, the reason is because a fetus is a person in the Constitutional sense by virtue of the term Posterity found in the Preamble. The notation of the problem is put a recognition that the problem must be resolved.

[5] The Eighth Circuit found that certain issues were moot and did not reach them. However, it is evident that Appellants were forced to concede they were foreclosed from enforcing the Statutes and regulations based on decisions relying primarily on *Roe v. Wade*. Therefore, this court should disapprove of all of those cases found at 841 F.2d, at 1364-66 which have

further proceedings in light of the fact that the fetus is, by virtue of the term Posterity, found in the Preamble of the Constitution, a person in the Constitutional sense.

II

A FETUS IS A PERSON IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THE TERM POSTERITY IN THE PREAMBLE OF THE CONSTITUTION

A. Introduction - *Roe v. Wade* Did Not Consider Posterity.

This court in *Roe v. Wade*, 410 U.S. 113 (1973), *held* that a state had no right to regulate abortions in the first trimester of pregnancy in view of the right of privacy of the mother, could provide some regulation in the second trimester, and had the right to full regulation in the third trimester. In reaching this result, the court noted that Texas had failed to demonstrate where in the Constitution the fetus was a person in the Constitutional sense. 410 U.S., at 157-59. A reading of the Petition, Response, and Briefs on the merits by the parties and *amicus* in *Roe v. Wade*, shows that the primary focus of argument was on the term person as found in the 5th and 14th Amendments of the Constitution. 75 Landmark Briefs and Arguments of the Supreme Court of the United State. The opinion itself does not address the Preamble, nor any of the terms found in the preamble.

This court has used the term "posterity" on one prior occasion, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 550 (1876), but has never before been called upon to define the term, and to, or for, whom it was intended to include.

In at least one subsequent opinion, this court has held that the right of privacy cannot be used by consenting adults in the

held that Illinois cannot enforce its statutes on the same basis, and remand for reconsideration of this Court's opinion, or outright.

privacy of their own bedroom to engaged in homosexual conduct forbidden by State Law. *Bowers v. Hardwick*, 478 U.S. 186 (1986). No reported case has ever held that a female, based on her right to privacy, can do whatever she wishes with her body, including acts of prostitution in the privacy of her own bedroom in violation of state law. *A fortiori*, if the fetus is a person in the Constitutional sense, it does not seem reasonably possible that a woman can, absent justification or excuse of taking the life of a fetus in violation of state law.

This court, just this term, *Webster v. Reproductive Health Services*, 88-605 (July 3, 1989), held that the statutes therein which withheld public funds, employees, and facilities from use in non-therapeutic abortions did not offend the Constitution. In doing so, it was noted that the decision all but wipes *Roe* off the books as an unconditional right to an abortion. Id. slip opinion, concurring Opinion of Scalia, J., p. 1.

B. While the Preamble Does not Create Rights, it does define for Whom the Rights were Created

The Preamble's true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. *United States v. Boyer*, 85 F.425 (D.C., Mo., 1898) (Quoting Mr. Justice Storey on the Constitution, Section 462). *Cf., Hockett v. State Liquor Licensing Board*, 110 N.E. 485, 91 Ohio St. 176, L.R.S. 1971B, 7. That aside, it does define for whom the constitution was created, and where sovereignty resides. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);[6] *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

C. The Constitution was Established "By The

[6] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

People"[7]

The Constitution,[8] in the Preamble, declares that "We the People" do ordain and establish this Constitution. "Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservation, 'We, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.' Here is a

[7] Recorded history first notes that a sovereign rules with the consent of the governed in I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. There, David as a youth was anointed as the successor to Jesse, his father. When his father died, he ruled over the seven tribes of Judah for seven years. At that time, when the rest of Israel were doing poorly, they noted that Judah prospered under David, so they asked that he rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. But there is nothing to indicate the right to rule was in writing. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. Thus, the *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The U.S. Constitution abolished traditional concepts of sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures. *Infra*.

[8] In the solution of constitutional questions the same rule of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. *Adams v. Storey*, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. *Wright v. United States*, 302 U.S. 583, 588 (1938); *Knowlton v. Moore*, 178 U.S. 87 (1900). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendment were adopted. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall.) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Wcat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. *United States v. Classic*, 313 U.S. 299, 316 (1941).

better recognition of popular rights than volumes of those aphorisms which make the principle figure in several of our State bills of rights and which would sound much better in a treatise of ethics than a constitution of government." Hamilton, The Federalist Papers, No. 84.; Preamble, *Amicus* Appendix, p. A8.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold power and conduct the government through their representatives. They are what we familiarly call the "sovereign people" and every citizen is one of these people, and constituent member of this sovereignty. *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857);" *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

D. The Preamble Creates Two Classes of Persons, on an Equal Footing - "Ourselves" and "Posterity"

There being no debate, and the question of the meaning "to ourselves and our Posterity" being one of first blush, we must turn to the meaning commonly understood at the time of the adoption to determine its extent and application. *Veazie Bank v. Fenno*, 75 U.S. (8 Wall) 533, 542 (1869); *Locke v. New Orleans*, 71 U.S. (4 Wall) 172 (1866); *Gibbons v. Ogden*, 22 U.S. (9 Weat.) 1, 188-189 (1824); *United States v. Harris*, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); *United States v. Block*, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852).

The phrase in question begins with the preposition "to". As so used, it marks the object for which the purposes were

[9] The 13th & 14th Amendments do not overrule this proposition. Rather, they redefine citizen (See, Article I, § 2, cl 3; § 9, cl. 1), and thus enlarge the class of persons who are citizens.

secured. Webster's Dictionary of the English Language, 1968.

"Ourselves" is a pronoun, the plural of "ourself", and when used in the objective, as here, it simply serves as the reflexive pronoun corresponding to "we" or "us". *Ibid.* "We", in this case, appears at the beginning of the preamble and is defined by the parenthetical statement immediately following "the People of the United States." "Ourselves" is therefore synonymous with "the people of the United States" and hence also "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

"And" is a particle joining words and sentences, and expressing the relations of connection or addition. Webster's, op. cit. In this case, its purpose is to add to the object for which the purposes were secured. "Our" means of, or belonging to, "us", i.e., to the speaker (in this case "We, the People of the United States), or to the speaker and the person or persons whom he speaks for or includes. It is a possessive adjective corresponding to "We", "Us"; expressing the genitive of possession; also, the objective genitive, as in "our defense", "our Maker", "our persecutors". Oxford English Dictionary, Compact Edition, 1971. (Hereinafter, OED). Its purpose is to include "Posterity" on an equal footing with, and the same rights as, "our selves" as evidenced by the parallel structure of the phrase. Therefore, "posterity" is synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

E. Posterity Was Understood At the Time of Adoption to Include All Future Generations

Posterity, as it appears in the Preamble, has not been defined by the Supreme Court, therefore we must turn to what the framer's understood it to mean at the time the constitution was adopted in 1789. *Ante*, footnote 8, and the citations therein. "Posterity", at the time of the Framers, was defined as "1. The descendants collectively of any person; all who have

proceeded from a common ancestor. 2.+.a. A later generation (with plural). obs. b. All succeeding generations (collectively)." OED, op. cit. *Accord, Breckenridge v. Denny*, 71 Ky (8 Bush.) 523. The Preamble is not concerned with an individual in particular, as in 1. Nor in the sense of 2.a, which in any event is obsolete. 2b appears to be the sense which the framers had in mind. Samuel Johnson, "Idler No. 3", p. 5, used it in that sense in 1758 when he wrote, "The Ocean and sun will last our time, and we may leave posterity to shift for themselves." It was again used in that sense by Colquhounn in Commentaries on the Thames, ix, 284 when he wrote in 1800 "They will deserve the Thanks of the Nation, and the gratitude of Posterity." OED, op. cit.

The Constitution was signed on September 17, 1787, and Congress on February 18, 1791 formally recognized that the states had ratified the Constitution and therefore it was in effect. 3 Rotunda, Treatises on Constitutional Law, pp. 663-64, note 1. Thus it may be assumed the same sense was intended. *Ante*, footnote 8, and the citations therein.

F. That a Fetus was intended as a member of Posterity is Consistent with Common Law Tradition.

The Framers used the term Posterity without qualification. In 1644, in a well known pamphlet, it was argued that Parliament can no more censure the issue of the mind than it can the issue of the womb." Milton, John, "Aeropagitica" (1644).[10] At common law, it was understood that certain members of future generations, fetuses,[11] were a life in being for the pur-

[10] Milton went on to observe that he did not believe that his remarks applied to Catholics. While this Catholic takes exception to the exception, his premise appears sound in all other respects. It may be that today he would have different feelings on the matter.

[11] That a fetal has rights was probably recognized as early as 322 BC at least. Aristotle, *Politics*, VII, 1335b, 24-26; Acquinas, *Summa Theologiæ*, 1, q. 76, a. 5 and q. 118, a. 2; Noonan, Contraception, 86-88 (Harv. U. Press,

poses of the Rule Against Perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). Moreover, prenatal injuries, were to a limited extent, recognized at Common Law. "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and death by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198.[12] And common law does not appear to have barred tort actions for prenatal injuries. *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960).

It thus appears that the framer's intended that "All succeeding generations (collectively)" include common law concepts of the rights of a fetus and to be synonymous with "citizen". *Scott v. Sanford*, *supra*, 60 U.S. (19 How.) 404; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

G. That a Fetus was intended as a member of Posterity is Consistent with the known object and Purposes of the Framers.

As the Preamble appears to confer rights upon "posterity" equal to "our selves", it is necessary to determine whether the framer's[13] intended that the rights be vested. Ante, footnote

1965). The Old Testament provided a remedy for anyone causing a miscarriage. 21 Exodus 22. It does not offend the Establishment Clause of the 1st Amendment merely because civil enforcement corresponds to the tenants of some religious beliefs. *Generally, Witters v. Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

[12] Lord Coke's rationale rested on the impossibility of determining when life began, hence there would always be reasonable doubt as to whether or not murder had been committed. Two reasons may be advanced for that. First, at common law, "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Article 54. Thus, a failure of evidence. Second, medical knowledge as to the status of a fetus was quite primitive when compared to modern medical practices.

[13] Of the 39 signers of the constitution, at least 8 were lawyers (of

8, and the cites therein. One measure of intent would be to determine whether vesting has occurred for the purpose of the rule against perpetuities. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with the powers of alienation. But such a concept would have been inconsistent with the concept of "unalienable rights" found in the Declaration of Independence[14] and the concept of an "indestructible and perpetual union." *White v. Hart*, 80 U.S. (13 Wall.) 646, 650. Therefore, the framer's must have had a different intent in mind when they used "Posterity."

If "Posterity" is to be viewed as conferring a contingent remainder to a class, then it must fail for being obnoxious to the rule against perpetuities because there would be members of the class capable of taking more than 21 years, plus the gestation period, after lives in being. Gray, The Rule Against Perpetuities (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960). But if void, then it would create a fee simple absolute in the present generation, thus, once again, frustrating the intent of the framer's in creating "unalienable rights" and a "perpetual union". Therefore,

which one studied at the Middle Temple in London England and another studied law in England), two more appear to have studies law extensively (Chs. C. Pinchkney at the Middle Temple in London, England), and two more were, or became, judges. Generally, Encyclopaedia Britannica (1971) (Comparison with signers Volume 22, p. 695, with their biographies.). Hence it is fair to assume that the framer's were not unaware of what they were doing, and how to secure that which they wished to do.

[14] American Declaration of Independence; Schwartz, The Bill of Rights, A documentary history. The Declaration states, in relevant part: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these rights, Government are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, ¶ 2.

another meaning consistent with the framer's intent must be found. *Ante*, footnote 8, and the citations therein.

Under the rule in Shelly's Case, a limitation of an estate to an ancestor for life, with the remainder to his heirs or the heirs of his body, gave the whole estate in fee to the ancestor. 31 *Corpus Juris Secundum*, Estates § 4. This rule applies only where the estate in freehold and the estate in remainder are created by the same instrument as in the Preamble. *People v. Emery*, 314 Ill. 220, 145 N.E. 349; 69 C.J.S. p. 512, note 77. Again, because this is inconsistent with the known intent of the framers, another meaning must be found. *Ante*, footnote 8, and the citations therein.

An estate tail may, under certain circumstances, be created or arise by implication. *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409; *Haward v. Howe*, 12 Gray (Mass.) 49; *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162; *Gay v. Scates*, 37 Pa 31; *Larew v. Larew*, 146 Va. 134, 135 S.E. 819. Such a situation commonly arises if a conveyance[15] or devise in fee has been made to some particular person named without issue, upon an indefinite failure of issue. In other words, whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of decent; so long as his posterity should endure, and an estate in fee or in tail is given in remainder upon an indefinite failure of issue, then the estate first created will be construed to be an estate tail, or fee tail. 28 American *Jurisprudence*, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83, 17 S.Ct. 488, 41 L.Ed. 925; *Anderson v. United Realty Co.*,

[15] The Constitution expressly concerns estates and interests in lands. See, Art. I, § 8, cl. 17 (District of Columbia; Places purchased); Art. III, § 3, cl. 2 (forfeitures); Art. IV, § 2, cl. 1 (privileges and immunities), § 3, cl. 2 (property belonging to the United States; Amendment III (Quartering of soldiers); Amend IV (Secure in their persons, houses);Amend V (nor be deprived of ... property without due process of law; nor shall private property be taken for public use without just compensation ....).

79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 164 (recognizing by *dictum* that this rule was followed at common law).

The Statute of De Donis[16] made fee tails unalienable by using the words "to A and the heirs of his body." In 1472, Taltarum's Case virtually abolished tails for most purposes. Y.B. 12 Edw. IV, Mich., fo 14 b, pl, fo 19a, 25. An estate in tail was not subject to The Rule Against Perpetuities because it was a present future interest. See, 13 Edw. I, c. 1; Y.B. 12 Edw. IV. Mich., fo 14 b, pl. 16., fo. 19a, 25. Hence it is reasonable to infer that in lieu of the common law formulation the framers chose "to ourselves and our Posterity" to effectuate their intent that the "first takers should take by inheritance in a direct line, and in a regular order and course of decent, so long as his posterity should endure". This construction would carry out and effectuate the intent of the framers that the rights conferred be "unalienable", and to create a perpetual union. *Ante*, footnote 8, and the citations therein.

II. Posterity, including a fetus, has Presently Enforceable Rights

There are three points in time when one could cross the threshold of being "our selves" (present interest) from "posterity" (Presently enforceable future interests): conception; at birth; at age of capacity. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

Implicit in the Preamble is the concept that the Constitution is to be a social contract. Eg, Hobb, Leviathan (1651); Locke, Second Treatise of Government (1690); Laqueur, The Human Rights Reader. It was submitted to the People for ratification. 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; Amicus Appendix. 3 Rotunda, op cit, p. 663, note 1. Thus it is

[16] 13 Edw. I, c. 1.

implicit that acceptance could only be by those not suffering from a disability, ie., persons with the capacity to consent. R. Edge, "Voidability of Minor's Contracts: A Feudal Doctrine in a Modern Economy," 1 G.L.Rev. 205 (1967). Viewed as a social contract, the Individual in general promises the individual in particular to secure for him inalienable rights, in return for which the individual promises to conform to the laws of the majority which do not derogate[17] from the promise of inalienable rights. Such mutual promises have always been considered sufficient consideration for enforceability. Chitty on Contracts (23rd ed, 1968) 134; Restatement of Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909.

As persons who have not reached the age of capacity[18] could not consent, Chitty, op. cit., it would appear that adults are of the class "our selves," and all others of the class "Posterity."

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a *guardian ad litem*, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he may be a part, 2 Stephens Commentaries 342 (1841), or by the State acting in *Parens patriae*. *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917, 925; 17 Halbury's Laws of England (1st ed, 1911), Infants ¶¶ 132, 135. Thus, it is clear that at common law that at least those members of

---

[17] Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law, 60 AJIL 55 (1966);*.

[18] The 22nd Amendment provides: "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2. The Congress shall have the power to enforce this article by appropriate legislation." Arguably, without this provision, any "person born in the United States or under its jurisdiction" is a citizen, and could vote regardless of age. In practice, age was regulated by the States, and it was understood to be the common law age of maturity, unless modified by the respective states. 3 Rotunda, op. cit., p. 688, Historical Note.

Posterity who were born had a presently enforceable right.

Turning to whether a fetus, as a member of Posterity, had a common law protectable interest, it appears in the affirmative. As already noted, ante p. 11 citing Lord Coke, while it is was not murder to kill a child in a mother's womb, it was still a misprision (crime)!. The unborn was a life in being for purposes of the rule against perpetuities. Gray, op.cit. Moreover, it does not appear that common law barred tort actions for prenatal injuries, *Sinkler v. Kneale*, *supra*, 164 A.2d 93, 94 (1960), which could be brought by a representative. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

It thus appears that in view of the known object and intent of the framer's that they intended to create unalienable rights and a perpetual union, knew of the common law rights of the unborn, and chose Posterity without limitation to include within the class of persons protected the unborn conceived fetus.

I. A fetus is life within the meaning of the 5th Amendment

The Constitution provides, in relevant part:

> "No person shall be, ... deprived of life ... without due process of law."

U.S. Constitution, 5th Amendment. Neither a State nor the federal government may utilize money to take life without due process of law. *Eg, Flash v. Cohen*, 392 U.S.83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Assuming, *arguendo*, that the fetus is a life, it has the right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135, to be heard on the question as to whether its life should

be terminated. *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

It would appear that a fetus has all of the characteristics of life:[19] excretion,[20] ingestion,[21] respiration,[22] irritation,[23] and reproduction.[24] A zygote (early fetus) is viable, in contradistinction to the ovum and sperm which are not.[25] Whether or not it can be ascertained at any point in time that it is human is an absurd proposition; assuming it goes to term it cannot be anything but human. The fact that the zygote is not viable extrauterine does not negate the fact of life. Life exists in an environment. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut were life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Moreover, even a fetus securely within the womb will die if there is an abruption of the placenta.[26] Finally, the courts can judicially notice the advance of science in making possible test tube pregnancies, and transfers from one womb to another, all suggesting the presence of life from conception.

The terms "ensoulment", "psych", "free will", and when they manifest themselves, are not relevant. We are concerned with Posterity, and it cannot be denied, in light of the arguments heretofore made, that Posterity includes all future generation,

---

[19] Biology: Observation & Concept by Case & Steirs (1971), p. 110.

[20] Id, pp. 122, 141, 143, 149-150;.

[21] Id, pp. 70, 80.

[22] Id, pp. 8, 51, 64, 77.

[23] Id, irritation, pp. 267, 329, 330;.

[24] Id, reproduction, pp. 122, 163-165, 298-299, 327, 329;.

[25] Id, pp. 324-327.

[26] Jacobs, Warren M. and Jacobs Mark A., MDs, Obstetrics and Gynecology, Family Health & Medical Guide (1979), page 93;.

with the conceived having a presently protectable interest. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917; 17 Halbury's Laws of England (1st ed, 1911) Infants ¶¶ 132, 135.

Therefore, the fetus is a life which may not be taken without due process of law, and a compelling, legitimate governmental interest.[27] *Generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950).

III

A STATE HAS AN INTERNATIONAL AND CONSTITUTIONAL OBLIGATION TO PROTECT HUMAN LIFE, AND THEREFORE THE REGULATIONS UNDER SCRUTINY ARE CONSTITUTIONAL

Under International Law, a State has the obligation to provide police protection of its citizens at home. Verdross, *Forbidden Treaties int'l Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens in Int'l Law*, 60 AJIL 55 (1966). The concept to protect a person from due process in A ican Jurisprudence is derived from the *Magna Carta* (1215). McKechnie,[28] *Magna Carta*; the Great Charter of King John. The 5th Amendment prohibits the taking of life without due process of law, and it is enforced and made binding against the states by the 14th Amendment. *Generally, Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

---

[27] Because a fetus is a person, the State has an interest in protecting that life, and it therefore becomes a balancing test weighing the interest of the mother against that of the fetus. It would appear then that the life of the fetus could be terminated only if it threatens the life of the mother, because other alternatives are now available such as transferring the zygote to the womb of a willing carrier or mother.

[28] McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw 1 (*Magna Carta*)(1297), p. 14, Notes, ¶ 2.

Given a state's obligation to protect it citizens at home, and to ensure life is not taken without due process of law, Ohio has a legitimate interest in providing for the protection of fetal life. It's citizens, and the citizen's of every state has an interest in insuring that there exists safeguards to insure that abortion does not become a tool for genocide. Eg, International Convention on the Prevention and Punishment of the Crime of Genocide, Congressional Digest, December 1984; U.S. Const., Art. VI, cl 2 (treaties).

This is not to say that a State may say a woman does not have any right to privacy and may never have an abortion. Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d (Quartering of soldiers), and 4th (search and seizure) Amendments; *Katz v. United States*, 389 U.S. 347 (1967), and its *progeny*. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes to do with their body if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Nonetheless, every person has the right to self defense. Foster, Crown Law 273-277 (1762); Restatement (2nd) Torts §§ 63, 64, & 65; *Brown v. United States*, 256 U.S. 335 (1921). Thus it would appear where the woman's life or health is endangered, termination of the pregnancy would be justified. But even here, there appears to be less drastic alternative means than outright abortion. This court can judicially notice, or remand for consideration, the fact that modern advances have made possible womb to womb transfers to embryos. On the same basis, this court may notice or remand the fact that there are many persons unable to conceive who would welcome such transfers.

There is another point to consider; the minor woman. As persons who have not reached the age of capacity[29] could not consent, Chitty, op. cit. If an adult does not have an absolute right to abortion, *a fortiori* neither does a minor female. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132 (1976), and *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979), relied primarily upon *Roe*. But as *Roe* stands on quicksand for *holding* that a woman has an unqualified right to abortion, those opinion are similarly flawed. *Wesbster*.

[29] See footnote 14, supra.

But even more is at stake. We are dealing with minors, and nearly every state has laws which make it statutory rape to have carnal knowledge of a female under age, or incest or child abuse if done by a family member. The courts are littered with cases where one parent or the other, have sold children into prostitution for drug money, or other reasons. How is the state to but an end to that evil crime, statutory rape, or incest, if there is no notification to anyone? It cannot, and thus the state has been hampered in its role of providing police protection of its citizens at home in the enforcement of its penal laws. All that *Bellotti II held* was that parents cannot have a veto power, and therefore alternative procedures for obtaining consent were constitutionally required. The Minnesota statute does not confer veto powers on the parent. It only requires notifica-tion so that if there is a problem, a person interested in the health and welfare of the minor can but an end to the abuse.

Based on the foregoing, Minnesota's statutes and regulations which do nothing more than to insure at the minimum that both parents have actual notice of the abortion, without involvement of the courts carries out its basic duties under International law and the U.S. Constitution. It does not absolutely bar abortions, but does insure that life is not arbitrarily taken,[30] and it furthers the state interest in

[30] Indeed, arguably Minnesota, misled no doubt by *Roe*, has not gone far enough in the protection of fetal life because it allows the taking of the fetal life without any hearing whatsoever. But that issue is not now before the court, although under *Brown I* and *Brown II*, this Court could, and probably should, consider that issue as well.

protecting expectant mothers from a potentially abuse environment in the home.

CONCLUSION

Based upon the foregoing, this court should *overrule Roe v. Wade*, 410 U.S. 113 (1973) prospectively, *reverse* the decision of the Eighth Circuit at 853 F.2d 1452 as to the constitutionality of subdivsion 2 of Minnesota Statute §§ 144.343 (1987), and remand for further proceedings not inconsistent with this Court's opinion.

Dated: August 27, 1989

Respectfully submitted,

JAMES JOSEPH LYNCH, JR.
Attorney at Law
P.O. Box 15766
Sacramento, CA 95852
(916) 448-7871

Attorney for *Amicus Curiæ*

EXCERPTS FROM

2 Farrand, Max, The Constitutional Debates*

[129]

COMMITTEE OF DETAIL, I

***

[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

1.

*****

[163]

COMMITTEE OF DETAIL, IX

*****

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday MADISON August 6

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the

same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

****

[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes -- 5; noes -- 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes --- 3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

*****

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up,

***

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

*****

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

*****

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

Thursday September 13, 1787.

****

Resolved that the preceding Constitution be laid before the United States in Congress assembled,and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification. ***

*****

[604]

***

[To postpoine the report respecting the 22nd and 23rd --- 9; noes --- 1.] Ayes

*****

To strike out the word "to" before establish justice --- 8; bites --- 2,] Ayes

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President.	
	[567]	[568]	[569]
New Hampshire	aye	aye	aye
Massachusetts	aye	aye	aye
Rhode Island	aye	aye	aye
Connecticut	aye	aye	aye
New York	aye	aye	aye
New Jersey	aye	aye	aye
Pennsylvania	aye	aye	aye
Delaware	aye	aye	aye
Maryland	aye	aye	no
Virginia	aye	aye	aye
North Carolina	aye	aye	aye
South Carolina	aye	dd	aye
Georgia	aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

*****

[643]

... --- He then moved that the Constitution be signed ...

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

*****

[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

*****

[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

(14) (16)

Nos. 88-1125 and 88-1309

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, *et al.*,
Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,
Respondents.

STATE OF MINNESOTA, *et al.*,
Cross Petitioners,

v.

JANE HODGSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

LEONARD J. PRANSCHKE
SIBYL C. BOGARDUS
PHILIP E. DRAHEIM *
DRAHEIM & PRANSCHKE
12444 Powerscourt Drive
Suite 450
St. Louis, Missouri 63131
(314) 965-6455
Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

QUESTION PRESENTED

Whether the Minnesota statute requiring a 48-hour written notice to parents of an unemancipated minor of their minor's pending abortion, without a judicial by-pass procedure, is constitutionally permissible because it protects the family right of privacy and promotes the integrity of the family.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
THE MINNESOTA STATUTE REQUIRING A 48-HOUR NOTICE TO PARENTS OF A MINOR THAT SHE INTENDS TO HAVE AN ABORTION SHOULD BE UPHELD UNDER THE CONSTITUTION. THE PARENTS' RIGHTS TO RAISE A FAMILY AND TO GUIDE THEIR CHILDREN IN ETHICAL AND MORAL DECISIONS SHOULD NOT BE VIOLATED BY COURT HOLDINGS THAT GIVE A MINOR THE RIGHT TO HAVE AN ABORTION	3
Supreme Court decisions stating that a minor has a right of privacy entitling her to an abortion free of parental authority contradict the case law precedents for *Roe v. Wade*	3
1. *Roe v. Wade*'s right of privacy analysis depends largely upon *Griswold v. Connecticut*, 381 U.S. 479 (1965), and other family privacy cases	3
2. The constitutional right of marital privacy in *Griswold* is based upon the right of privacy in raising a family	4
3. The precedents for *Griswold* established that the foundation of the family privacy right is a fundamental right of parents, not the states, to decide how to raise their children	5

TABLE OF CONTENTS—Continued

	Page
4. In defining the fundamental right of family privacy in non-abortion cases, the Court has shown a consistent respect for American tradition and history, as well as for its own precedents	8
5. The Court's holdings that minors have the right to an abortion without parental involvement clash with the accepted doctrines of the family privacy line of cases	12
6. The fundamental right of parents to direct the rearing of their children outweighs a minor's right to an abortion as a matter of sound constitutional law	16
CONCLUSION	22
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	3, 15, 22
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	17
Armstrong v. Manzo, 380 U.S. 545 (1965)	8
Bellotti v. Baird, 443 U.S. 621 (1979)	*passim*
Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970)	12
Browning v. Hoffman, 111 S.E. 492 (W. Va. 1922)	15
Cantwell v. Connecticut, 310 U.S. 500 (1940)	17
Carey v. Population Services Intern., 431 U.S. 678 (1977)	17
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	8
Commonwealth v. Nickerson, 87 Mass. (5 Allen) 518 (1862)	15
Craig v. Boren, 429 U.S. 190 (1976)	17
Eisenstadt v. Baird, 405 U.S. 438 (1972)	17
Franklyn v. Peabody, 228 N.W. 681 (Mich. 1930)	15
Ginsberg v. State of New York, 390 U.S. 629 (1968)	10
Griswold v. Connecticut, 381 U.S. 479 (1965)	*passim*
H.L. v. Matheson, 450 U.S. 398 (1981)	14, 15, 18, 22
Helvering v. Hallock, 309 U.S. 106 (1940)	12
May v. Anderson, 345 U.S. 528 (1953)	8
Meyer v. Nebraska, 262 U.S. 390 (1923)	*passim*
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	6, 13
Moss v. Rishworth, 222 S.W. 225 (Tex. Crim. App. 1920)	15
New Orleans v. Dukes, 427 U.S. 297 (1976)	16
Parham v. J.R., 442 U.S. 584 (1979)	11, 18, 21
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	*passim*
Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983)	3, 22
Planned Parenthood v. Danforth, 428 U.S. 2 (1976)	*passim*
Prince v. Massachusetts, 321 U.S. 158 (1944)	7, 11, 13
Reed v. Reed, 404 U.S. 71 (1971)	16

TABLE OF AUTHORITIES—Continued

	Page
Roe v. Wade, 410 U.S. 113 (1973)	3, 4, 12
Rogers v. Sells, 61 P.2d 1018 (Okla. 1936)	15
San Antonio Ind. School Dist. v. Rodriquez, 411 U.S. 11 (1973)	16, 17
Stanley v. Illinois, 405 U.S. 645 (1972)	11
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980)	12
Wisconsin v. Yoder, 406 U.S. 205 (1972)	*passim*
Zoski v. Gaines, 260 N.W. 99 (Mich. 1935)	15
STATUTES:	
Minn. Stat. 144.343(2) (1988)	2
MISCELLANEOUS AUTHORITIES:	
Luther, *The Large Catechism*, in *The Book of Concord* (T. Tappert ed. 1959)	19, 20
1979 Lutheran Church-Missouri Synod Resolution 3-02A "To State Position on Abortion"	21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1125

JANE HODGSON, *et al.*,
Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,
Respondents.

No. 88-1309

STATE OF MINNESOTA, *et al.*,
Cross Petitioners,

v.

JANE HODGSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

INTEREST OF AMICUS CURIAE

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the eighth largest Protestant body in the United States.

It is composed of approximately 6,200 member congregations which, in turn, have approximately 2,600,000 individual members. The Lutheran Church-Missouri Synod holds a profound belief that human life begins at conception and opposes willful abortion, except as tragically necessitated to prevent the death of the mother. The Lutheran Church-Missouri Synod believes that parents have the primary duty and right to counsel a pregnant, minor daughter on the issue of an unplanned pregnancy and to provide compassionate alternatives to abortion.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

The amicus adopts the statement of the case in the Brief for the Cross Petitioners.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents to the Court a Minnesota statute regulating the family decision-making process when a minor child chooses to have an abortion. The statute's "pure notice" provision requires a minor's physician or his agent to notify both of the minor's parents 48 hours before her planned abortion, without provision for a judicial bypass procedure. Minn. Stat. § 144.343(2) (1988).

This case is a significant opportunity for the Court to re-examine the constitutional basis for *Bellotti v. Baird*, 443 U.S. 621 (1979) (*Bellotti II*), *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and other cases which give minors the right to an abortion without the involvement of their parents. The issues in this case require the Court to consider the wisdom of granting minors a right to an abortion without family involvement, a right which directly violates the fundamental right to family privacy. By permitting a minor to have an abortion without parental involvement, the Court is interfering with the right of parents who believe religiously that it is their duty to guide and counsel their children. The Court is further contributing to the decline of the family, the traditional source of the instruction of moral values to American youth.

The Court should uphold the "pure notice" provision of the Minnesota statute based on the fundamental right of family privacy. In so doing, the Court should overturn its holdings in *Danforth*, *Bellotti II*, *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983) and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), to the extent they require state laws regulating minors' abortions to permit a bypass of parental involvement in minors' decisions to have abortions.

ARGUMENT

THE MINNESOTA STATUTE REQUIRING A 48-HOUR NOTICE TO PARENTS OF A MINOR THAT SHE INTENDS TO HAVE AN ABORTION SHOULD BE UPHELD UNDER THE CONSTITUTION. THE PARENTS' RIGHTS TO RAISE A FAMILY AND TO GUIDE THEIR CHILDREN IN ETHICAL AND MORAL DECISIONS SHOULD NOT BE VIOLATED BY COURT HOLDINGS THAT GIVE A MINOR THE RIGHT TO HAVE AN ABORTION.

Supreme Court decisions stating that a minor has a right of privacy entitling her to an abortion free of parental authority contradict the case law precedents for *Roe v. Wade*, 410 U.S. 113 (1973).

1. *Roe v. Wade's* right of privacy analysis depends largely upon *Griswold v. Connecticut*, 381 U.S. 479 (1965), and other family privacy cases.

In 1973, in *Roe v. Wade*, the Supreme Court held that under the United States Constitution a woman has a fundamental right to privacy which may include the right to an abortion. 410 U.S. 113 (1973). The Supreme

Court based its rationale in large part on *Griswold v. Connecticut*, a case involving constitutional protection of the right to family privacy. After searching for a source for the right to an abortion, the *Roe* Court relied on the right of privacy which is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action." *Id.* at 153. The Court found that the sources for the right of privacy under the fourteenth amendment existed both in the penumbras of the Bill of Rights, as held in *Griswold v. Connecticut*, and in the concept of liberty guaranteed by the first section of the fourteenth amendment, as held in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), discussed below. The Court extended the family privacy right found in these cases to justify a right to an abortion, relying on the concept that the right of personal privacy has "some extension" to activities relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Roe*, 410 U.S. at 152-153. In this manner, the right of privacy, upon which *Roe* and the subsequent minors' abortion rights cases are based, is derived from the family right of privacy established in *Griswold*, *Pierce*, and *Meyer*.

2. The constitutional right of marital privacy in *Griswold* is based upon the right of privacy in raising a family.

In 1965, the Supreme Court held in *Griswold v. Connecticut* that married people have a fundamental right of privacy which protects their use of contraceptives from state interference. 381 U.S. at 485-486. On the basis of this family right to privacy, the *Griswold* Court struck down a Connecticut statute prohibiting the use of contraceptives. *Id.* The Court declared that the statute was unconstitutional, not because it regulated sexual activity, but because the statute interfered directly in the intimate relationship of husband and wife. The Court based its

decision on the concept that the family relationship merits special protection from state interference. The Court stated in *Griswold*:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

The majority opinion in *Griswold* reveals the Court's intent to reinforce this Nation's continuing esteem for the family. The privacy right in *Griswold* is deliberately based on the right of family privacy. The Court protected the marital relationship as the very core of the family. At the time of *Griswold*, the Court had recognized the right of family privacy as a fundamental right for over forty years. As precedent for its holding, the *Griswold* Court cited the 1923 Supreme Court decision of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and its 1925 decision of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Griswold*, 381 U.S. at 481. The language of the *Griswold* opinion evidences the Court's marked concern for family integrity, legally affirming the family relationship as a noble, lasting institution deserving protection from state interference.

3. The precedents for *Griswold* establish that the foundation of the family privacy right is a fundamental right of parents, not the state, to decide how to raise their children.

Two major precedents for the fundamental privacy right relied upon in *Griswold* are *Meyer* and *Pierce*. In these cases and those following them, discussed below, the Supreme Court has consistently recognized, respected,

and protected family integrity. The constant theme found in these early family privacy cases is that the unique nature of the family entity and its fundamental right of privacy require the Court to insulate the family in a special, private realm from the dictates of the state in decisions affecting child development and rearing.

An examination of these two early cases on the fundamental right to family privacy reveals the stark contrast between the traditional constitutional protection the Court provides the family, and the Court's marked lack of reverence for the family when presented with the issue of the minor's right to an abortion.

In the first of the two major privacy cases cited in the *Griswold* opinion, *Meyer v. Nebraska*, the Court struck down a Nebraska statute which prohibited the teaching of foreign languages to students below the eighth grade level. The Court held that the statute unconstitutionally infringed upon the liberty guaranteed to families under the due process clause of the fourteenth amendment. 262 U.S. at 401-402. The Court based this holding on the family's "natural duty" to educate its children, a duty from which necessarily flows the corresponding constitutional, fundamental right of parents to make decisions and to control the upbringing of their children. *Id.* at 399. The *Meyer* Court found that the inherent value of the family to society elevates family privacy to the level of a fundamental constitutional right. *Id.* at 399-400.

Meyer introduced two major themes into the constitutional family privacy line of cases. First, by emphasizing the family's role in the development of their children as citizens, the Court stated that the inherent value of the family socialization function merits a special measure of protection. *Id.* at 399, 402. The Court's opinion said that families instill the various values that cause children to become individuals, an important quality in American society. *Id.* at 399-400; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) ("It is through

the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). In *Meyer*, the Court protected the function of the family and criticized governments that remove children from the control of their parents in attempts to produce ideal citizens. *Meyer*, 262 U.S. at 401-402.

The second major theme of *Meyer* is that state control over children conflicts with the "established doctrine" that legislative action may not arbitrarily or unreasonably interfere with man's liberty "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. While the Supreme Court recognized the state's power over children, such as the power to compel school attendance, the Court refused to permit a state to use such power when it resulted in interference with family integrity. *Id.* at 402-403.

In the second major family privacy case on which the Court relied in *Griswold*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court re-affirmed the sanctity of the family institution protected in *Meyer* and continued to apply and develop the two themes of *Meyer*. In *Pierce*, the Court first relied on *Meyer* to hold that the state's compulsory education act, requiring every child between the ages of eight and sixteen to attend public schools, unconstitutionally infringed upon and interfered with the liberty of parents "to direct the upbringing and education" of children under their control. *Pierce*, 268 U.S. at 534-535. The Court relied on the two complementary theories asserted in *Meyer*: the family has inherent value

because of the ways in which parents raise and educate their children; and the "fundamental theory of liberty" of the family excludes any general power of the state to "standardize its children." *Id.* at 535.

The *Pierce* Court restated the second theory of *Meyer* as follows: Rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. *Id.* In holding the state's compulsory education act unconstitutional, the Court asserted that decisions relating to child-rearing are not within the competency of the state. As in *Meyer*, the Court respected the fundamental right of the parents to make family decisions affecting their minor children, preferring the parents' interest above the asserted interest of society and the state: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* As in *Meyer*, the Court protected the parents' decisions from interfering state legislation based upon the fundamental right to family privacy.

4. In defining the fundamental right of family privacy in non-abortion cases, the Court has shown a consistent respect for American tradition and history, as well as for its own precedents.

The Court has applied the doctrine of family privacy in numerous cases.[1] The discussion in this Section argues that it is settled constitutional law that the parents' au-

[1] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *id.* at 495-496 (Goldberg, J., concurring); *id.* at 502-503 (White, J., concurring); *May v. Anderson*, 345 U.S. 528 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

thority within their households to direct the rearing of their children is primary and is paramount to a state's interest in regulating the relationship between parents and children. The Court has invariably protected the family from state intrusion, in the absence of abuse, neglect, or other danger to the child. As the cases reveal, the Court has consistently adhered to the parents' rights to rear their children in cases that involve issues just as sensitive as abortion and in cases in which the parents' rights arguably conflict with those of the child.

The right to family privacy developed as the Court considered a wide variety of issues involving the relationship of the state to parents and children. In general, the Court has applied the family privacy right to protect all members of the family as a discrete unit from unwarranted state interference. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that the first and fourteenth amendments prevent a state from compelling Amish parents to send their children to public school from eighth grade through age sixteen. In *Yoder*, the Court cited the *Pierce* rule: the functions of a state which relate to children, such as education, must yield to the right of parents to direct the religious upbringing and education of their children. *Id.* at 213.

The *Yoder* Court explained that tradition and precedent require the Court to protect the family's privacy from state interference, as a fundamental right. First, the Court continued to regard the family unit as a discrete entity, emphasizing the traditional esteem in which American society holds the child rearing role of the family. *Id.* at 214. In the opinion of the Court, parental direction of their children's future is a family role which has a "high place in our society." *Id.* The Court believed that the history of Western civilization showed a strong tradition of parental concern for the upbringing of their children, reflected in an enduring American tradition

that parents have the primary role as decision makers in their children's lives. *Id.* at 232.

Second, the Court respected the doctrines of its precedents which established a fundamental, due process right to family privacy. The *Yoder* Court cited *Pierce* for the proposition that the autonomy of the family is a "fundamental" concept which forms the basis of all United States government and which derives from the common law duty of parents to raise their children. *Id.* at 232-233. The Court defined this concept to include the duty and corresponding constitutional right of parents to teach their children moral standards, religious beliefs, and elements of good citizenship. *Id.* at 233. As in other family privacy cases, the Court found that this familial duty deserves constitutional protection from the state and precludes the state from standardizing children.

In *Ginsberg v. State of New York*, 390 U.S. 629 (1968), the Court favored parental rights over those of the child and upheld a statute which forbade merchants to sell obscene materials to minors. The Court held that dual state interests justified such a statute: the interest in the well-being of youth and the interest in reinforcing parental authority. *Id.* at 639-640. The Court determined that "[t]he legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639. In upholding the law, the Court emphasized that the statute did not interfere with the parental role in assessing sex-related materials and did not prevent parents from giving obscene materials to their children if they chose to do so. *Id.* As in *Meyer* and *Pierce*, the Court required state statutes regulating the relationship between parents and children to respect the inviolability of the parental right to control their children. *Id.*

The Court's decisions in family privacy cases do not recognize an absolute right to parental autonomy but rather a strong parental right of liberty to control family life, which is tempered by society's concern for the well-being of children and the need for security within organized society. The Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944), discussed this balance and upheld application of a criminal statute, a child labor law, to prevent the parent of a minor child from allowing the child to distribute religious literature on a city street.

The *Prince* case raised the competing claims of the parents' right to rear children and the state's authority to regulate, as well as the sensitive issue of freedom of religion. *Id.* at 168. The *Prince* Court stated the general constitutional standard that a state may act as parens patriae to restrict parents' control in order to guard the state's general interest in the youth's well-being. *Id.* at 168-171. *Compare Yoder*, 406 U.S. at 230 (the power of parents to make decisions for a minor is subject to limits if it appears the parents' decision will either jeopardize the health and safety of a child or potentially cause significant social harm) *and Stanley v. Illinois*, 405 U.S. 645 (1972) (states may intervene in family decisions and limit parental rights when the child's welfare or safety is endangered or when the public must be protected, if tht state cannot protect the interests adequately without intervention) *with Parham v. J.R.*, 442 U.S. 584, 624 (1979) (Stewart, J., concurring) (state intervention, whenever a parent commits a child, is not warranted because there is a rebuttable presumption that a parent is acting in the best interests of his child and because Georgia law provides that an unfit parent may be stripped of his parental authority under laws dealing with neglect and abuse of children).

5. The Court's holdings that minors have the right to an abortion without parental involvement clash with the accepted doctrines of the family privacy line of cases.

By requiring exclusion of the parents from the moral, social, and religious decision surrounding an unplanned pregnancy, the Court has created law which contradicts *Roe*'s own long-standing precedents establishing the family privacy right. The result of the Court's decisions in the minors' abortion cases is that an individual right of privacy has been held to supersede the very right from which it was derived, the right to raise a family, found in Supreme Court precedents which protect the family from state interference. Ironically, the Court has eviscerated the very precedents upon which it based *Roe*.

This destruction of the force of the family privacy right violates the doctrine that the Court must respect the themes and holdings of its precedents. Important policy considerations support a continuity and predictability in the law. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 240 (1970). Stare decisis plays an important role in orderly adjudication and serves the broad societal interests in evenhanded, consistent, and predictable application of legal rules. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). Respect for past decisions should not mean a mechanical formula of adherence to the latest decision, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), *cited in Thomas*, 448 U.S. at 241. Proper respect for the rule of stare decisis calls for a return to the doctrines of family autonomy set forth in *Pierce* and *Meyer* and followed by the Court in *Griswold*, by overruling this Court's holdings that a minor must have the right to circumvent parental involvement in her decision to have an abortion.

The tortuous reasoning in the Supreme Court cases on minors' rights to abortions evidences the Court's inability adequately to reconcile the abortion right with the fundamental rights of family privacy. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court ignored the inherent inconsistency in granting minors the right to an abortion without parental consent, in spite of a long line of constitutional cases acknowledging the parents' fundamental right to dictate their child's moral, social, and religious decisions and to affect general development of their children. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Danforth* marks the beginning of the erosion of the two long-accepted doctrines of *Meyer* and *Pierce*, that parents control their children's decisions and may do so without state interference. *Danforth* gave pregnant children the constitutional right to make decisions without their parents' involvement and contrary to their parents' wishes, thereby permitting a state to isolate a child from her parents without the state showing any harm to the child from the parents' involvement.

To reach its conclusion that a Missouri statute requiring parental consent for a minor's abortion was unconstitutional, the *Danforth* opinion first states that a wife has a constitutional right to obtain an abortion without spousal consent. Since neither the state nor any third party could veto an adult woman's abortion decision, the Court bootstrapped to finding a minor's right, reasoning that a minor must have a right to an abortion without a veto by her parent. *Danforth*, 428 U.S. at 74. The Court then held the consent statute unconstitutional, omitting any analysis of established precedents that parents have the "high duty" to direct their children in moral, social, and religious decisions. The abortion decision involves precisely the type of value judgments which

the Court traditionally and consistently has held are reserved to the parents in guiding their children. Since *Danforth*, the Court has isolated the pregnant child from the parent in what may be the single most stressful and confusing choice she must make in a lifetime. The *Danforth* decision, therefore, shows a blatant disregard for the family and the earlier family privacy decisions of the Court.

No adequate reason is found in the *Danforth* opinion for requiring the removal of a minor from parental involvement in her pregnancy decision. According to the opinion, the very existence of the minor's pregnancy had so "fractured" the family that it was fruitless for the state to attempt to enhance parental control and authority through a consent requirement. *Id.* at 75. The Court also recognized the "truism" that a minor who has exhibited the ability to become pregnant has exhibited a degree of maturity sufficient to elevate her right to an abortion above her parents' fundamental right to affect her development. *Id.* The Court later repudiated both of these "truths." *See Bellotti II*, 443 U.S. at 648 (the Court assumed that a "normal family relationship" exists when a minor child is pregnant); *H. L. v. Matheson*, 450 U.S. 398, 408 (1981) ("There is no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion."). The minor's right to an abortion, without parental consent, is not supported by any rationale in the *Danforth* opinion other than the conclusion that an adult woman has the right to decide to abort her pregnancy without her husband's consent.

The Court has continued woodenly to apply the minor's right to an abortion without parental involvement, as decided in *Danforth*, despite its own contrary precedents supporting family-made decisions. The Court has conceded that similar factors are present in the situation of a minor with an unplanned pregnancy as were present

in cases such as *Yoder* and *Pierce*: the particular vulnerability of children, the inability of children to make critical decisions in an informed and mature manner, and the importance of the guiding role of parents in the upbringing of their children. *Bellotti II*, 443 U.S. at 633-39; *see also H. L. v. Matheson*, 450 U.S. 398 (1981) (the state's interest in preventing medical, emotional, and psychological harm are significant when a pregnant girl is a minor). The Court acknowledged that the state validly may limit freedom of minors when making important affirmative choices with potentially serious consequences and that the state may impose parental notice and consent requirements on a minor's right to make important decisions. *Bellotti II*, 443 U.S. at 634, 640.[2] The Court has said that it is constitutionally permissible for a state to require minors to seek parental advice about a pregnancy. *Bellotti II*, 443 U.S. at 634, 640-641; *Akron*, 462 U.S. at 427 n.10.

In the face of these statements of precedent, the Court has ignored the state's interest in protecting parents' rights. The *Bellotti II* Court rationalized that the state must act with "particular sensitivity" when it legislates to foster parental involvement because the decision involves the "unique nature of the abortion decision" and a "constitutional right to seek an abortion." *Bellotti II*, 443 U.S. at 642. While the plurality in *Bellotti II* recog-

---

[2] The language of the Court in *Bellotti II* with respect to parental notice and consent is in accord with the general rule that the consent of the parent is necessary for an operation on a child. *Rogers v. Sells*, 61 P.2d 1018 (Okla. 1936); *Zoski v. Gaines*, 260 N.W. 99 (Mich. 1935); *Franklyn v. Peabody*, 228 N.W. 681 (Mich. 1930); *Browning v. Hoffmann*, 111 S.E. 492 (W. Va. 1922); *Moss v. Rishworth*, 222 S.W. 225 (Tex. Crim. App. 1920); *Commonwealth v. Nickerson*, 87 Mass. (5 Allen) 518 (1862); *see also Parham v. J. R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.").

nized that alternatives to abortion may be feasible and relevant to the minor's best interest, the Court concluded that *Danforth* prevented a state from requiring parental consent. *Id.* at 643.

The *Bellotti II* decision is an example of how the Court has blindly applied *Roe* and *Danforth* as precedents on the abortion issue, while ignoring the older fundamental family privacy precedents and the adverse effects of isolating a child from her parents in an important moral, social, and religious decision. The Court intrudes deeply into the family by its decisions in *Danforth* and *Bellotti II*, creating divisiveness and distrust in a most sacred, intimate relationship, and causing the precise type of interference with the family entity that the Court forbade in *Pierce*, *Meyer*, and *Yoder*.

6. The fundamental right of parents to direct the rearing of their children outweighs a minor's right to an abortion as a matter of sound constitutional law.

The irony of the Court's decisions depriving parents of involvement in their children's decisions to have abortions is increased by the realization that the Court apparently does *not* feel that a minor's right to an abortion is a *fundamental* right, yet the Court believes the minor's right must outweigh the parents' right of family privacy, which is fundamental. The Court has not stated that minors have a fundamental right to an abortion. The level of scrutiny the Court applies in the minors' abortion rights cases evidences that the Court does not feel that minors have a fundamental right to abortions.

Generally, legislation that does not interfere with a fundamental right is examined under a "rationally related" test to determine whether the legislation is constitutional. *New Orleans v. Dukes*, 427 U.S. 297 (1976); *San Antonio Ind. School Dist. v. Rodriquez*, 411 U.S. 1 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). However, in

contrast to this lowest standard of scrutiny, state legislation that encroaches upon a fundamental constitutional right is subject to strict scrutiny, the most exacting standard: the regulation may be justified only by a compelling state interest, and the law must be narrowly tailored to express only that legitimate state interest. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The state must show that its action is necessary to promote a compelling or overriding state interest. *San Antonio Ind. School Dist.*, 411 U.S. 1 (1973). A third approach, intermediate scrutiny, has been used by the Court when the statute implicates an important, but not fundamental, right. The legislation must bear a substantial relationship to an important state interest when state action affects an individual's significant interest or right. *Craig v. Boren*, 429 U.S. 190 (1976).

In *Danforth* the Court sought a "significant," as opposed to compelling, state interest behind the parental consent requirement of the statute under scrutiny, thereby implying that the right of the minor was not a fundamental right. *Danforth*, 428 U.S. at 75. The Court stated that intermediate scrutiny is the proper standard in the minors' abortion cases in *Carey v. Population Services Intern.*, 431 U.S. 678, 693 (1977). This is a less rigorous test than the "compelling state interest" test applied to restrictions on adults' fundamental privacy rights. *Carey*, 431 U.S. at 693 n.15. According to the Court, the mid-tier standard of scrutiny is appropriate when a state statute regulates minors' abortions, because the state has greater power in the regulation of children; the abortion decision requires independent decision making; and children are regarded by the law as having less capability to make these decisions. *Id.* The Court has found that a state has an "important" interest in en-

couraging a familial, rather than a judicial, resolution of a minor's pregnancy decision. *Bellotti II*, 443 U.S. at 639; *see also Matheson*, 450 U.S. at 411-413 (the state has a "significant" interest in regulating minors' abortions).

A post-*Danforth* decision which did not involve abortion signals that family privacy is still a fundamental right. *Parham v. J. R.*, 442 U.S. 584 (1979), presented to the Court the opportunity to limit the parents' right to make decisions for children and to apply generally the limits on parents the Court imposed in *Danforth*. *Parham* involved the right of parents voluntarily to commit their child to a mental health facility without a state statute imposing a pre-commitment, formalized fact-finding hearing for the child. The family privacy right was held to prevent state intrusion into a family decision because the law's concept of the family "rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 602. The Court stated that the risk of abuse

> [C]reates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.

Id. at 602-603 (citation omitted) (emphasis in original).

The Court's analysis in *Parham* demonstrates that the family privacy right is still a fundamental right. The Court should reconcile its continued deference to the family decisional right with the Court's disregard for the family when it is faced with an unplanned pregnancy.

The Court should analyze the parental notice requirement of the Minnesota statute at issue in this case with

proper respect for the traditional, fundamental right to family privacy, balancing against that right the less than fundamental right of the minor to have an abortion without parental involvement.

Upholding the "pure notice" provision of the Minnesota statute supports an important component of the time-tested fundamental right to family privacy—the fundamental right of a parent to influence the child on *all* moral, social, and religious decisions. *Yoder*, 406 U.S. at 232. The abortion decision is a moral, social, and religious decision. When a minor faces an unplanned pregnancy, the parents should have the right to discuss the moral, social, and religious implications of the decision with their daughter. A family with a pregnant minor is still a family; the value of the family unit is as high as before the child's pregnancy; and parents have a deep interest in discussing the pregnancy with their child. If anything, the sensitive nature of an unplanned pregnancy requires increased protection of the parents' important right to counsel their child. A holding that the Minnesota statute's "pure notice" provision is constitutional will serve to strengthen the family unit and the traditional American value of parental authority within it.

The Lutheran Church-Missouri Synod believes parents have a God-given right and responsibility to be the primary shapers of their children's values and morals. Dr. Martin Luther clearly enunciated this principle in *The Large Catechism*, written in 1529. The Lutheran Church-Missouri Synod and virtually all Lutheran churches in the world still regard *The Large Catechism* as an official and binding doctrinal statement.

Lutherans believe that "God has exalted this estate of parents above all others; indeed, He has appointed it to be His representative on earth." Luther, *The Large Catechism*, in *The Book of Concord* 382 (T. Tappert ed.

1959). Parents "occupy the place of God," *id.* at 389, who "has created and ordained them to be our parents." *Id.* at 380. Moreover, God has appointed and commanded obedience to father and mother "next to obedience to His own majesty"; for that reason, "nothing ought to be considered more important than the will and word of our parents, provided that these, too, are subordinated to obedience toward God." *Id.* at 381. "Out of the authority of parents all other authority is derived," including that of schools, households, and civil government. *Id.* at 384ff. With such authority goes the parental responsibility to "earnestly and faithfully discharge the duties of their office, not only to provide for the material support of their children . . . but to bring them up to the praise and honor of God"; this is a "strict commandment and injunction of God, who holds you accountable for it." *Id.* at 388. Accordingly, "we must spare no effort, time, and expense in teaching and educating our children to serve God and mankind," for it is a parent's chief duty, "on pain of losing divine grace, to bring up his children in the fear and knowledge of God." *Id.* at 380.

Because parents are charged with the responsibility of training their children in the moral values of the Christian faith, statutes permitting children to bypass parents in reaching the important moral decision of what to do about an unplanned pregnancy deprive parents of that right and responsibility, thereby directly interfering in the practice of an important religious belief.

Interference by the state in family decisions concerning abortion violates another important religious belief—that abortion itself, except as necessary to save the life of the mother, is contrary to the will of God and, therefore, is not a moral option. The sanctity of human life from conception and opposition to abortion are sincere and deeply held religious beliefs of The Lutheran Church-Missouri Synod. The Synod has, throughout its history, opposed abortion and has adopted official positions in its

conventions since 1971, condemning willful abortion as contrary to the will of God. Its convention resolution, "To State Position on Abortion" adopted in 1979, states that based upon Scripture, "the living but unborn are persons in the sight of God from the time of conception"; that "as persons the unborn stand under the full protection of God's own prohibition against murder"; and that abortion is not a moral option, except as tragically necessitated by medical procedures applied to prevent the death of the mother. *See* 1979 Lutheran Church-Missouri Synod Resolution 3-02A "To State Position on Abortion," Appendix 1a.

Adherence to the prior holdings of this Court that a judicial bypass procedure must be included in parental notice and consent statutes regulating minors' abortions results in undermining the fundamental family right of privacy, a right which includes the parents' right to affect their child's religious, moral, and medical decisions. The judicial bypass inserts the state, through the court system, directly between the parent and child, destroying all hope that parents can talk to the child about her pregnancy and thus exercise their religious beliefs and fundamental right of family privacy.

Such state intervention is not justified, and by requiring it, the Court violates the general standard the Court established in *Prince* and *Yoder*, that the state may intrude on the privacy of a family only to protect a child from harm. The Court should not continue to mandate such a violation of a fundamental right, because of some possibility of an undefined harm to the minor when the parents learn of the pregnancy. If the Court requires the Minnesota "pure notice" statute to include a judicial bypass provision, the Court will contradict the traditional assumption that parents act in their child's best interests and that each family is a healthy, well-functioning family. *Parham*, 442 U.S. at 604. The Court should not ignore such a time-honored American belief.

The Court should hold the "pure notice" section of the Minnesota statute constitutional, based upon the fundamental right of privacy of the family which, on balance, is paramount to any non-fundamental right of a minor to have an abortion. In doing so, the Court should overturn its earlier holdings in *Danforth*, *Bellotti II*, *Akron*, *Ashcroft*, and *Matheson*, requiring state laws to have judicial bypass procedures as alternatives to parental involvement in minors' abortion decisions.

CONCLUSION

The Lutheran Church-Missouri Synod believes that this Court should end its participation in the current trend toward erosion of the parents' authority over their children and disintegration of the traditional American family. It asks this Court to reverse the United States Court of Appeals for the Eighth Circuit by upholding the constitutionality of the Minnesota statute requiring prior notice to a minor child's parents of her intention to have an abortion, without requiring the statute to include a judicial bypass procedure.

Respectfully submitted,

LEONARD J. PRANSCHKE
SIBYL C. BOGARDUS
PHILIP E. DRAHEIM *
DRAHEIM & PRANSCHKE
12444 Powerscourt Drive
Suite 450
St. Louis, Missouri 63131
(314) 965-6455
Attorneys for Amicus Curiae

* Counsel of Record

APPENDIX

TO STATE POSITION ON ABORTION

RESOLUTION 3-02A

Overtures 3-20A-3-23 (*CW*, pp. 97-99)

WHEREAS, The Lutheran Church-Missouri Synod throughout its history has opposed abortion and since 1971 has spoken in convention to condemn "willful abortion as contrary to the will of God"; and

WHEREAS, We as members of Christian congregations have the obligation to protest this heinous crime against the will of God legally sanctioned in the United States and other lands; and

WHEREAS, The practice of abortion, its promotion, and legal acceptance are destructive of the moral consciousness and character of the people of any nation; therefore be it

Resolved, That The Lutheran Church-Missouri Synod in convention urgently call upon Christians—

1. To hold firmly to the clear Biblical truths that (a) the living but unborn are persons in the sight of God from the time of conception (Job 10:9-11; Ps. 51:5; 139:13-17; Jer. 1:5; Luke 1:41-44); (b) as persons the unborn stand under the full protection of God's own prohibition against murder (Gen. 9:6; Ex. 20:13; Num. 35:33; Acts 7:19; I John 3:15); and (c) since abortion takes a human life, abortion is not a moral option, except as a tragically unavoidable byproduct of medical procedures necessary to prevent the death of another human being, viz., the mother; and

2. To speak and act as responsible citizens on behalf of the living but unborn in the civic and political arena to secure for these defenseless persons due protection under the law; and

3. To offer as an alternative to abortion supportive understanding, compassion, and help to the expectant parent(s) and family, and to foster concern for unwanted babies, encouraging Lutheran agencies and families to open hearts and homes to their need for life in a family; and be it further

Resolved, That the Synod earnestly encourage its pastors, teachers, officers, and boards—

1. To warn publicly and privately (Prov. 31:8-9) against the sin of abortion;

2. To instruct the community of God that abortion is not in the realm of Christian liberty, private choice, personal opinion, or political preference;

3. To nurture a deep reverence and gratitude for God's gracious gift of human life;

4. To oppose in a responsible way attitudes and policies in congregations, schools, hospitals, Lutheran social service agencies, and other institutions within their sphere of influence and work which suggest that abortion is a matter of personal choice;

5. To support the efforts of responsible pro-life groups in their communities, e.g., "Lutherans for Life" (CTCR Report, *CW*, p. 74);

6. To promote clear instruction of Christian morality in homes, schools, and churches of the Synod, showing the blessings and safeguards inherent in God's will for sexual chastity before marriage and faithfulness in marriage;

7. To teach within our Lutheran schools and churches the biological, social, and parental functions of childbearing; and

8. To support the efforts to secure the human life amendment to the United States Constitution.

Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO. 88-1125 and NO. 88-1309

HODGSON, et al.,

Petitioners,

v.

MINNESOTA, et al.,

Respondents.

MINNESOTA, et al.,

Cross-Petitioners,

v.

HODGSON, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF MEMBERS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, AS AMICI CURIAE IN SUPPORT OF THE STATE OF MINNESOTA

*Maura K. Quinlan
Philip J. Murren
BALL, SKELLY, MURREN & CONNELL
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Counsel for Amici Curiae
**Counsel of Record*

September 29, 1989

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. MINNESOTA'S PARENTAL NOTICE STATUTE IS CONSTITUTIONAL UNDER *ROE V. WADE* AND SUBSEQUENT DECISIONS OF THIS COURT	3
A. This Court Has Not Held That States Must Provide a Judicial Alternative to Parental Notice	3
B. A Requirement of Parental Notice is Constitutional Because it Does Not Constitute an "Undue Burden" on Abortion and is Rationally Related to Legitimate State Interests	5
C. Assuming, *Arguendo*, That a Requirement of Parental Notice Does Constitute an "Undue Burden" on Abortion, Thereby Triggering Heightened Scrutiny, the Statute is Still Constitutional Because it is Reasonably Related to Compelling State Interests	7
II. THE COURT SHOULD REEXAMINE *ROE V. WADE* AND OVERRULE IT	14
CONCLUSION	18
APPENDIX A	A-1

TABLE OF AUTHORITIES

Cases: Page

A.C.O.G. v. Thornburgh, 656 F.Supp. 879 (E.D.Pa. 1987) 1

A.C.O.G. v. Thornburgh, 737 F.2d 283 (3d Cir. 1984) .. 17

Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)..... 4, 8, 9, 15

Bellotti v. Baird, 443 U.S. 622 (1979) 1, 4, 7, 10, 12

Black & White Taxicab and Transfer Co. v. Brown & Yellow Taxicab and Transfer Co., 276 U.S. 518 (1928)..... 18

Danforth v. Rodgers, 414 U.S. 1035 (1973)..... 14

Doe v. Bolton, 410 U.S. 172 (1973) 17

H.B. v. Wilkinson, 639 F.Supp. 952 (D.Utah 1986) 14

H.L. v. Matheson, 450 U.S. 398 (1981) 5, 7, 12, 13

Hartigan v. Zbaraz, 484 U.S. 171, 98 L.Ed.2d 478 (1987)..... 5, 7

Hodgson v. Minnesota, 853 F.2d 1452, 1455 (8th Cir. 1988) 3

Hodgson v. Minnesota, 648 F.Supp. 756 (D.Minn. 1986). 13

Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983). 4, 9, 13

Planned Parenthood v. Casey, 686 F.Supp. 1089 (E.D.Pa. 1988) 2

Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 6, 12

Preston v. Thermalito School District, et al., No. 89930 (Butte County, California Superior Court filed Mar. 24, 1986, refiled Dec. 15, 1986) 11

Roe v. Wade, 410 U.S. 113 (1973)..... *passim*

Swift v. Tyson, 16 Pet. 1 (1842) 17, 18

Thornburgh v. A.C.O.G., 476 U.S. 744 (1986) . 1, 5, 6, 8, 15

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

Webster v. Reproductive Health Services, 492 U.S. ___, 106 L.Ed.2d 410 (1989)..... 14, 15

Statutes:

Minn. Stat. §144.343..... 3

Other Sources:

Centers for Disease Control: Abortion Surveillance 1981, (1985)..... 16, 17

Gardner, Scherier & Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, American Psychologist (June, 1989) 7

Nathanson, *Aborting America* (1979) 16

Torres & Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169 (1988). 17

INTEREST OF THE AMICI CURIAE

Amici are members of the Pennsylvania General Assembly whose names are listed in Appendix A hereto attached. They represent members of both the House and Senate and both the Democratic and Republican parties. Pennsylvania is one of many states which have relied on the sincerity of this Court's statements in *Roe v. Wade,* 410 U.S. 113 (1973), that the right to abortion, as recognized therein, is not absolute and that the states may regulate abortion in a manner which furthers their important and legitimate interests.

In keeping with its duty to protect innocent life and preserve maternal health, the General Assembly has grappled with the abortion issue for the past sixteen years. It has been difficult, however, for the General Assembly to comply with the rulings of this Court regarding abortion, given the inherent uncertainty regarding the contours of *Roe* under its existing trimester framework. It also has been distressing to see the General Assembly's motives for regulating abortion challenged when it has consistently attempted to comply with this Court's own prior rulings. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 744, 764 (1986).

In 1982, Pennsylvania enacted a law requiring parental consent or judicial authorization prior to the performance of an abortion upon a minor child. This law was crafted to comply with this Court's decision in *Bellotti v. Baird,* 443 U.S. 622 (1979)(Bellotti II). However, its enforcement was enjoined prior to its operation on the ground that it did not expressly protect the confidentiality of the judicial proceedings. *A.C.O.G. v. Thornburgh,* 656 F.Supp. 879, 889 (E.D.Pa.1987). The General Assembly, in 1988, enacted even more explicit language governing the judicial bypass proceedings. That statute, like its predecessor, specifically provides that all court proceedings "shall be confidential" and, in addition, provides that the court which conducts the judicial proceedings "shall order a sealed record of the pleadings, submissions, transcripts, exhibits, orders, evidence and any other written material to be maintained." Despite this express language, the district court also

enjoined enforcement of the new law; holding that it did not guarantee absolute confidentiality since "[t]here is no assurance that the minor's petition will be sealed from the moment it is filed." *Planned Parenthood v. Casey,* 686 F. Supp. 1089 (E.D.Pa.1988). *Amici* have a substantial interest in preventing such overly technical and rigid approaches by the lower courts from frustrating the legitimate efforts of the Pennsylvania General Assembly to regulate in this area.

Amici, representing large constituencies in Pennsylvania, also urge the Court to reexamine *Roe* and to overrule it so that states may have greater flexibility in providing additional protections for pregnant women, pregnant minors, and unborn children. A right, on the part of states, must be recognized to deal with those interests according to values inherent in the fabric and traditions of American constitutional law.

SUMMARY OF THE ARGUMENT

Minnesota law requires, with certain exceptions, that both parents of a pregnant minor be notified 48 hours prior to the performance of an abortion on their daughter. The Eighth Circuit Court of Appeals held that prior decisions of this Court required that Minnesota also provide for a judicial procedure whereby the minor could avoid notification if she were found to be mature or that an abortion was in her best interest. No prior decision of this Court, however, requires a state to provide a judicial alternative to parental notice. Moreover, when reviewed under the standards set forth in *Roe* and subsequent decisions, Minnesota's statute is constitutional.

Amici respectfully urge this Court to determine and announce the proper benchmark by which statutes regulating abortion should be judged so that state legislatures may be guided by a clearly enunciated constitutional standard when carrying out their duty to enact legislation in this sensitive and difficult area. *Amici* believe this would best be accomplished by reexamination and overruling of *Roe v. Wade.*

ARGUMENT

I. MINNESOTA'S PARENTAL NOTICE STATUTE IS CONSTITUTIONAL UNDER *ROE v. WADE* AND SUBSEQUENT DECISIONS OF THIS COURT.

Minnesota's law requires that both parents of a pregnant minor be notified 48 hours prior to the performance of an abortion upon her unless: (1) one of the parents cannot be located through reasonably diligent efforts; (2) a medical emergency exists and there is insufficient time to provide the required notice; (3) the written consent of the parties required to be notified already has been provided; or (4) the pregnant minor declares that she is the victim of sexual abuse, neglect, or physical abuse and has notified the proper authorities of that fact. Minn.Stat. §144.343. Believing itself to be bound by prior decisions of this Court, the Eighth Circuit held that Minnesota could not require such notice unless it also provided for a judicial procedure whereby the pregnant minor could avoid notification altogether if she were found to be mature or that an abortion was in her best interest. *Hodgson v. Minnesota,* 853 F.2d 1452, 1456-57 (8th Cir. 1988).

No prior decision of this Court, however, has held that a judicial alternative is required in the context of a parental notice requirement. Thus, that question remains open. Moreover, a requirement of parental notice does not constitute an undue burden on abortion and is rationally related to the state's legitimate interests in protecting the fundamental right of parents to direct the upbringing of their children and in protecting their children from making imprudent decisions involving serious and irreversible consequences. Indeed, even if a requirement of parental notice were considered to constitute an "undue burden," it would be constitutional because it reasonably relates to the state's compelling interests in protecting parental rights, minor children and unborn children.

A. This Court has not Held that States Must Provide a Judicial Alternative to Parental Notice.

A majority of this Court has held that the "relevant legal standards with respect to parental-*consent* requirements are not in dispute." *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 490 (1983) (emphasis added). A state wishing to require parental consent prior to the performance of an abortion on a minor also "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439-440 (1983).[1]

A majority of this Court, however, has never held that a law requiring parental notice must also provide a judicial alternative to notice. The statutes at issue in *Bellotti II*, *Akron*, and *Ashcroft* all involved parental *consent*, where a veto power was given to parents, rather than parental notice which provides for no such veto power.[2] Indeed, the Court specifically noted in both *Akron* and *Ashcroft* that parental notice provisions were not at issue.[3]

---

1. *Amici* recognize that prior decisions of the Court hold that parental consent requirements are invalid without a bypass procedure. However, they note that a majority of the present Court has never adopted that position. Given that the cases relied upon by plaintiffs throughout this litigation involved parental consent and the standards articulated in that context, it would be appropriate for this Court to reevaluate the continuing validity of such decisions. If a minor has no constitutional right to obtain an abortion without parental consent, she surely has no right to do so without parental notification.

2. Although much of the plurality opinion of Justice Powell in *Bellotti II* appears to equate notice and consent provisions, it is clear that a majority of that Court did not hold that notice and consent were equivalent. *See*, 443 U.S. at 654 n.1 (Stevens, J., concurring in judgment, joined by Brennan, Marshall and Blackmun, JJ.) ("Neither *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute veto.") *Id.* at 651-52 (Rehnquist, J., concurring); *Id.* at 656-57 (White, J., dissenting) (continuing to hold his views expressed in Danforth).

3. In *Akron*, the Court stated: "The Court of Appeals upheld §1870.05(A)'s notification requirement . . . . The validity of this ruling has not been challenged in this Court." 462 U.S. at 439 n.29 (citation omitted). *See also, Akron*, 462 U.S. at 469 n.12 (O'Connor, J., dissenting). Also, in *Ashcroft*,

H.L. v. Matheson, 450 U.S. 398 (1981), was the only case in which the constitutionality of a statute requiring parental notice rather than consent was before the full Court.[4] In that case, the Court expressly declined to rule on the question of whether a judicial alternative is necessary in the context of parental notice.[5]

Since no decision of the Court has held that a judicial alternative to parental notice is constitutionally mandated, that question remains open.

B. A Requirement of Parental Notice is Constitutional Because it Does Not Constitute an "Undue Burden" on Abortion and is Rationally Related to Legitimate State Interests.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), Justice O'Connor restated the standard under which abortion laws should be reviewed:

> Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to

---

the Court stated: "The lower courts found that §188.028's notice requirement was unconstitutional. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, §188.028 contains no requirement for parental notification." 462 U.S. at 491 n.17 (citations omitted).

4. Although *Hartigan v. Zbaraz*, 484 U.S. 171, 98 L.Ed.2d 478 (1987) involved the Illinois parental notice statute, the Court only affirmed the judgment below by an equally divided vote.

5. "Members of the particular class now before us in this case have no constitutional right to notify a court in lieu of notifying their parents. This case does not require us to decide in what circumstances a state must provide alternatives to parental notification." 450 U.S. at 413, n.22 (citation omitted). *See also, Matheson*, 450 U.S. at 414 (Powell, J., concurring) ("I join the opinion of the Court on the understanding that it *leaves open* the question whether §76-7-304(2) unconstitutionally burdens the right of a mature minor or a minor whose best interest would not be served by parental notification.") (emphasis added); *Id.* at 420-421 (Stevens, J., concurring) (Court should have addressed the question of whether a State may require notification of all minor women regardless of their maturity and should have held that it may require such notice).

> legitimate purposes such as the advancement of [the state's] compelling interest . . . An undue burden will generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree."

Thornburgh, 476 U.S. at 828 (internal citations omitted).

There is a fundamental difference between a statute which requires parental consent prior to the performance of an abortion on a minor and one which requires only that parents be notified prior to the abortion. This Court has viewed a requirement of consent as granting to parents "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Planned Parenthood v. Danforth,* 428 U.S. at 74.[6] In contrast, a notice requirement grants no veto power to the parents whatsoever. Regardless of her parents' wishes, the minor may obtain an abortion once her parents have been notified. Thus, a requirement of parental notice does not involve an "absolute obstacle" to or even a "severe limitation" on abortion. Accordingly, it does not constitute an "undue burden."[7]

Since a requirement of parental notice does not constitute an "undue burden," it need only rationally relate to the state's legitimate interests. Minnesota has a legitimate and compelling interest in protecting the rights of parents to counsel their children on important decisions and in protecting minors "who often lack the ability to make fully informed choices that take account of both immediate and long-range consequences [of

6. Justice Stevens, however, argued persuasively in *Danforth* that a parental consent requirement is justified by the state's compelling interests. 428 U.S. at 102-105 (Stevens, J., dissenting).

7. The fact that the Minnesota law requires a 48-hour waiting period does not alter this conclusion. The waiting period is designed to allow parents some meaningful opportunity to consult with their daughters and merely postpones the effectuation of the minor's decision. Should the parents disagree with a decision to abort, they cannot prevent the minor from obtaining an abortion by withholding their consent. Rather, at the conclusion of the waiting period, the minor may effectuate her decision despite her parents wishes.

their decisions]," from making imprudent decisions without the benefit of their parents' guidance. *Bellotti II,* 443 U.S. at 640. *See also, Matheson,* 450 U.S. at 421 (Stevens, J., concurring) (the state's interest is "fundamental and substantial.") Requiring that parents be notified prior to the performance of an abortion upon their minor daughter and affording them an opportunity to consult with her and advise her regarding the wisdom of undergoing an abortion certainly furthers both of the state's interests.

Plaintiffs argue that there is no need for parental notice laws and that such laws are not rationally related to the state's interest in assuring that a wise decision is made regarding the desirability of abortion. They base this claim, in part, upon expert testimony from their witnesses, that by age 14 minors are indistinguishable from adults in their capacity to make personal decisions. Aside from the fact that such an assertion conflicts with common sense and experience, it has been soundly criticized in technical journals as overstating the premise. *See* Gardner, Scherier & Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights,* American Psychologist, 895-902 (June, 1989) (criticizing assertions of "fact" regarding equivalence of decision-making skills of children and adults in briefs filed in this Court in *Hartigan v. Zbaraz).*

Indeed, much of the plaintiffs' expert testimony regarding the maturity of minors to make the abortion decision without parental involvement reflects a pro-abortion mentality – starting from the premise that a decision to undergo an abortion evidences maturity and that, *a fortiori,* a minor who desires an abortion is mature. States must not be restricted to legislating in a manner which relies upon such biased assumptions and "facts" which are largely unprovable.

C. Assuming, *Arguendo,* that a Requirement of Parental Notice Does Constitute an "Undue Burden" on Abortion, Thereby Triggering Heightened Scrutiny, the Statute is Still Constitutional Because it is Reasonably Related to Compelling State Interests.

Heightened judicial scrutiny of state abortion regulations is, as Justice O'Connor stated:

> . . . reserved for instances in which the state has imposed an "undue burden" on the abortion decision . . . And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes "necessary to apply an exacting standard of review," the possibility remains that the statute will withstand the stricter scrutiny.

Thornburgh, 476 U.S. at 828, O'Connor, J., dissenting.

The "stricter scrutiny" applied by this Court in abortion cases, however, does not encompass the "narrowly drawn" test traditionally applied to statutes involving fundamental rights. As Justice O'Connor noted in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be "narrowly drawn" to express only the relevant state interest. In *Roe*, the Court mentioned "narrowly drawn" legislative enactments, 410 U.S. at 155, but the Court never actually adopted this standard in the *Roe* analysis. In its decision today, the Court fully endorses the *Roe* requirement that a burdensome health regulation, or as the Court appears to call it, a "significant obstacle," (citation omitted) be "reasonably related" to the state's compelling interest.

Akron, 462 U.S. 416, 467-468, n.11.[8]

8. The *Roe* Court noted that "[w]here *certain* 'fundamental rights' are involved, the Court has held that regulation limiting those rights may be justified only by a 'compelling interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155 (citations omitted) (emphasis added). Although this passage of *Roe* is often quoted as the appropriate standard of review for abortion legislation, the Roe Court clearly did not adopt the "narrowly drawn" part of that test. The above comment was made in the context of a review of the Court's approach previously taken toward various privacy interests—*i.e.*, marital intimacy, marriage and contraceptives. After tracing the manner in which fundamental rights grounded in privacy traditionally had been reviewed, the Court stated that the fundamental right of privacy as it concerned abortion was inherently different from those other fundamental rights. *Id.* at 159.

This "reasonableness" test was relied upon by the Court throughout its 1983 decisions. For example, in *Akron*, the Court stated:

> [T]he state "may regulate the abortion procedure to the extent that the regulation *reasonably relates* to the preservation and protection of maternal health." Roe, 410 U.S. at 163.

462 U.S. at 430-431 (emphasis added). Again, in *Ashcroft*, the Court upheld the Missouri statute requiring that a second physician be present during post-viable abortions because it "reasonably further[ed] the State's compelling interest in protecting the lives of viable fetuses." 462 U.S. at 486.[9]

The test ultimately adopted in *Roe* was an intermediate one which reflects the differences, noted by the Court, between the right of privacy as it concerns abortion and that right as it concerns other fundamental interests which do not involve "potential life." After noting that the state's interest in maternal health becomes compelling at approximately the end of the first trimester, the Court held that states could regulate abortions after that stage in pregnancy in a manner that "*reasonably relates* to the preservation of maternal health." *Roe*, 410 U.S. at 163 (emphasis added).

9. The Court upheld this requirement even for abortions performed by dismemberment (D&E) when there was no possibility of fetal survival. Justice Blackmun, in dissent, felt that the Court's relaxed and flexible approach was an unjustified departure from "narrowly drawn" standards applied in other privacy areas. Thus he stated:

> When a D&E abortion is performed, the second physician can do nothing that furthers the state's compelling interest in protecting potential life. His presence is superfluous . . . . Because the statute is not tailored to protect the state's legitimate interest, I would hold it invalid.

Id. at 500. A majority of the *Ashcroft* Court, however, rejected Justice Blackmun's reasoning and his application of a narrowly drawn approach to such legislation. Instead, it applied the reasonableness test adopted in *Roe* and reaffirmed in *Akron*.

> [T]he state's compelling interest in protecting the viable fetus justifies the second physician requirement even though there may be the rare case when a physician may think honestly that D&E is required for the mother's health. *Legislation need not accommodate every conceivable contingency.*

Id. at 484 n.7 (emphasis added).

Moreover, it is clear that the "narrowly drawn" test has not been applied in the context of statutes requiring parental involvement. For example, in *Bellotti II,* Justice Powell stated:

> As [the Massachusetts law] provides for involvement of the state superior court in minors' abortion decisions, we discuss the alternative procedure described in this text in terms of judicial proceedings. We do not suggest, however, that a state choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or office. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.

443 U.S. at 643, n.22. Certainly, employment of "procedures and a forum less formal than those associated with a court of general jurisdiction" would be less restrictive than requiring minors to pursue a judicial alternative to parental consent. Although the Court recognized that such less restrictive alternatives were available, it held that the states could impose the more burdensome requirement of proceeding in a court of general jurisdiction.

Thus, plaintiffs' claim that a "parental involvement requirement, with or without a judicial bypass system, cannot be sustained unless the state is able to prove that the statute is necessary, narrowly tailored, and actually serving state interests previously recognized as significant or compelling" (Petition for Certiorari at 9 n.15) is unsupported by this Court's prior decisions and must be rejected.

Assuming, *arguendo,* that a requirement of parental notice does constitute an "undue burden," it is still constitutional under the above standerds. Parents have a fundamental constitutional right to direct the upbringing of their children. *Bellotti II,* 443 U.S. at 637-639. It is virtually impossible for them to exercise this right and fulfill their responsibilities regarding the upbringing of their children when those children are spirited away and convinced to have abortions without notifying their

parents.[10] To hold that the Constitution requires a judicial alternative to parental notice would effectively nullify the fundamental right of parents to have a guiding role in the upbringing of their children. At a minimum, parents have a right to be notified when their children are in stressful circumstances, faced with decisions having irreversible and grave consequences, and to offer them advice and guidance. Thus, the parental notice law furthers the state's compelling interest in protecting parental rights.

The state also has a compelling interest in protecting pregnant minors from the consequences of an incorrect abortion decision. As has been noted several times by members of the Court:

> There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional distress, may be ill equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and

10. A California case is illustrative of this concern. In *Preston v. Thermalito School District, et al.,* No. 89930 (Butte County, California Superior Court filed Mar. 24, 1986, refiled Dec. 15, 1986), a junior high school teacher, through a course of deceptive conduct, arranged for an abortion for a 14 year old immature and unemancipated minor student without notifying the child's parents, despite the fact that the mother had personally visited the school principal to request that she, through a system of "daily reports," be kept apprised of all matters relating to her daughter.

The facts allege that despite the mother's explicit plea to be so informed, the daily reports were manipulated by the school in an effort to conceal the fact that the minor had been excused from school on several occasions relative to the abortion. In addition, the teacher sent the mother a note seeking permission for the girl to babysit at the teacher's home, when in fact the teacher planned to transport the minor to have the abortion.

The girl's mother did not learn of the deception and the abortion until four days later when summoned to the hospital emergency room where her minor daughter was undergoing emergency surgery for post-abortion complications.

> support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Danforth, 428 U.S. at 91 (Stewart, J., concurring) (footnote omitted); *Bellotti II*, 443 U.S. at 621-22 (Powell, J.,).

It remains true that the vast majority of minors obtain abortions in clinics where they are counseled, if at all, by those who do not know them and, thus, have no reliable way of judging what is in their best interest. In addition, the fact that the salaries of clinic "counselors" are paid by the abortion clinic which profits when they convince a minor to have an abortion hardly ensures that they will be provided unbiased information.

Moreover, it is quite possible that many teenagers will misjudge their parents' reactions. As Justice Stevens noted in *Matheson*:

> If there is no parental-[notice] requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-[notice] requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision.

450 U.S. at 423-424. Also, as Justice Stevens aptly noted:

> The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.

Id. at 424.

Thus, states should not be forced to provide a bypass procedure to the notification requirement. The record in this case shows that some Minnesota judges simply "rubber stamp" petitions of minors utilizing the bypass procedure. *Hodgson v. Minnesota*, 648 F.Supp. 756 (D.Minn.1986). Contrary to plaintiffs' assertions, however, this fact does not indicate that parental notice laws serve no purpose. Instead, it demonstrates only that the states are prevented from adequately furthering their interests in preserving parental rights and protecting minor children when they are required to provide "rubber-stamp" bypass procedures.

The Minnesota law reasonably relates to the State's interest in protecting pregnant minors by assuring that those who are most likely to have the minor's best interests in mind—her parents—are given the opportunity to provide her advice. This protects the pregnant minor from being left to rely on whatever information biased and unfamiliar clinic personnel wish to provide.

Finally, the State has a legitimate and compelling interest in protecting fetal life which exists throughout pregnancy. *Ashcroft*, 462 U.S. at 505 (O'Connor, J., dissenting). The state also has a compelling interest in preventing teen pregnancy—a problem of seemingly runaway proportion. Prior to enforcement of the Minnesota parental notice law, the number of teen pregnancies and abortions had been steadily increasing. After the law became effective, both the teen abortion rate and teen pregnancy rate dropped substantially.[11] Thus, the Minnesota

---

11. In Minnesota, between 1980 (the last full year prior to enforcement of the parental notice law) and 1984, (a time during which the law was in effect), the number of abortions for teenagers under the age of 18 dropped from 2,327 to 1,395—a decline of 40.1%— and the decline in the abortion rate

law has also furthered these state interests.

II. THE COURT SHOULD REEXAMINE *ROE V. WADE* AND OVERRULE IT.

In *Webster v. Reproductive Health Service,* five Justices of this Court expressed the view that *Roe's* trimester framework is "unworkable," "flawed," and "problematic." 106 L.Ed.2d at 435-36 (Rehnquist, C.J., joined by Kennedy, J. and White, J.); *Id.* at 443 (O'Connor, J., concurring); *Id.* at 445 (Scalia, J., concurring). However, only Justice Scalia stated that he was willing to reexamine *Roe* and overrule it explicitly. And, although Justices Rehnquist, White and Kennedy would have abandoned the *Roe* trimester framework in *Webster,*[12] Justice O'Connor did not feel it necessary to reject that framework

for this age group was 32.2%. Figures based on data contained in *Reported Induced Abortions,* published yearly by the Minnesota Department of Health. For the same time period and age group, the number of births dropped from 2,083 to 1,654—a decline of 18.6%—and the birthrate dropped statewide by 7.9%. Figures obtained from Minnesota Department of Health computer printouts regarding births and female population size. Also during this time period, the number of pregnancies (abortions plus births) for Minnesota teens under age 18 dropped from 4,360 to 3,049—a decline of 30.1%—and the pregnancy rate decreased 20.9%. *Id.*

Thus, not only does it appear that the parental notice law has reduced the number of teen abortions, it also appears that the law has had a beneficial impact on reducing the overall teen pregnancy rate. Indeed, that teens are avoiding pregnancy altogether is also supported by the statements made by a pregnant teen seeking an abortion in Utah. In response to a question from the judge regarding whether she had attempted to prevent the pregnancy the pregnant girl indicated that she had not since she thought she could easily obtain an abortion without her parents learning about it. *H.B. v. Wilkinson,* 639 F.Supp. 952, 956 (D.Utah 1986). Presumably, this girl would have used preventive measures or avoided sexual activity had she known, in advance, that her parents would be notified in the event she became pregnant and sought an abortion.

12. It should be noted that while Justice Rehnquist stated that *Roe* need not be reevaluated because Missouri had chosen viability as the point at which it wished to protect fetal life, that statement fails to recognize that Missouri "chose" the point of viability to regulate on behalf of fetal life only because this Court struck down its prior law which protected the unborn child throughout pregnancy, in *Danforth v. Rodgers,* 414 U.S. 1035 (1973).

despite her continued belief that it "cannot be supported as a legitimate or useful framework" and has "no justification in law or logic." *Akron,* 462 U.S. at 453, 459.

Amici urge the Court to abandon this piecemeal approach because it effectively places the state legislatures in no-man's-land. *Amici* are required to attempt to divine the views of the various Justices regarding the extent to which abortion is constitutionally protected in order to enact legislation which will protect unborn children to the fullest extent possible. This, of course, is a very difficult task given the variety of opinions issued in *Webster.*

Consequently, *amici* respectfully submit that the Court should determine the proper benchmark by which statutes regulating abortion should be judged *before* evaluating the constitutionality of those statutes. Such a determination would be greatly preferable to the unpredictable course resulting from the division of opinion in *Webster.*

The issue of abortion is divisive and hotly disputed in the legislative arena as well as this Court. As Justice O'Connor stated in *Thornburgh,* this Court's abortion decisions "have already worked a major distortion in the Court's constitutional jurisprudence" and have had an "institutionally debilitating effect" on the Court. *Thornburgh,* 476 U.S. at 814 (O'Connor, J., dissenting). *Amici* submit that the absence of an identifiable standard after *Webster*—thus requiring the state legislatures to speculate about the scope of the "limited" nature of the right to abort—will have a similar "institutionally debilitating effect" upon the State General Assemblies.[13]

Without definite guidance from the Court regarding the constitutional limits on their ability to enact legislation, the states will be forced to address the issue with great uncertainty again and again--to the potential detriment of other pressing business. Given that the members of the General Assemblies of the various states take an oath to uphold the Constitution, it is

13. Significantly, whenever the General Assembly is wrong in its assessment, the Commonwealth may be penalized by having substantial awards of attorneys' fees assessed against it.

appropriate for this Court to declare whether the right of privacy protected by the Constitution includes the right to obtain an abortion. And, if the Constitution presently does not prohibit states from protecting fetal life, the Court should make this known to the states so that they may be allowed to regulate to the fullest extent constitutionally permissible, if they so choose.[14]

---

14. Although only a few states would probably limit abortions to those necessary to preserve a woman's life, dire predictions abound of women dying from "back alley" abortions. These predictions are simply unfounded. For example, a leading member of the pre-*Roe* "abortion reform" movement, Dr. Bernard N. Nathanson (co-founder of the National Abortion Rights Action League), has admitted to his organization's knowing falsification of "back-alley" abortion death statistics:

> How many deaths were we talking about when abortion was illegal? In N.A.R.A.L. we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000-10,000 deaths a year." I confess that I knew the figures were totally false, and I suppose the others did too if they stopped to think of it. But in the 'morality' of our revolution, it was a *useful* figure, widely accepted, so why go out of the way to correct it with honest statistics? The overriding concern was to get the laws eliminated, and anything within reason that had to be done was permissible.

B.N. Nathanson, M.D., *Aborting America*, at 193 (1979).

In 1972 prior to *Roe*, 33 states prohibited abortions except where necessary to preserve the life of the mother, while others permitted abortion in various circumstances. The CDC report on induced abortions shows that during 1972 (when medical technology was not as advanced as today) 24 women died from legal abortions while 39 died from illegal abortions. *Centers for Disease Control: Abortion Surveillance 1981*, p. 51, Figure 8. It is unlikely that, in the present political climate, 33 states will be able to pass legislation limiting abortions to life-of-the-mother situations. But even if this many states were to do so, with advances in medical care, it is exceedingly unlikely that anywhere near 39 women would die of illegal abortions.

Moreover, in 1973, after *Roe* made abortion legal on demand, 25 women died from legal abortions and 19 died from illegal abortions. Thus, legalizing abortion on demand has had little impact on the number of maternal deaths from abortion. Indeed, between 1973 and 1982 (the last year for which statistics are available) while abortions have been legal on demand, almost four times as many women have died from legal abortion as from illegal abortions. *Id.*

At the core of the majority opinion in *Roe* there operates the fundamental fallacy that state legislatures are constitutionally forbidden to provide significant legal protection for human life at its most vulnerable stage. Yet it is state legislatures which are expressly designed as fora for the resolution and continuing adjustment of such difficult governmental questions. *Roe's* disregard for the judgment of state legislators casts this Court in the role of deciding essentially legislative questions, and transfers the burden of correcting "unwise" legislative judgments from the electoral process to the federal courts. Not only does this assumption of the legislative role sap the legitimacy of the courts, it has failed to achieve the political stabilization of the issue of abortion which was its evident purpose. *Roe* has only served to postpone the achievement of that stabilization.

In an earlier time, Justice Holmes urged the prompt correction of the fallacious premise of *Swift v. Tyson*, 16 Pet. 1 (1842):

> [T]he fallacy has resulted in an unconstitutional assumption of powers by the courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.

Meanwhile, unborn children die at a rate of 1.5 million per year--with approximately 1%, or 15,000 per year (220,000 since *Roe*), being killed between the 20th week of pregnancy and birth. *Centers for Disease Control: Abortion Surveillance 1981*, p.iv, Summary Table. Such late-term abortions must be allowed for any reason relevant to the "health" of the woman. *Roe v. Wade*, 410 U.S. at 163. As defined in *Doe v. Bolton*, "health" is broad, indeed, including emotional well-being and the woman's family situation. 410 U.S. 179, 192 (1973); *A.C.O.G. v. Thornburgh*, 737 F.2d 283, 299 (3rd Cir. 1984) (the broad definition of "health" applies to abortions after viability as well as before viability). Indeed, few late-term abortions are performed due to risk to the physical health of the mother. A recent study indicated that 71% of the women obtaining abortions after the 16th week of pregnancy did so because they did not recognize that they were pregnant or had misjudged gestation. Torres & Forrest, *Why do Women Have Abortions?*, 20 Family Planning Perspectives 169, 174 (Table 4) (1988), Maternal health as a reason for late-term abortion did not have sufficient statistical significance even to be listed in the table. *Id.* And, the study states that women "were less likely to be having a later abortion . . . if they were having health problems. . ." *Id.*

Black & White Taxicab and Transfer Co. v. Brown & Yellow Taxicab and Transfer Co., 276 U.S. 518, 533 (1928).

What was at stake in the abandonment of the rule of federal common law of *Swift v. Tyson* was primarily parameters of federal-state relationships and rights of private property. *Roe* has not only skewed legislative-judicial relationships, it has cost the rights of over 20 million potential citizens to have any say at all over their own life or death. The tragedy of *Roe* is certainly manifest in the loss of human life it has occasioned, but it is also manifest in the powerlessness to correct that situation which has been enforced on the voting citizens of this nation.

CONCLUSION

For the foregoing reasons, *amici curiae* request that this Court uphold Minnesota's parental notice law in its entirety and reexamine and overrule *Roe v. Wade* so that the states may be given greater flexibility to protect unborn human life.

Respectfully submitted,

*Maura K. Quinlan
Philip J. Murren
BALL, SKELLY, MURREN & CONNELL
511 North Second Street
P. O. Box 1108
Harrisburg, PA 17108
(717) 232-8731
Attorneys for *Amici Curiae*
**Counsel of Record*

September 29, 1989

APPENDIX

APPENDIX A

THE *AMICI CURIAE*

The *amici curiae* consist of members of the General Assembly of the Commonwealth of Pennsylvania, including the following:

Senators: D. Michael Fisher (R) Allegheny; Edward W. Helfrick (R) Westmoreland; J. William Lincoln (D) Fayette; Robert J. Mellow (D) Lackawanna; Raphael J. Musto (D) Luzerne; Terry L. Punt (R) Franklin; M. Joseph Rocks (R) Philadelphia; Frank A. Salvatore (R) Philadelphia; John J. Schumaker (R) Dauphin; William J. Stewart (D) Cambria.

House Members: John E. Barley (R) Lancaster; Fred Belardi (D) Lackawanna; Robert E. Belfanti, Jr. (D) Northumberland; Jerry Birmelin (R) Wayne; Kevin Blaum (D) Luzerne; Karl W. Boyes (R) Erie; Raymond Bunt, Jr. (R) Montgomery; James M. Burd (R) Butler; Alvin C. Bush (R) Lycoming; Thomas R. Caltagirone (D) Berks; Edgar A. Carlson (R) Tioga; Gaynor Cawley (D) Lackawanna; Richard J. Cessar (R) Allegheny; Mario J. Civero, Jr. (R) Delaware; Nicholas A. Colafella (D) Beaver; Anthony L. Colaizzo (D) Washington; Anthony M. DeLuca (D) Allegheny; Thomas W. Dempsey (R) Lycoming; Scott Dietterick (R) Luzerne; Rudolph Dininni (R) Dauphin; Jim Distler (R) Elk; Bernard J. Dombrowski (D) (Erie); Thomas J. Fee (D) Lawrence; Patrick E. Fleagle (R) Franklin; A. Carville Foster (R) York; Stephen F. Freind (R) Delaware; James J. Gallen (R) Berks; Ron Gamble (D) Allegheny; Frank J. Gigliotti (D) Allegheny; Leonard Q. Gruppo (R) Northampton; George C. Hasay (R) Luzerne; Arthur D. Hershey (R) Chester; Stanley J. Jarolin (D) Luzerne; Edwin G. Johnson (R) Blair; Ralph Kaiser (D) Allegheny; Ted V. Kondrich (R) Allegheny; Gerard A. Kosinski (D) Philadelphia; Susan Laughlin (D) Beaver; Dennis E. Leh (R) Berks; William R. Lloyd, Jr. (D)

Somerset; Edward J. Lucyk (D) Schuylkill; Joseph Markosek (D) Allegheny; Keith R. McCall (D) Carbon; Christopher K. McNally (D) Allegheny; Emil Mrkonic (D) Allegheny; Dennis M. O'Brien (R) Philadelphia; Richard D. Olasz (D) Allegheny; John M. Perzel (R) Philadelphia; Merle H. Phillips (R) Northumberland; Joseph R. Pitts (R) Chester; Jere W. Schuler (R) Lancaster; Frank A. Serafini (R) Lackawanna; Edward G. Stabeck (D) Lackawanna; Thomas B. Stish (D) Luzerne; Jere L. Strittmatter (R) Lancaster; Ted Stuban (D) Columbia; Leona G. Telek (R) Cambria; Thomas M. Tigue (D) Luzerne; Fred A. Trello (D) Allegheny; Peter R. Vroon (R) Chester; Christopher R. Wogan (R) Philadelphia; Frank W. Yandrisevits (D) Northampton.

Supreme Court, U.S.
FILED
OCT 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1125, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANE HODGSON, M.D., *et al.*,
Petitioners, Cross-Respondents,

v.

STATE OF MINNESOTA, *et al.*,
Resondents, Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS (AAPS) AS *AMICUS CURIAE* IN SUPPORT OF STATE OF MINNESOTA

Of Counsel:
KENT MASTERSON BROWN
1114 First National Bldg.
167 West Main Street
Lexington, KY 40507
(606) 233-7879

CLARKE D. FORSYTHE *
LEANNE MCCOY
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND (AUL)
343 S. Dearborn Street #1804
Chicago, IL 60604
(312) 786-9494
Counsel for Amicus Curiae

* Counsel of Record

October 10, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

83 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE PEOPLE OF MINNESOTA HAVE A COMPELLING INTEREST IN HELPING PARENTS AND FAMILIES TO REDUCE TEENAGE PREGNANCY AND TEENAGE ABORTION 4

A. Although Many States Have Enacted Parental Consent and Notice Laws, Minnesota Is Unique in Having Had A Parental Law in Effect Which Can Be Evaluated Through Demographic Data Collected By the Department of Health 5

B. The Plaintiff Clinics Have Failed To Show the Notice Law Adversely Impacts the Health of Teens, Adversely Impacts the Integrity of the Family, or Fails to Be Consistent With Parents' Rights to Rear and Counsel Their Children 7

II. WHILE THE MINNESOTA PARENTAL NOTICE OF ABORTION LAW WAS IN EFFECT AND ENFORCED, TEENAGE ABORTION AND PREGNANCY DECLINED SUBSTANTIALLY AND TEENAGE BIRTHS DID NOT GENERALLY INCREASE COMPARED TO PREVIOUS YEARS 11

A. During the Four Years that the Notice Law Was In Effect, Teenage Pregnancies, Abortions, and Births Declined Substantially 13

1. Pregnancies 13

2. Abortions 14

3. Births 15

4. Migration 16

TABLE OF CONTENTS—Continued

Page

B. During the Four Years that the Notice Law Was In Effect, Teenage Pregnancy, Abortion, and Birth Rates Declined Substantially.. 17

1. Pregnancy Rate for 10-17 Year Olds..... 17

2. Pregnancy Rate for 18-19 Year Olds..... 18

3. Abortion Rate for 10-17 Year Olds..... 18

4. Abortion Rate for 18-19 Year Olds..... 18

5. Birth Rate for 10-17 Year Olds..... 19

6. Birth Rate for 18-19 Year Olds..... 19

C. The Data Are Strong Evidence that the Notice Law Effectively Reduced Teen Pregnancy Rates in Minnesota During Its Effective Period..... 20

D. Minnesota Teenagers Did Not Have Abortions at Significantly Later Points in Pregnancy Relative to Other Age Groups While the Notice Law Was in Effect 21

E. Minnesota Teenagers Did Not Have Increased Complications From Induced Abortion Relative to Other Age Groups While the Notice Law Was in Effect..... 23

III. THE CONTENTION THAT THE NOTICE LAW INCREASED BIRTHS TO TEENS IS BASED ON STATISTICS FOR ONLY THE LIMITED AREA OF THE MINNEAPOLIS CITY LIMITS AND THESE MUST BE VIEWED WITHIN THE CONTEXT OF OTHER DEMOGRAPHIC PHENOMENA IN MINNEAPOLIS AND THROUGHOUT THE STATE 25

CONCLUSION..... 29

TABLE OF CONTENTS—Continued

APPENDICES: Page

APPENDIX 1: State Reporting Requirements and Parental Consent and Notice of Abortion Statutes.... 1a

TABLE 1: Abortions, Births, and Pregnancies: 1973-1986 ..... 11a

FIGURE 1a: Abortions, Births, and Pregnancies, Ages 10-17: 1973-1986 ..... 13a

FIGURE 1b: Abortions, Births, and Pregnancies, Ages 18-19: 1973-1986 ..... 14a

FIGURE 1c: Abortions, Births, and Pregnancies, Ages 20-24: 1973-1986 ..... 15a

FIGURE 1d: Abortions, Births, and Pregnancies, Ages 25-54: 1973-1986 ..... 16a

TABLE 2: Abortion, Birth, and Pregnancy Rates: 1973-1986..... 17a

FIGURE 2a: Abortion, Births, and Pregnancy Rates, Ages 10-17: 1973-1986..... 19a

FIGURE 2b: Abortion, Birth, and Pregnancy Rates, Ages 18-19: 1973-1986 ..... 20a

FIGURE 2c: Abortion, Birth, and Pregnancy Rates, Ages 20-24: 1973-1986 ..... 21a

FIGURE 2d: Abortion, Birth, and Pregnancy Rates, Ages 25-54: 1973-1986..... 22a

TABLE 3: Number and Percentage of Abortions with Gestation Age [greater than] 12 Weeks: 1975-1986 ..... 23a

FIGURE 3a: Number of Abortions with Gestation Age [greater than] 12 Weeks: 1975-1986..... 25a

FIGURE 3b: Percentage of Abortions with Gestation Age [greater than] 12 Weeks: 1975-1986..... 26a

TABLE 4: Number and Percentage of Abortions with Reported Medical Complications: 1975-1986..... 27a

FIGURE 4a: Number of Abortions with Reported Medical Complications: 1975-1986 ..... 29a

TABLE OF CONTENTS—Continued

	Page
FIGURE 4b: Percentage of Abortions with Reported Medical Complications: 1975-1986	30a
TABLE 5: Birth Rate for Different Regions of Minnesota: 1973-1987	31a
FIGURE 5a: Birth Rate for Different Regions of Minnesota, Ages 15-17: 1973-1987	34a
FIGURE 5b: Birth Rate for Different Regions of Minnesota, Ages 10-14: 1973-1987	35a
FIGURE 5c: Birth Rate for Different Regions of Minnesota, Ages 18-19: 1973-1987	36a
FIGURE 5d: Birth Rate for Different Regions of Minnesota, Ages 20-24: 1973-1987	37a
FIGURE 5e: Birth Rate for Different Regions of Minnesota, Ages 25-54: 1973-1987	38a
TABLE 6: Birth Rate for Minneapolis Residents by Age Group: 1976-1987	39a
FIGURE 6: Birth Rate for Minneapolis Residents by Age Group: 1976-1987	40a
TABLE 7: Births to Mothers [less than] 18 years of Age as Percentage of Total Births: 1970-1987	41a
FIGURE 7a: Births to Mothers [less than] 18 Years of age as Percentage of Total Births, Minneapolis, Minnesota, and U.S.: 1970-1987	43a
FIGURE 7b: Births to Mothers [less than] 18 Years of Age as Percentage of Total Births, by Race/Ethnicity, Minneapolis and U.S.: 1970-1987	44a
TABLE 8: Percent Racial/Ethnic Enrollment, Minneapolis Public School District: 1971-1987	45a
FIGURE 8: Percent Racial/Ethnic Enrollment, Minneapolis Public School District: 1971-1987	46a

TABLE OF AUTHORITIES

CASES

	Page
Bellotti v. Baird, 443 U.S. 622 (1979)	2, 6
Bowen v. Kendrick, 108 S.Ct. 2562 (1988)	5
Herbst v. Daley, No. 84 C 5602 (N.D. Ill. July 1, 1984)	7
H.L. v. Matheson, 450 U.S. 398 (1981)	2
Hodgson v. Minnesota, 648 F.Supp. 756 (D.Minn. 1986), *cert. denied*, 107 S.Ct. 1333 (1987)	6, 11
Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 109 S.Ct. 3240 (1989)	11
Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983)	2
Planned Parenthood v. Danforth, 428 U.S. 52 (1976)	4, 6
Roe v. Wade, 410 U.S. 113 (1973)	4, 6
South Dakota v. Dole, 107 S.Ct. 2793 (1987)	17
Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989)	25

STATUTES

Minn. Stat. Ann. sec. 144.343(2)-(7) (West 1989)	11
Minn. Stat. Ann. sec. 145.413 (West 1989)	11
Minn. Stat. Ann. sec. 645.451 (West 1989)	12
N.D. Cent. Code sec. 14-02.1-03.1 (Supp. 1987)	16
23 U.S.C. 158 (1982 ed. and Supp. III)	17

MISCELLANEOUS

Blum, et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619 (1987)	16
Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Cross-Petitioners in *Hodgson v. Minnesota*, No. 88-1125, 88-1309	4
Brief of Certain American State Legislators in Support of Appellants in *Webster v. Reproductive Health Services, Inc.*, No. 88-605	4
Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986)	16

TABLE OF AUTHORITIES—Continued

	Page
Centers for Disease Control, *Abortion Statistics U.S., 1984-1985* (1989)	5
Gardner, Scherer, & Tester, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, Am. Psychologist 895 (June 1989)	8
Henshaw, et al., *A Portrait of American Women Who Obtain Abortions*, 17 Fam. Plan. Persp. 90 (1985)	5
Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States 1979-1980*, 15 Fam. Plan. Persp. 5 (1983)	5
Russo, *Adolescent Abortion: The Epidemiological Context*, in G. Melton, ed., *Adolescent Abortion: Psychological & Legal Issues* 40 (1986)	5
Smith, et al., *An Assessment of the Incidence of Maternal Mortality in the United States*, 74 Am. J. Pub. Health 780 (1984)	7
South Dakota Vital Statistics (1982-1987)	16
Teen Pregnancy: What is Being Done? A State by State Look, A Report of the House Select Committee on Children, Youth and Families, 99th Cong. 2d Sess. (Dec. 1986)	6, 7
Torres, et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 88-1125, 88-1309

JANE HODGSON, M.D., *et al.*,
Petitioners, Cross-Respondents,

v.

STATE OF MINNESOTA, *et al.*,
Resondents, Cross-Petitioners.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS (AAPS) AS *AMICUS CURIAE* IN SUPPORT OF STATE OF MINNESOTA

INTEREST OF THE *AMICUS CURIAE* *

The Association of American Physicians and Surgeons, Inc. (AAPS), a not-for-profit corporation, is the largest association of private practicing physicians in the United States. AAPS is comprised of active, practicing physicians and osteopaths of all specialties, from every state and territory in the United States and the District of

---

* This brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of this Court.

Columbia. One purpose of the AAPS is to protect and preserve the private practice of medicine in all of its aspects. AAPS supports the right of patients, both adults and minors, to be provided full and accurate medical information with which to render informed decisions pertaining to their medical treatment. The AAPS recognizes the importance of involving parents in the medical treatment of minors particularly in the provision of surgical procedures. Many of the members of the AAPS are pediatricians and obstetricians/gynecologists who routinely provide medical services to minors. In addition, many AAPS members are family practitioners whose practices involve working with the family, as a unit, in the provision of medical treatment. For these reasons, the issues involved in this case are of acute interest to the Association.

SUMMARY OF ARGUMENT

In this challenge to the Minnesota parental notice of abortion law, as applied, Minnesota abortion clinics and physicians have launched a selective attack to overturn this Court's decisions in *H.L. v. Matheson*, 450 U.S. 398 (1981), *Bellotti v. Baird*, 443 U.S. 622 (1979), and *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983), as well as the constitutional principle that parents have fundamental rights to rear and raise their minor daughters in the area of abortion decision-making. The clinics' record in this case focuses exclusively on a minute subsection of Minnesota teens—those who sought elective abortions through judicial bypass—constituting only 25% of all pregnant teens and never more than .34% of the entire population of Minnesota teens aged 10-17. The clinics attempt to establish the unremarkable proposition that parents and teenagers do not always see eye to eye on teens' activities, that some parents may be abusive, that parents may react with grief, fear, or anger when they suddenly discover that their minor, unwed daughter is unexpectedly pregnant, and that this discovery may

not improve but may harm the parent-teen relationship. The record contains several stories of sad and unfortunate relations between parents and their children. But these conflicts are part and parcel of the parent-child relationship throughout history, and, as part of that relationship, have defined parental authority throughout Anglo-American law. In this sense, adolescent pregnancy is no different than many other serious, adverse events in the lives of teenagers and their families—for example, drug abuse, juvenile delinquency, or failure in school. It is in these very circumstances that parental authority is defined by the law's reaffirmation and support.

If the clinics could show that the notice law resulted in tangible threats to the health of minors generally in Minnesota—above and beyond that normally posed by pregnancy and elective abortion themselves—that minors suffered increased abuse from parents, that physicians were prevented from providing prenatal care, or that minors were denied prenatal care, it would then be plausible for the clinics to claim that the notice law was not reasonably related to preserving parental authority or adolescent health. But this is not the case that the clinics have made.

Part of the impact of the notice law that the clinics have either selectively ignored, misconstrued, or incompletely presented is revealed through the official demographic data of the Minnesota Department of Health on adolescent pregnancy, abortion, and childbirth. These data show that teenage pregnancy, abortion, and birth rates declined markedly between 1980-1986; teens who decided to abort were not unusually delayed from having abortions until later times of pregnancy that might increase the risk of abortion; and complications from abortions performed on teens did not increase relative to other age groups. In addition, a comparison of the pregnancy, abortion, and birth rates provides strong support for the conclusion that the notice law effectively caused a

decrease in the pregnancy rate. Between 1980-1986, the birth rate throughout Minnesota fell 12.5% for 10-17 year olds and 28.4% for 18-19 year olds, the abortion rate fell 27.4% for 10-17 year olds and 20.7% for 18-19 year olds, and the pregnancy rate fell 20.5% for 10-17 year olds and 25.4% for 18-19 year olds. Since it seems undisputed that the notice law directly decreased abortion rates, while birth rates simultaneously decreased, this strongly suggests that the law decreased abortion rates by affecting pregnancy rates. This supports the conclusion that the notice law in fact changed adolescent behavior. These data indicate that the notice law is reasonably related to Minnesota's compelling interest in preserving parental authority and adolescent health.

ARGUMENT

I. THE PEOPLE OF MINNESOTA HAVE A COMPELLING INTEREST IN HELPING PARENTS AND FAMILIES TO REDUCE TEENAGE PREGNANCY AND TEENAGE ABORTION.

This Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), established a constitutional right to elective abortion for adolescent girls of any age that minors had not exercised at any time in the preceding history of this country. *See* Brief Amicus Curiae of the American Academy of Medical Ethics in Support of Cross-Petitioners in *Hodgson v. Minnesota*, No. 88-1125, 88-1309 at 2-23; Brief of Certain American State Legislators in Support of Appellants in *Webster v. Reproductive Health Services, Inc.*, No. 88-605. In the aftermath of those decisions, parents and public officials in every state have sought to adjust public policy on health care to take account of this new constitutional right while preserving other compelling, traditional social values. This Court has recently held that government has a "legitimate secular purpose" in reducing "the social and economic problems caused by

teenage sexuality, pregnancy, and parenthood." *Bowen v. Kendrick*, 108 S.Ct. 2562, 2571 (1988).

In 1985, approximately 26.3% of elective abortions were performed on minors age 18 or younger. Centers for Disease Control, *Abortion Statistics U.S., 1984-1985* (1989) (Table 1.). More than 40 percent of all teenagers who have known pregnancies obtain abortions. Henshaw, et al., *A Portrait of American Women Who Obtain Abortions*, 17 Fam. Plan. Persp. 90, 93 (1985); Russo, *Adolescent Abortion: The Epidemiological Context*, in G. Melton, ed., *Adolescent Abortion: Psychological & Legal Issues* 40, 49 (1986). In 1986, in Minnesota, approximately 49.3% of pregnancies for teens, age 10-17, ended in elective abortion. Table 1, *infra*. Nearly eighty percent (78%) of all abortions performed on teenagers are done in abortion clinics. Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States 1979-1980*, 15 Fam. Plan. Persp. 5, 11 (1983). One study found that less than half of the abortion clinics require parental notice, even for teenagers 15 years of age or younger; even fewer require parental notification before performing abortions on minors age 16 or older. Torres, et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 285 (1980) (Table 1). Yet, in this study of 1,170 unmarried teenage abortion patients, "[n]inety-one percent were living with their parents, four percent were living with relatives . . . ." *Id.* at 287.

A. Although Many States Have Enacted Parental Consent and Notice Laws, Minnesota Is Unique in Having Had A Parental Law In Effect Which Can Be Evaluated Through Demographic Data Collected By the Department of Health.

The States have sought to address the problem of teenage pregnancy and abortion in many different ways. They have instituted scores of public programs, includ-

ing family planning programs, adoption services, child care, school-based educational programs, and maternal and child health care programs. *See Teen Pregnancy: What is being Done? A State by State Look*, A Report of the House Select Committee on Children, Youth and Families, 99th Cong. 2d Sess. 56 & Appendix IV (Dec. 1986) [hereinafter *Teen Pregnancy*]. The States stress parental involvement in many of these programs. *Id.* at 67-70.

Over 30 states, including Minnesota, have passed parental consent or notice legislation in order to protect the health of minors and to protect parental authority in the area of adolescent health decisionmaking. *See* Appendix 1 to this Brief. As this Court has said, "parental consent and notice are qualifications that typically may be imposed by the State on a minor's right to make important decisions." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (plurality op.). Because this Court's decisions in *Roe v. Wade* and *Danforth* constitutionalized this area of the law, states can ensure parental involvement only through positive legislation.

Very few of these state parental consent and notice statutes have been allowed to go into effect for any meaningful period of time. Many have been declared unconstitutional by federal courts. Statutes in almost a dozen states are currently enjoined in the midst of pending litigation. *See* Appendix 1. As the district court below acknowledged, it was the first district court "ever to examine a parental notification or consent substitute statute in actual operation." *Hodgson v. Minnesota*, 648 F.Supp. 756, 774 (D.Minn. 1986). And there is no other currently pending litigation in this country that is examining the effect of parental notice or consent legislation as applied.

Determining the effect of these parental laws has also been frustrated by the absence of state or federal laws

requiring the reporting of statistical data. Data collected from reporting provide demographic statistics that are critical for the study of maternal morbidity and mortality. *See e.g., Teen Pregnancy* at 1-19; Smith, et al., *An Assessment of the Incidence of Maternal Mortality in the United States*, 74 Am. J. Pub. Health 780 (1984). "No federal laws require reporting for abortion." *Teen Pregnancy* at 5. State reporting requirements for abortion are in effect in less than thirty states. Appendix 1. Many states do not have reporting for a wide array of demographic factors. *Teen Pregnancy* at 1-19. Many states do not, or cannot, require mandatory reporting of abortion statistics. Illinois, for example, has been prohibited by court order from collecting abortion data since 1984. *Herbst v. Daley*, No. 84 C 5602 (N.D.Ill. July 1, 1984). Reporting requirements are essential to determine the complete effect of these laws. Minnesota is virtually unique in having had a parental notice law and reporting statute in effect simultaneously for a meaningful period of time.

B. The Plaintiff Clinics Have Failed To Show That the Notice Law Adversely Impacts the Health of Teens, Adversely Impacts the Integrity of the Family, or Fails to Be Consistent With Parents' Rights to Rear and Counsel Their Children.

The clinics' attack on the Minnesota law falls into two broad categories: (1) testimony concerning various burdens imposed on pregnant teens by the notification requirement and the bypass procedure; (2) testimony questioning the necessity and effectiveness of the notification requirement and bypass procedure in furthering the statutory purposes of protecting parental authority and adolescent health. The clinics, and their *amicus*, contend that minors of any age are no less mature and no less capable of making important decisions than their adult parents.[1]

---

[1] The American Psychological Association (APA), which has filed an *amicus curiae* brief in this case in support of Hodgson,

The clinics' claim that the notice law had an adverse effect on minors in Minnesota is exclusively focused on those minors who sought abortions. The clinics' challenge reflects a narrow, distorted focus on the impact of the notice law. Minors who sought abortions through the bypass procedure between 1981-1984 constitute less than 25% (23.5%) of the total number of minors (aged 10-17) who became pregnant. *Cf.* Table 1-2, J.A. 60. The clinics' case focuses on only half of the pregnant teens in Minnesota, and that half amounts to only .30% of all Minnesota teens aged 10-17 who were under the influence of the law. *Cf.* J.A. 60, Tables 1-2.[2] The clinics' case thus virtually ignored the impact on the half of the teens who became pregnant and did not abort in Minnesota (and their parents). And the clinics' record says nothing about the drop in the pregnancy rate and how the notice law influenced teens who did not become pregnant. It is, therefore, wholly inaccurate for the clinics to claim that their witnesses had "first-hand knowledge of nearly 100% of the minors who were affected by the statute." Pet.Br. at 29. By their challenge, the clinics would strip all Minnesota parents of the statutory protection of their constitutional rights, as well as all minors of the influence of the law in ensuring parental guidance, in order to remove the requirement of judicial bypass from .30% of Minnesota teens.

has recently been criticized for filing briefs in this Court which overstate the extent to which "developmental theory and data confirm that adolescents and adults have equivalent decision-making capacities." Gardner, et al., *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights,* American Psychologist 895 (June 1989). One of the Plaintiffs' experts, Lenore Walker, expounded this theory at trial and contributed to the APA brief. APA Brief at n.2.

[2] The 23.5% figure is derived from the estimated number of pregnancies in the 10-17 age group between August 1, 1981 and December 31, 1984 (10,872) compared with the stipulated number of bypass petitions filed during that same period (2,552). J.A. 60. (The 10,872 figure uses 5 mos. of the total number of pregnancies (3,714) in the 10-17 age group in Minnesota in 1981.) *See* Tables 1-2. It appears that 49.6% of the teens that aborted between Aug. 1, 1981 and December 31, 1984 sought judicial bypass. This is based on a comparison of the total of approximately 5,149 abortions for that time period for the 10-17 age group (5 mos. of 1981 total) with the stipulation of 2,552 bypass petitions in that period (J.A. 60).

There is little, if any, evidence in the record on the experience of the 50% of the pregnant teens, aged 10-17 (or their families), who did not abort—no testimony from those teens or their parents (either custodial or non-custodial) or their doctors, no medical evidence of their pregnancy or current condition, no evidence of their experience in giving birth or caring for their newborn children, no evidence of their past history or future plans or aspirations, no evidence that any minor who carried her child to term later regretted it.

Even the experience of the 50% of the pregnant teens who aborted is presented in the record almost exclusively through the eyes of third parties (*not* parents)—abortion clinic personnel, court or administrative personnel, or experts apparently experienced with only teens who aborted.[3] These teens are "represented" only by three single mothers of pregnant daughters and eight teens as

[3] The following are the Plaintiffs' witnesses, excluding some of the named Plaintiffs: Paul Wendt, Meadowbrook Clinic; Allen Oleisky, judge, Stanley Henshaw, statistician; Henry Albrecht, juvenile court judge; Edwin G. Widseth, asst. county atty.; Susanne Smith, supervisor, GAD program; Kathrine Welsh, Women's Health Center; Cynthia Daly, asst. public defender; Dr. Lenore Walker, psychologist; Gerald Martin, judge; Charlotte Baker, Midwest Health Center; Maria Honkala, medical asst.; Thomas P. Webber, Planned Parenthood administrator; Heather Sweetland, asst. public defender; Laura Hunter, abortion clinic counselor; Elissa Benedek, psychiatrist; William Sweeney, county judicial officer; Gary B. Melton, psychologist; George Petersen, district judge; Paul Garrity, judge; Steven Butzer, psychiatrist; Neil Riley, judge; Edward Ehlinger, health department administrator; Henry David, Trans. Family Research Inst.; Dr. Arthur Horwitz, Meadowbrook clinic.

named plaintiffs. Pet. Br. at 23 n.49. The experience of certain minors who were deposed is characteristic of the lifestyle of many teens, but there is no evidence that the notice law seriously exacerbated the parent-teen relationship for these teens or for any significant number of Minnesota teens. Most of the Plaintiffs' experts relied on "studies" and "the "literature"—none of which seem to involve Minnesota youth. District Court Transcript (T.) 1137, 1146. The exception seems to be Steven Butzer, who cited two cases of Minnesota adolescents he had counseled, but his experience seems to have been only with girls who sought abortion. J.A. 296-300. There is apparently no evidence of even a single report of child abuse caused by the parental notification, or a single report of medical complications caused by the law, or a single case of parental prevention or coercion of an abortion. Cross Petitioners' Brief (Cross Pet.Br.) at 10-11, 18.

The data collected by the Department of Health tell a broader public health story—not only about those teens who aborted (.60% in 1982) but also about those who never got pregnant (98.7%) and those who carried their children to term (.66%); and it is a story different from the one that the clinics present. The data collected and reported by Minnesota are unique in what they can tell public health researchers about the effect of the notice law. This analysis of the Department's data demonstrates that the notice law is reasonably related to protecting parents' constitutional rights and protecting the health of minors, because it requires parental notice without causing any increased health problems for minors and, in fact, possibly decreases adolescent pregnancy and abortion rates *without* causing increased birth rates. This is an extraordinary benefit for teens and their families in Minnesota—an impact which the clinics virtually ignored.

II. WHILE THE MINNESOTA PARENTAL NOTICE OF ABORTION LAW WAS IN EFFECT AND ENFORCED, TEENAGE ABORTION AND PREGNANCY DECLINED SUBSTANTIALLY AND TEENAGE BIRTHS DID NOT GENERALLY INCREASE COMPARED TO PREVIOUS YEARS.

The Minnesota notice law was only in effect from August 1, 1981 through March 2, 1986, when a preliminary injunction was entered against the entire statute, followed by a permanent injunction on November 6, 1986. Minn. Stat. Ann. 144.343(2)-(7) (West 1989); *Hodgson v. Minnesota*, 648 F.Supp. 756, 760, 781 (D.Minn. 1986), *cert. denied*, 107 S.Ct. 1333 (1987); *Hodgson v. Minnesota*, 853 F.2d 1452, 1455 (8th Cir. 1988); Cross Pet. Br. at 10. That injunction continued in effect throughout the appellate review. After the court of appeals *en banc* reversed the district court's decision on August 8, 1988 and upheld the notice law, the Eighth Circuit issued an order on October 7, 1988, staying the issuance of its mandate pending the filing of a writ of certiorari, or until such time as this Court acted on the petition for certiorari. That stay continues in effect.

During the time that the notice law was in effect, the Minnesota Department of Health, Center for Health Statistics (the Department) collected demographic data from Minnesota abortion providers under mandatory statutory reporting requirements. Minn. Stat. Ann. 145.413 (West 1989); T. 2069, 2076-79 (Dr. Paul Gunderson). The Department began to collect data in 1973. T. 2072. The data collected included :

- the number of teenage pregnancies, abortions, and births,
- complications incurred by teenagers during abortion, and
- the gestational age at which the abortion was performed.

The data relied upon in this brief are the Department's official data. As it has to other researchers (T. 660), the Department provided official data through computer disks and data tables on incidence and population in age specific groupings appropriate for an evaluation of the law—10-17 years, 18-19 years, 20-24 years, 25-54 years.[4] The surveillance of abortion data by the Department begins with age 10. T. 2082. And the Department collects abortion data using a category of 17 years and under. Defendants' Exhibit (D. Exh.) 35; J.A. 481. Official population estimates were also provided by the Department because this analysis was conducted prior to the 1990 census.

In this analysis, it was assumed that any change in the incidence of pregnancy, abortion, and childbirth because of the notice law would most heavily fall on teens 17 and below, who were directly affected by the notice law (Minn.Stat.Ann. 645.451 (West 1989)); less heavily on teens age 18-19 who would have recently been subject to the law; somewhat less on women age 20-24; and least on women age 25-54.[5] The notice law itself does not define "minor" by age, and thus it is quite possible that there was some confusion as to who, among 17-19 year olds, was covered by the law. Moreover, some teens who gave birth at 18 might have been 17 at the time they became pregnant and thus were directly affected by the law. Those who were 18 or 19 in 1983-1986 were subject to the law in 1981 (as, for example, Francis H. (J.A. 68-69)), and the group as a whole could reasonably have been influenced by the law through socialization, including schooling and peer contacts. Similarly, some in the 20-24 age group in later years would have been subject to the law in the earlier years of its enforcement. Women age 25-54 would never have been personally affected by the law. For these reasons, these four groups were considered separately.

[4] The data presented in this brief do not include either teens or adults whose ages were unknown or non-Minnesota residents.

[5] Plaintiffs' witness, Stanley Henshaw, of the Alan Guttmacher Institute, also distinguished between teens age 17 and below and teens age 18-19. J.A. 98. The Director of the Minnesota Center for Health Statistics, Dr. Paul Gunderson, also relied on a category of "17 and below" because the Center collects data for this category. D. Exh. 35; T. 2082-84, 2101-2102, 2104.

This brief presents and analyzes the number and rates of adolescent pregnancies, abortions, and births in Minnesota between 1975 and 1986, the last year for which complete statistics were available.[6] In addition, the study examines the impact of the notice law on medical complications and gestational age at the time of abortion. The examination of rates allows for and takes into account adjustments for changes in the population of Minnesota. The brief also examines the impact on all of these phenomena among women age 25-54, in order to assess law-specific and general population effects. Figures and Tables noted hereafter are included in the Appendix to this Brief.

A. During the Four Years that the Notice Law Was In Effect, Teenage Pregnancies, Abortions, and Births Declined Substantially.

1. *Pregnancies*[7]

The Department's official data show that pregnancies for Minnesota teens, age 10-17, declined between 1981-1986, while the notice law was in effect. Table 1 and Figure 1a show that the number of pregnancies rose from 3,958 in 1975 to 4,315 in 1980 and then decreased to a low of 2,987 in 1983 and to 3,133 in 1986. Thus, the number of pregnancies in this age group grew by 9.0%

[6] At the time of trial in 1986, the State only presented data for years 1980-1983 (D. Exh. 35; J.A. 481) and Planned Parenthood had only data up to 1982 and not beyond. T. 660-61.

[7] Pregnancies equal the sum of abortions, live births, and fetal deaths.

between 1975 and 1980 and fell by 27.4% from 1980 to 1986. In this age group, the highest number of adolescent pregnancies occurred in the year before the notice law went into effect.

Table 1 and Figure 1b show that the number of pregnancies for the 18-19 age group increased from 6,494 in 1975 to a high of 8,301 in 1980 and then declined to a low of 5,493 in 1986. The number of pregnancies in this age group increased by 27.8% between 1975 and 1980 and fell by 33.8% from 1980-1986.

Table 1 and Figure 1c show that the number of pregnancies for the age group 20-24 increased between 1975 and 1980 from 22,001 to 28,093 and then declined between 1980 to 1986 from 28,093 to 22,792—almost to the 1975 figure.

Table 1 and Figure 1d figures show that pregnancies for the 25-54 age group increased between 1975 and 1980 but then continued to increase between 1980 to their highest level in 1986. This group would be the least likely to be affected by the notice law, and the figures show that, in fact, pregnancies in this age group continued to rise throughout the effective period of the notice law.

2. *Abortions*

The Department's data also show that abortions for teenagers, aged 10-17, declined between 1980 and 1986, while the notice law was in effect. Table 1 and Figure 1a show that abortions in this age group rose from 1,507 in 1975 to a high of 2,327 in 1980, the year before the notice law took effect, and then fell to a low of 1,395 in 1984 before rising to 1,545 in 1986. Abortions for this age group increased 54.4% from 1975 through 1980 and fell by 33.6% from 1980 to 1986.

For the 18-19 age group, abortions grew markedly between 1975 and 1980 before decreasing between 1980-1986. Table 1 and Figure 1b show that abortions for this

age group rose substantially from 1,758 in 1975 to a high of 3,380 in 1980, the year before the notice law took effect, and then fell to a low of 2,372 in 1986. Abortions thus rose 92.3% between 1975 and 1980, before falling 29.8% between 1980 and 1986.

In the 20-24 age group, Table 1 and Figure 1c show that abortions grew 124.1% from 2,702 to 6,054 between 1975 and 1980, the last year before enforcement of the notice law, and then remained relatively stable between 1980 and 1986, falling 5.5%.

For the 25-54 age group, abortions did not decline between 1980 and 1986, as Table 1 and Figure 1d show. Abortions in this age group increased 179.3% from 2,161 in 1975 to a high of 6,035 in 1986. Abortions thus rose 118.2% between 1975 and 1980 and rose 28.0% between 1980 and 1986.

3. *Births*

The Department's data show that births for teens age 10-17 declined while the notice law was in effect. In the 10-17 age group, as Table 1 and Figure 1a show, the number of births fell from 2,427 in 1975 to 1,974 in 1980, but continued to decline between 1980-1986, to 1,573 in 1986. Births for teens age 10-17 thus dropped by 18.7% from 1975 to 1980 but dropped 20.3% from 1980 to 1986.

For the 18-19 age group, Table 1 shows that births rose from 4,693 in 1975 to a high of 4,883 in 1980, the year before the notice law went into effect, and then declined to a low of 3,096 in 1986. For this age group, births increased by 4.0% from 1975 to 1980, but decreased by 36.6% from 1980 to 1986. In reviewing this age group, it must be remembered that some girls who became pregnant at 17 would give birth after they were 18. Thus, some girls who gave birth while they were 18 may well have been influenced by the law.

In the 20-24 age group, as Table 1 and Figure 1c show, births increased 14.4% from 1975-1980 but then de-

clined 22.6% between 1980-1986, from 21,899 to 16,959. In the 25-54 age group, as Figure 1d shows, births increased from 1975-1980, increased slightly between 1980-1982, and continued to increase 1982-1986. Births rose from 28,746 in 1975 to a high of 42,269 in 1986.

4. *Migration*

Migration out of Minnesota for abortions was apparently not conducted on any significant scale. Four states border Minnesota: North Dakota, South Dakota, Iowa, and Wisconsin. North Dakota has had a parental consent law in effect since at least 1981. N.D. Cent. Code 14-02.1-03.1 (1981 & 1989 Supp.).[8] South Dakota reports 5, 19, 20, 30, 20, and 17 abortions performed on Minnesota teen residents, 19 years and under, during 1981 through 1986, respectively. *South Dakota Vital Statistics* (1982-1987). Iowa has no parental or reporting law in effect. Wisconsin had no mandated reporting before 1987. One researcher, Robert Blum, concluded that "[i]n contradistinction to the Massachusetts data, there is little evidence to indicate large numbers of Minnesota youth are leaving the state for abortion. . . ." Blum, et al., *The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987).

One study by Cartoof and Klerman purported to find significant migration out of Massachusetts in their study of the impact of the Massachusetts parental consent law. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986). Nevertheless, as in the case where migration occurs between states with differences in the drinking age

[8] Stanley Henshaw suggested that there was migration to North Dakota based merely on the fact that a clinic opened up in Fargo in 1981. J.A. 99-101; Henshaw T. at 32. But he then chose to exclude North Dakota from his regional assessment of birth rates because of its parental consent law. Henshaw T. at 39-40.

for teenagers, the solution to migration is not to abolish the public health standards of stricter states but to strengthen the standards in the more permissive states. *Cf. South Dakota v. Dole*, 107 S.Ct. 2793 (1987); 23 U.S.C. 158 (1982 ed. and Supp. III). Regardless of the Massachusetts scenario, however, the facts indicate that Minnesota's experience is different. Massachusetts is geographically a small state bordered by several other states without parental involvement legislation that may be more easily reached by car or public transportation (e.g., Maine, New York). Thus, the conclusions of Cartoof and Klerman simply do not apply to Minnesota.

B. During the Four Years that the Notice Law Was In Effect, Teenage Pregnancy, Abortion, and Birth Rates Declined Substantially.

Because raw figures do not take account of possible changes in Minnesota's population for a particular age group from year to year, rates for pregnancies, abortions, and births were also calculated based on the Department's data. Rates, in this study, equal the occurrence (incidence) of a phenomenon per 1000 females. *Cf.* T. 664-65. The numerator is the number reflecting the phenomenon for females in that age category; the denominator is the population number for females in that age category (in thousands). The data in this brief rely on the Department's data for the entire population of Minnesota, not just on a sample. Table 2 contains rates for abortion, births and pregnancy for the various age groups between 1975-1986.

1. *Pregnancy Rate for 10-17 Year Olds*

The pregnancy rate equals the number of pregnancies in the particular age group divided by the population of females in that age group in thousands (pregnancies/population). Table 2 and Figure 2a show that the pregnancy rate for the 10-17 age group rose from 12.7 (12.7

per 1000) in 1975 to a high of 15.6 in 1980, the year before the notice law took effect, and then declined to a low of 11.3 in 1983 and 12.4 in 1986. Thus, even though the population of 10-17 year olds declined between 1975 and 1986, the pregnancy rate declined, as well, by 20.5% between 1980-1986.

2. *Pregnancy Rate for 18-19 Year Olds*

Table 2 and Figure 2b show that the pregnancy rate for the 18-19 age group rose substantially from 75.5 (75.5 per 1000) in 1975 to a high of 98.5 in 1980, the year before the notice law went into effect, but then fell after 1980 to 96.0 in 1981 and to 73.5 in 1986, below the 1975 level. Again, even though the population in Minnesota in the 18-19 age group fell from a high of 86,924 in 1976 to 74,689 in 1986, the pregnancy rate also declined 25.4% between 1980-1986.

3. *Abortion Rate for 10-17 Year Olds*

The abortion rate equals the number of abortions in the selected age group divided by the population of the females in that age group in thousands (abortions/population). Table 2 and Figure 2a show that the abortion rate for the 10-17 age group rose from 4.9 in 1975 to a high of 8.4 in 1980, the year before the notice law became effective, and then fell to 6.8 in 1981, to a low of 5.4 in 1983 and 6.1 in 1986.[9] The abortion rate thus rose 71.4% between 1975-1980 and then fell 27.4% between 1980-1986.

4. *Abortion Rate for 18-19 Year Olds*

The Department's data also show that the abortion rate for the 18-19 age group in Minnesota fell during the time

[9] Stanley Henshaw suggested that the rate of abortions for teens age 15-17 has declined, in part, because they passed themselves off as 18. Henshaw T. 61. This is implausible because it would result in an increase in the abortion rate for 18-19 year olds, which plainly did not occur.

that the notice law was in effect. Table 2 and Figure 2b show that the abortion rate rose from 20.4 in 1975 to a high of 40.1 in 1980, the year before the notice law became effective. The abortion rate then fell 4.8% to 38.20 in 1981 and a further 16.8% to a low of 31.80 in 1986. The abortion rate thus rose 96.6% between 1975-1980 and fell 20.7% between 1980-1986.

5. *Birth Rate for 10-17 Year Olds*

The birth rate equals the number of births in the selected age group divided by the population of females in that age group in thousands (births/population). Figure 2a and Table 2 show that the birth rate for the 10-17 age group in Minnesota fell from 7.8 (7.8 per 1000 teens) in 1975 to 7.2 in 1980, and that it continued to fall to 7.0 in 1981, to a low of 5.8 in 1983 and then to 6.3 in 1986. The birth rate therefore fell 7.7% between 1975-1980 but fell 12.5% between 1980-1986.

6. *Birth Rate for 18-19 Year Olds*

The Department's data show that the birth rate for the 18-19 age group in Minnesota fell during the time the notice law was in effect. Table 2 and Figure 2b show that the birth rate for the 18-19 age group rose from 54.6 in 1975 to 58.0% in 1980 (+6.2%), the last full year before the notice law took effect. The birth rate in this age group then fell to 57.4 in 1981 and to a low of 41.5 in 1986. Thus, the birth rate fell 28.4% between 1980-1986.

In sum, the Department's data refute the clinics' contention that the notice law increased the birth rate for teenagers in Minnesota. Between 1980-1986, the birth rate fell 12.5% for 10-17 year olds, 28.4% for 18-19 year olds, and 23.6% for 20-24 year olds.[10] In contrast,

[10] Stanley Henshaw acknowledged the decline in Minnesota birth rates for 15-17 and 18-19 year olds, but attributed this to a regional decline. J.A. 100.

the birth rate for 25-54 year olds increased 6.1% between 1980-1986. The Minneapolis birth rate data is separately examined in Section III below.

C. The Data Are Strong Evidence that the Notice Law Effectively Reduced Teen Pregnancy Rates in Minnesota During Its Effective Period.

The comparison of the pregnancy, abortion, and birth rates in Minnesota between 1981-1986 strongly supports the conclusion that the notice law effectively caused a decrease in the pregnancy rate in those years. Since the abortion rate fell 27.4% for 10-17 year olds and 20.7% for 18-19 year olds, while the birth rate throughout Minnesota simultaneously fell 12.5% for 10-17 year olds and 28.4% for 18-19 year olds, the pregnancy rate must have declined, as the data confirm, supporting the conclusion that the notice law in fact changed adolescent behavior. In other words, since it seems undisputed that the notice law did directly decrease abortion rates, while birth rates simultaneously decreased, the law must have decreased abortion rates by affecting pregnancy rates.

In addition, the number of teens, aged 10-17, who aborted as a percentage of all pregnant teens (including fetal deaths), aged 10-17, did not decline markedly between 1980-1986. The figures are, respectively, for those years: 53.9%, 49.0%, 47.3%, 47.9%, 46.0%, 50.3%, 49.3%. This is further evidence that the impact of the notice law was to reduce teen pregnancies generally, rather than to compel teens to give birth rather than abort.

On the other hand, it may not be possible, examining the pregnancy and abortion rates in Minnesota alone, to conclude with certainty that the notice law itself caused lower pregnancy rates by inducing minors to change their behavior. But the Department's data at least make clear that the notice law did not cause higher birth rates in Minnesota and was enforced during an unprecedented period when pregnancy and abortion rates declined for teens aged 10-17.

D. Minnesota Teenagers Did Not Have Abortions at Significantly Later Points in Pregnancy Relative to Other Age Groups While the Notice Law Was in Effect.

The plaintiff clinics claim that the notice law delayed minors from having abortions, pushing them into later gestational periods, with the implication that this increased the risk of abortion. Pet. Br. at 13-14; T. 2088; J.A. 347. For this claim, they rely, in part, on a report by the Meadowbrook Women's Clinic, one of the plaintiffs, that "as of December 1985, over 30% of their minor patients seeking abortions were in the second trimester." Pet. Br. at 14 n.29. But this bare statistic from one clinic, presented in isolation, says virtually nothing. Moreover, the Department's data bely these claims generally. *See also* Cross Pet. Br. at 19; J.A. 346-49, 474, 481.

Table 3 and Figure 3a show the number of abortions performed at [greater than] 12 weeks gestational age for all age groups between 1975-1986.[11] For the 10-17 age group, the number of abortions performed after 12 weeks grew from 403 in 1978 to 510 in 1980, jumping substantially between 1979-1980, but *declined* sharply (28.4%) from 1980-1981. Between 1981-1986, the number of abortions performed in this age group after 12 weeks continued to decline 8.8% to 333 in 1986.

Table 3 and Figure 3b show the percentage of abortions performed after 12 weeks. For the 10-17 age group,

[11] The 12-week point was used because 12 weeks is generally used as the line between the first and second trimesters and because the clinics' allegation is that the proportion of minors who had "second trimester abortions increased dramatically." Pet. Br. at 13-14. Dr. Paul Gunderson also used a 12 week cutoff. T. 2103-2104.

the percentage of abortions performed after 12 weeks grew 22.3% from 1975-1980, declined between 1980-1982, increased between 1982-1984 and then declined between 1984 and 1986, with the result that the percentage of abortions performed after 12 weeks in 1985 was nearly the same as the percentage in 1980. For 1980-1986, the percentage of abortions performed at [greater than] 12 weeks for 10-17 year olds dropped 1.4%.

The figures for the 10-17 age group, however, cannot properly be viewed in isolation but must be compared with the figures for the other three age groups in Minnesota between 1975-1986. The percentage of abortions performed after 12 weeks for the 18-19 age group declined from 16.6% in 1980 to 15.2% in 1982, and then increased from 1982 to 1984 before dropping between 1984-86, a total increase between 1980-86 of 10.3%. A similar pattern occurred for the 20-24 and the 25-54 age groups. The 20-24 age group shows a 9.8% increase from 1975-80 in the percentage of abortions performed after 12 weeks. But there is a significant increase in 1984 before a drop to 1986, with a resulting increase of 4.5% between 1980-86. For the 25-54 age group, the percentage of abortions performed after 12 weeks decreased 2.3% between 1975-80 and then increased 1.2% between 1980-86.

Three primary characteristics should be noted for all age groups. First, the percentage of abortions performed after 12 weeks is consistently related to age differences, both before and after the enactment of the notice law. The percentage of abortions after 12 weeks for the 10-17 age group is consistently higher than the 18-19 age group, which is consistently higher than the 20-24 age group, which is consistently higher than the 25-54 age group for all years from 1975-1986. Second, as Figure 3b shows, for all groups there appears to be a cyclical trend with "peaks" every four years, which the notice law has not interrupted. Third, after the notice law became effective

in 1981, the percentage of abortions after 12 weeks dropped for all age groups between 1980-1981, rose slightly from 1981-1982, and rose after 1982. The fact that the number and percentage of abortions performed after 12 weeks in the 10-17 age group dropped between 1980 and 1981, and the fact that the number of abortions for all age groups performed after 12 weeks increased after 1982, provide strong evidence that the notice law did not selectively increase the gestational age at which teens obtained abortion.

E. Minnesota Teenagers Did Not Have Increased Complications From Induced Abortion Relative to Other Age Groups While the Notice Law Was in Effect.

The plaintiff clinics also claim that complications from induced abortions incurred by teens subjected to the notice law increased because of the law. This claim is based entirely on journal publications about general rates of complications and not on any specific medical evidence in the record. *See* Pet. Br. at 14; J.A. 347-48.[12] By relying on general rates of complications, which generally increase with gestational age, the clinics' argument assumes the validity of their claim that the law caused adolescents to have later abortions. But this assumption has been contradicted by the Department's data. Independent of the gestational age data, the Department's data indicate that the claim of increased complications is unfounded. *See* Cross Pet. Br. at 19, 39-40; J.A. 347-48.

---

[12] Plaintiffs' counsel told the district court: "In Plaintiffs' Exhibits 1 through 9 and also in Dr. Hodgson's testimony there is a claim that the risk increases through delay, specifically the types of risks such as laminaria due to cervical—lack of laminaria use which relates to cervical injury, but we haven't demonstrated or said on any particular patients those risks have occurred except those who haven't been able to get it, who have gone to childbirth, which of course is much more dangerous." T. 2088; J.A. 347. When asked by the court whether the claim was that the notice law "resulted in an increase in complications to minors" rather than an increase in "risk," counsel for plaintiffs replied, "No." *Id.*

For purposes of this analysis, it must be understood that between 1982-1984, the Department changed and broadened its definition of "complication" for purposes of the reporting statute. T. 2090-2094. This broader definition encompassed more specific instances of morbidity that were required to be reported as complications of abortion. Specifically, the Department changed their reporting form to include more examples of complications (from 8 categories to 12 categories), including a distinction between "minor" complications (not requiring hospitalization) and "major" complications (requiring hospitalization) (e.g., pelvic infection, hemorrhage, and others). In the aftermath, the Department found increased reporting of "minor" complications.

Table 4 and Figures 4a-4b show the number and percentage of abortions with reported complications for all age groups in Minnesota, 1975-1986. The rate of complications is determined by dividing the number of complications by the number of abortions. For the 10-17 age group, the number of complications declined from 16 in 1975 to 6 in 1980, and then declined to 0 in 1981, before jumping to 10 in 1982 and dropping to 8 in 1986, the same as the 1978 figure. Figure 4b shows that, for the 10-17 age group, the percentage of abortions with reported complications increases 56.3% between 1982-1984 but then declines 48.0% between 1984-1986. For the 18-19 age group, the percentage increases 211.1% between 1982-1984 and then declines 43.8% between 1984-1986. For the 20-24 age group, the percentage increases 60.9% between 1982-1984 and then declines 18.4% between 1984-1986. Finally, for the 25-54 age group, the percentage increases 33.7% between 1982-1984 and continues to increase 3.4% between 1984-1986.

In sum, the Department's data show that reported complications increased for all age groups between 1975-1986. This is entirely consistent with the Department's findings after the change in its definition of complica-

tions. Between 1982-1984, the percentage of complications *increased more* for the 18-19 and 20-24 age groups than for the 10-17 group. And, between 1984-1986, the percentage of complications *fell less* for all other groups than the 10-17 age group. These facts provide strong evidence that the notice law caused no increased complications for teens age 10-17 who were subject to the law.

III. THE CONTENTION THAT THE NOTICE LAW INCREASED BIRTHS TO TEENS IS BASED ON STATISTICS FOR ONLY THE LIMITED AREA OF THE MINNEAPOLIS CITY LIMITS AND THESE MUST BE VIEWED WITHIN THE CONTEXT OF OTHER DEMOGRAPHIC PHENOMENA IN MINNEAPOLIS AND THROUGHOUT THE STATE.

The plaintiff clinics claim that the notice law caused a 38.4% increase in the birth rate to teens age 15-17 by relying on a 38.4% increase in the birth rate for teens age 15-17 in Minneapolis between 1980-84. Pet.Br. at 12. Plaintiffs, purporting to quote Edward Ehlinger of the Minneapolis Dept. of Health, argue that the notice law "was the only factor that uniquely affected the fifteen to seventeen year old age group which could explain the difference." Pet.Br. at 12. Ehlinger, in fact, did not say that it was the "only" factor; he said merely that it "would be an important factor." T. 2030-31.

As this Court stated recently in *Webster v. Reproductive Health Services, Inc.*, 109 S.Ct. 3040, 3050 (1989), the states may "make a value judgment favoring childbirth over abortion." Thus, the fact that the notice law may have increased births to teens affected by the law is not a constitutional indictment against the law. Such a fact would merely imply that parental influence, as required by the law, had encouraged teens to give birth rather than abort. Such parental guidance is hardly a result which violates the Constitution. But, in fact, the data undermine the claim that the notice law caused in-

creased births to teens either in Minnesota generally or in Minneapolis specifically.

The clinics' assertion rests entirely on data gathered from the Minneapolis Department of Health concerning residents of the City of Minneapolis only. *See* P. Exh. 116; T. 2072 (Dr. Paul Gunderson). The data *do* show an increase of 38.4% between 1980-84 in births to teens between the age of 15-17 who are residents of Minneapolis. *See* Table 5. For 1980-87, the birth rate of Minneapolis teens aged 15-17 is 39.1, 41.2, 42.7, 47.3, 54.1, 58.2, 62.2, 64.5, respectively. When seen within the context of demographic statistics throughout Minnesota and within demographic changes in Minnesota in the 1980's, however, the allegation that the increase is due to the notice law is doubtful.

Initially, it is important to realize that teens who are residents of Minneapolis make up roughly only 6% of the teen population of Minnesota. In 1981, the 15-17 year old female population for Minnesota was 107,784, while the female population in Minneapolis for ages 15-17 was only 6,548. Thus, the 38.4% increase in the birth rate in Minneapolis was limited to 6% of the state's population of 15-17 year olds.

Statistics throughout Minnesota show that the 38.4% increase in the birth rate to Minneapolis residents age 15-17 between 1980 and 1984 was unique to Minneapolis and did not occur in metropolitan Minneapolis or in Minnesota in general, as Table 5 and Figure 5a show. *See also* T. 2073-74 (Dr. Paul Gunderson). The birth rates for ages 15-17 in years 1980-1986 in metropolitan Minneapolis are 17.4, 17.2, 17.2, 15.1, 17.4, 16.5, 17.8. And the birth rate for ages 15-17 between 1980-86 in Minnesota as a whole is 17.5, 17.5, 16.6, 14.6, 16.1, 15.1, 15.6. In addition, Minneapolis differs in birth rate from other geographic regions in Minnesota for other age groups besides 15-17, particularly for ages 10-14, 18-19, and 25-34, as Table 5 and Figures 5b-5e show. Finally, the Minneapolis birth rate for 15-17 year olds continues

to climb throughout 1986 and 1987, even after the notice law was enjoined in March, 1986.

The number of births to teens as a percentage of all births in Minneapolis must also be considered. In Table 7 and Figure 7a, it is apparent that the percentage of births to minors in Minneapolis is lower than that found in the nation generally, but exhibits a remarkably parallel trend to the national trend over time. The selective increase in birth rate in Minneapolis is reflected in the Minneapolis line in Figure 7a, insofar as the percentage of total births to teen births in Minneapolis rises contrary to the national and statewide trend between 1985-1987. But this increase occurs later than we would expect were it a result of a law enacted in 1981. The real increase in the percent of births to minors does not happen until several years later: 1985, 1986, and 1987, when the law was no longer in effect. The increase in the 15-17 year old Minneapolis birth rate during 1981-83 is *not* accompanied by an increase in births to minors as a percentage of total births. This clearly parallels both the Minnesota and national trends in its decline during 1981-83. The opposing trends in Minneapolis in birth rate to minors 15-17 (Figure 5a) and percent of births to minors (Figure 7a) indicate that birth rates must have been increasing in general in Minneapolis from 1981-83, regardless of age. This indicates that the increase in birth rates in Minneapolis to minors during the enactment period of the notice law was merely part of a larger trend effecting all minors and adult women, including those not subject to the law.

Moreover, the increase in births for Minneapolis teens age 15-17 leads to a different conclusion when the Minneapolis population is examined in more detail. When the Minneapolis births are broken down by race, and compared with data from the National Center for Health Statistics, the increase in births to girls under 18 is seen to be largely confined to the minority population, spe-

cifically the population of Asian-Pacifics. Figure 7b is a breakdown by race of the Minneapolis and national trend lines in Figure 7a. The Asian-Pacific Island percentage of births to minors deviates from the national trend and increases dramatically. All other races roughly parallel national trends in their decline, at least until 1986, when the notice law was enjoined. This would suggest that Asian-Pacifics are disproportionately impacting the birth rate for teens age 15-17 in Minneapolis. It is implausible that the notice law would selectively impact Asian-Pacifics more than other races in Minneapolis. Therefore, other explanations for the Minneapolis increase in birth rate should be explored.

Figure 8 suggests one possible explanation—a substantial increase in the population of Asian-Pacific teens. Figure 8 shows the percent of minority enrollment in the Minneapolis Public School District from 1971 to 1987. This Figure shows that the percentage of Asian enrollment sharply increases between 1980-1981 and continues to increase from 1981-1987. It is precisely during this time that the percent of all births to minors for the Asian-Pacific population experienced the greatest increase. These statistics show an unusual increase in both the Asian-Pacific population in Minneapolis and in the percentage of births to minors for this population.

This increase in births to Asian-Pacific minors must be compared with the abortion behavior of this population. The abortion rate is important to consider because the clinics' challenge to the notice law is predicated on the assumption that it keeps minors from getting abortions. The notice law can directly influence only the abortion rate and the birth rate is influenced by a reduction in the number of abortions. This implies that as the influence of the notice law on the abortion rate decreases, its potential influence on the birth rate should also decline. Yet, Dr. Paul Gunderson testified to the virtual nonexistence of abortion to the Asian-Pacific population. *See*

T. 2076 (Dr. Paul Gunderson commenting on the low abortion rate of Asians in Minnesota). It is improbable, therefore, that a group with an extremely low abortion rate before the law went into effect would be the most effected by the law in terms of birth rate. Some other factor(s), and not the notice law, must explain this increase.

In summary, the Minneapolis data do not support the contention that birth rates for teens in Minneapolis increased because of the notice law. When viewed in conjunction with the data from other regions of Minnesota, it appears that the notice law did not increase births to teens in Minneapolis. Together with the marked decrease in pregnancy rates and abortion rates in Minnesota, these data demonstrate that the notice law, as applied, is reasonably related to preserving parental authority and protecting the health of minors.

CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

Of Counsel:
KENT MASTERSON BROWN
1114 First National Bldg.
167 West Main Street
Lexington, KY 40507
(606) 233-7879

CLARKE D. FORSYTHE *
LEANNE MCCOY
AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND (AUL)
343 S. Dearborn Street #1804
Chicago, IL 60604
(312) 786-9494
Counsel for Amicus Curiae

October 10, 1989

* Counsel of Record

APPENDIX

APPENDIX 1:

STATE REPORTING REQUIREMENTS AND PARENTAL CONSENT OR NOTICE OF ABORTION STATUTES

ALABAMA: Parental consent statute enacted in 1987; in effect and enforced since September 23, 1987. Ala. Code sec. 26-21-3 (Supp. 1988); *Ex parte: State of Alabama* and *Ex parte: Anonymous*, 531 So.2d 901 (Ala. 1988).

No reporting statute.

ALASKA: Parental consent statute enacted in 1970. Alaska Stat. sec. 18.16.010(a)(3) (1987). On October 21, 1976, an opinion of the Attorney General declared that this subsection is "clearly unconstitutional."

No reporting statute.

ARIZONA: Parental notice statute enacted in 1982; Ariz. Rev. Stat. Ann. sec. 36-2152 (1986); enjoined by federal court. New parental consent statute enacted May 22, 1989, with an intended effective date of September 15, 1989; preliminarily enjoined by federal court on September 15, 1989, and injunction extended on September 22, 1989. *Planned Parenthood v. Neeley*, No. CIV 89-489 TUC ACM (D.Ariz. 1989).

Reporting statute in effect from January 1, 1968. Ariz. Rev. Stat. Ann. sec. 36-340 and 341 (1986).

ARKANSAS: Parental consent statute enacted in 1969. Ark. Stat. Ann. sec. 41-2555 (Supp. 1985). Enjoined by federal court in 1980. *Smith v. Bentley*, 493 F.Supp. 916 (E.D. Ark. 1980). New parental notification statute enacted in 1989. Ark. Acts 270.

Reporting statute in effect from February 19, 1981. Ark. Stat. Ann. sec. 20-18-603 (1987).

CALIFORNIA: Parental consent statute enacted in 1987, with intended effective date of January 1, 1988.

Cal. Health & Safety Code sec. 25958 (Supp. 1988). Continuing state court injunction since December 28, 1987, entered on facial challenge to parental consent statute. *American Academy of Pediatrics v. Van de Kamp*, No. 884574 (Cal. Super. Ct. Dec. 28, 1987), *appeal docketed*, No. A040911 (1st Cir. Cal. App. argued August, 1989).

Reporting statute was added by statutes in 1971, amended and effective on June 30, 1973, and operative on July 1, 1973. Cal. Health & Safety Code sec. 25955.5 (1984).

COLORADO: No parental or reporting statute.

CONNECTICUT: No parental or reporting statute.

DELAWARE: Parental notice statute enacted on June 17, 1969, but not presently operative. Del. Code Ann. tit. 24, sec. 1790(b)(3) (1981).

Reporting statute enacted on June 17, 1969. Del. Code Ann. tit. 24, sec. 1790(c) (1981).

DISTRICT OF COLUMBIA: No parental or reporting statute.

FLORIDA: Parental consent statute enacted in 1979. Fla. Stat. Ann. sec. 390.001(4)(a) (West Supp. 1985). Enjoined by federal court on July 10, 1979, and subsequently declared unconstitutional; *Scheinberg v. Smith*, 482 F.Supp. 529 (S.D. Fla. 1979), *aff'd*, 659 F.2d 476 (5th Cir. 1981); parental consent statute enacted on June 15, 1988, with intended effective date of October 1, 1988; enjoined by federal court injunction on facial challenge on October 6, 1988, which was dissolved on February 13, 1989. *Jacksonville Clergy Consultation v. Martinez*, 707 F. Supp. 1301 (M.D. Fla. 1989), *appeal docketed*, No. 89-3127 (11th Cir.). Declared unconstitutional on May 12, 1989. *In re T.W.*, 543 So.2d 837 (Fla. App. 5 Dist. 1989).

Reporting statute in effect as of August 5, 1979. Fla. Stat. Ann. tit. 29, sec. 390.002 (1986).

GEORGIA: Parental notice statute enacted on April 14, 1987, with intended effective date of July 1, 1987. Ga. Code Ann. sec. 24A-4401 (Supp. 1988). Enjoined by federal injunction on June 30, 1987. *Planned Parenthood v. Harris*, 670 F. Supp. 971 (N.D. Ga. 1987). Amended parental notice statute enacted on March 31, 1988, with intended effective date of July 1, 1988; enjoined by continuing federal injunction on July 11, 1988. *Planned Parenthood v. Harris*, 691 F.Supp. 1419 (N.D. Ga. 1988).

There are two reporting statutes in the Georgia Code of 1981, which became effective on November 1, 1982. Ga. Code Ann. sec. 31-10-19, 16-12-141 (1988).

HAWAII: No parental or reporting statute.

IDAHO: Parental notice statute enacted in 1973; Idaho Code sec. 18-609(6) (1985).

No reporting statute.

ILLINOIS: Parental consent statute (Ill. Ann. Stat. ch. 38, para. 81-51 *et seq.* (Smith-Hurd 1989)) enacted in 1977 with an effective date of Jan. 1, 1978; enjoined by federal court in *Wynn v. Scott*, 448 F.Supp. 997 (N.D. Ill. 1978), *aff'd* 582 F.2d 1375 (7th Cir. 1978); *see also Wynn v. Carey*, 559 F.2d 193 (7th Cir. 1979). Parental notice statute enacted on November 2, 1983, with intended effective date of January 31, 1984; Ill. Rev. Stat. ch. 38, para. 81-65 (1988); enjoined by continuing federal court injunction since January 26, 1984. *Hartigan v. Zbaraz*, 584 F.Supp. 1452 (N.D. Ill. 1984), *aff'd*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by equally divided court*, 108 S.Ct. 479 (1989).

Reporting statute amended in 1984. Ill. Rev. Stat. ch. 38, para. 81-30 (1989). Enjoined by continuing federal court temporary restraining order since 1984 from gathering abortion statistics, *Herbst v. Daley*, No. 84 C 5602 (N.D. Ill. July 1, 1984).

INDIANA: Parental consent statute enacted in 1974; enjoined by federal court. *Gary-Northwest Women's Serv. Inc. v. Bowen*, 418 F.Supp. 9 (N.D. Ind. 1976), *aff'd on other grounds*, 429 U.S. 1067 (1977). Parental notification statute enacted in 1982, with intended effective date of Sept. 1, 1982; Ind. Code Ann. sec. 35-1-58.5-2.5 (Burns Supp. 1986). Enjoined by federal court in *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983); New parental consent statute enacted in 1984; enforced since September 1, 1984.

Reporting statutes in effect as of July 26, 1973. Ind. Code Ann. sec. 35-1-58.5-3 and sec. 35-1-58.5-5 (Burns Supp. 1988).

IOWA: No current parental involvement or reporting statute.

KANSAS: No parental involvement statute.

Reporting statute in effect as of July 1, 1975. Kan. Stat. Ann. sec. 65-445 (1985).

KENTUCKY: Parental consent statute enacted in 1982 with intended effective date of July 15, 1982. Ky. Rev. Stat. Ann. sec. 311-732 (1983). A temporary restraining order was entered against Kentucky's entire abortion statute on July 9, 1982, and the entire Act was declared unconstitutional on September 11, 1984. See *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984). The parental consent statute was amended in 1984 and again in 1986 with an intended effective date of July 15, 1986; temporary restraining order entered on July 10, 1986, on facial challenge and order lifted in approximately March of 1989. On Aug. 23, 1988, the district court partially enjoined the law, but upheld it as modified. See *Eubanks v. Wilkinson*, No. C82-0360-L(A), slip op. at 35-36 (W.D. Ky. Aug. 23, 1988), *appeal docketed*, No. 88-6085 (6th Cir. Sept. 22, 1988), No. 89-5353 (6th Cir. Mar. 21, 1989).

Reporting statute intended to be in effect as of July 15, 1982, but a temporary restraining order was entered against the State's entire abortion Act on July 9, 1982, and then the Act was declared unconstitutional on September 11, 1984. See *Eubanks v. Brown.*

LOUISIANA: Parental consent statute enacted in 1978, amended in 1980 and amended and reenacted in 1981 with this most recent version going into effect on July 23, 1981; La. Rev. Stat. Ann. sec. 40:1299.35.5 (West Supp. 1988); upheld by federal court in *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984).

Reporting statute enacted in 1978. La. Rev. Stat. Ann. sec. 40:1299.35.10, 40:1299.35.11 (1989). Constitutionality upheld except to the extent that the statute requires doctors to provide the zip code or residence of the pregnant woman. *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980). Related reporting statute enacted in 1979. La. Rev. Stat. Ann. sec. 40:48 (1989).

MAINE: Parental notice statute enacted in 1979 with an intended effective date of Sept. 14, 1979, but it was enjoined on Sept. 13, 1979. Me. Rev. Stat. Ann. tit. 22, sec. 1597 (1980 and Supp. 1988); *Women's Community Health Center v. Cohen*, 477 F. Supp. 542 (D.Me. 1979).

Reporting statute in effect as of March 31, 1978. Me. Rev. Stat. Ann. tit. 22, sec. 1596 (1980).

MARYLAND: Parental notice statute enacted in 1982; Md. Health-Gen. Code Ann. sec. 20-103 (1987). Attorney General issued opinion that it is unconstitutional. 70 Op. Atty. Gen. (Dec. 31, 1985).

Reporting statute in effect since 1968. Md. Health-Gen. Code Ann. sec. 20-208(c) (1987).

MASSACHUSETTS: Parental consent statute enacted on August 2, 1974, with intended effective date of October 31, 1974; Mass. Ann. Laws ch. 112, sec. 12 (Michie/Law. Co-op. 1985); enjoined by federal court on October

30, 1974; constitutionality upheld. The Massachusetts statute was enjoined and never enforced until after this Court's decision in 1981. *Bellotti v. Baird*, 443 U.S. 622, 625 n.1 (1979); constitutionality upheld. *Planned Parenthood v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981).

Reporting statute was in effect as of 1974. Mass. Ann. Laws ch. 112, sec. 12R (Michie/Law. Co-op. 1985).

MICHIGAN: No parental statute.

Reporting statute enacted in 1978. Pub. Act 368 of 1978. Mich. Stat. Ann. sec. 14.15 (2835) (Callaghan 1988).

MISSISSIPPI: Parental consent statute enacted in 1986, with intended effective date of July 1, 1986; Miss. Code Ann. sec. 41-41-53 (1988); enjoined by continuing, preliminary federal injunction since July 2, 1986, on facial challenge. *Barnes v. Mississippi*, No. J86-0458 (w) (S.D. Miss. 5/13/87).

No reporting statute.

MISSOURI: Parental consent statute enacted on June 14, 1974, with intended effective date of June 14, 1974; upheld by federal court on January 31, 1975. *Planned Parenthood v. Danforth*, 392 F. Supp. 1362 (1975); parental consent statute enacted in 1979 with intended effective date of June 29, 1979; Mo. Ann. Stat. sec. 188.028 (Vernon Supp. 1989); enjoined by federal court injunction from time of enactment until 1985. *See Planned Parenthood v. Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980); constitutionality upheld in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); subject to renewed challenge; injunction lifted in 1986. *T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986).

Reporting statutes have been in effect since June 29, 1979. Mo.Ann. Stat. sec. 188.052 and 188.055 (Vernon Supp. 1989); upheld in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

MONTANA: Parental notice statute enacted in 1974, but not presently operative. Mont. Code Ann. sec. 50-20-107 (1987).

Reporting statute in effect since 1974. Mont. Code Ann. sec. 50-20-110 (1987).

NEBRASKA: Parental notice statute enacted in 1981 with effective date of May 29, 1981; Neb. Rev. Stat. sec. 28-347 (1985); enjoined on September 16, 1983, in *Orr v. Knowles*, No. 81-0-301 (D.Neb. Sept. 16, 1983).

Reporting statute in effect as of July 1, 1978. Neb. Rev. Stat. sec. 28-343, 344, 345 (1985). Declared unconstitutional and enjoined insofar as statute requires physicians to make an official report of "prescribed" abortions. *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979).

NEVADA: Parental notice statute enacted on June 14, 1985, with intended effective date of July 1, 1985; Nev. Rev. Stat. sec. 442.255 (1986 & Supp. 1988); enjoined by continuing federal injunction since June 28, 1985, entered on facial challenge; appeal pending before Ninth Circuit since July 24, 1985. *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985), *appeal docketed*, No. 85-2335 (9th Cir. 1985).

Reporting statute in effect as of 1973. Nev. Rev. Stat. sec. 442.260 (1986).

NEW HAMPSHIRE: No parental or reporting statute.

NEW JERSEY: No parental or reporting statute.

NEW MEXICO: No parental statute.

Reporting statute enacted in 1977. N.M. Stat. Ann. sec. 24-14-18 (1986).

NEW YORK: No parental statute.

Reporting statute enacted in 1953 and most recently amended in 1987, effective Jan. 1, 1988. N.Y. Pub. Health Law sec. 4160, 4161 (McKinney 1989).

NORTH CAROLINA: No parental or reporting statute.

NORTH DAKOTA: Parental consent statute enacted in 1981; N.D. Cent. Code sec. 14-02.1-03.1 (Supp. 1987).

Reporting statute in effect since 1975; N.D. Cent. Code sec. 14-02.1-07; upheld in *Leigh v. Olson*, 497 F. Supp. 1340 (D. N.D. 1980).

OHIO: Parental notice statute enacted on November 20, 1985, with intended effective date of March 24, 1986; Ohio Rev. Code Ann. sec. 2151.85, 2919.12, and 2505.73 (Page Supp. 1985); enjoined by continuing federal injunction on facial challenge since March 31, 1986 (TRO), which became a preliminary injunction on April 22, 1986; *Akron Center for Reproductive Health v. Slaby*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd*, 854 F.2d 852 (6th Cir. 1988), *prob. juris. noted sub nom., Ohio v. Akron Center for Reproductive Health, Inc.*, U.S. No. 88-805.

No reporting statute.

OKLAHOMA: No parental law.

Reporting statute in effect as of October 1, 1978. Okla. Stat. Ann. tit. 63, sec. 1-738, 1-739 (West 1984).

OREGON: No parental law.

Reporting statute enacted in 1983. Or. Rev. Stat. Ann. sec. 435.496 (1987).

PENNSYLVANIA: Parental consent statute enacted in 1982; Pa. Stat. Ann. tit. 18, sec. 3206 (Purdon 1983); parental consent statute amended on March 25, 1988, with intended effective date of April 24, 1988; enjoined by continuing federal injunction since April 21, 1988, on May 23, 1988. *Planned Parenthood v. Casey*, 686 F.Supp. 1089 (E.D. Pa. 1988).

Reporting statute enacted in 1982. Pa. Stat. Ann. tit. 18, sec. 3214 (Purdon 1983). Partially enjoined in

American College of Obstetricians and Gynecologists v. Thornburgh, 613 F.Supp. 656 (E.D. Penn. 1985). The statute was amended on March 3, 1988, with an intended effective date of April 24, 1988. On April 21, 1988, a federal court granted a temporary restraining order and enjoined public disclosure of reports filed pursuant to sec. 3214(f). *Planned Parenthood v. Casey*, 686 F.Supp. at 1092. Then, the court permanently enjoined certain provisions of the reporting statute on May 23, 1988. *Id.* at 1129-1134.

RHODE ISLAND: Parental consent law enacted in 1982; R.I. Gen. Laws sec. 23-4.7-6 (Supp. 1985).

No reporting statute.

SOUTH CAROLINA: Parental consent statute was enacted in 1974; S.C. Code Ann. sec. 44-41-30 (Law. Co-op. 1985); enjoined by federal court; *Floyd v. Anders*, 440 F.Supp. 535 (D.S.C. 1977).

Reporting statute in effect as of 1975. S.C. Code Ann. sec. 44-41-60 (Law. Co-op. 1985).

SOUTH DAKOTA: Parental consent statute was enacted in 1973, but it is not presently operative. S.D. Codified Laws Ann. sec. 34-23A-7 (1986).

Reporting statute in effect as of 1973. S.D. Codified Laws Ann. sec. 34-23A-19 (1986).

TENNESSEE: Parental consent statute enacted in 1978; Tenn. Code Ann. sec. 39-4-202 (1982); enjoined by federal court in 1979; *Planned Parenthood v. Alexander*, No. 79-843 (Tenn. Ch. Ct. Oct. 24, 1979); parental consent statute enacted May 12, 1988, with intended effective date of July 1, 1989; enjoined by continuing federal injunction on facial challenge on June 30, 1989; and ruled unconstitutional on July 24, 1989, in *Planned Parenthood v. McWherter*, 716 F.Supp. 1064 (M.D. Tenn. 1989), *appeal docketed*, No. 89-6026 (6th Cir. Aug. 15, 1989).

Reporting statute in effect as of 1973. Tenn. Code Ann. sec. 39-4-203 (1982).

TEXAS: No parental or reporting statute.

UTAH: Parental notice statute enacted in 1974; Utah Code Ann. sec. 76-7-304 (1978); enjoined by federal court injunction; *L.R. v. Hanson*, No. 80-78 (D. Utah Feb. 8, 1980); constitutionality upheld in *H.L. v. Matheson*, 450 U.S. 398 (1981); subject to renewed challenge in 1986; *H.B. v. Wilkinson*, 639 F.Supp. 952 (D. Utah 1986). Upheld and in effect.

Reporting statute in effect from 1974 and amended in 1981. Utah Code Ann. sec. 76-7-313 (1978).

VERMONT: No parental or reporting statute.

VIRGINIA: No parental or reporting statute.

WASHINGTON: Parental consent statute enacted in 1970 with effective date of May 14, 1970; Wash. Rev. Code sec. 9.02.070 (1974). Enjoined on January 7, 1975, in *State v. Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975).

No reporting statute.

WEST VIRGINIA: Parental notice statute enacted in 1984; W. Va. Code sec. 16-2F-3 (1985).

No reporting statute.

WISCONSIN: No parental statute.

Reporting statute enacted in 1985 and in effect as of Nov. 1, 1986. Wis. Stat. Ann. sec. 69.186 (West 1989).

WYOMING: Parental consent and notice statute enacted in 1989 with an effective date of June 8, 1989. Wyo. Stat. sec. 35-6-118 (1989).

Reporting statute in effect after May 27, 1977. Wyo. Stat. sec. 35-6-107 and 108 (1988).

Table 1
Abortions, Births, and Pregnancies*

YEAR	AGE	ABORTIONS	BIRTHS	(FETAL DEATHS)	PREGNANCIES
1973	10-17	.	2406	24	.
	18-19	.	4509	46	.
	20-24	.	18276	123	.
	25-54	.	27211	277	.
1974	10-17	.	2330	35	.
	18-19	.	4649	37	.
	20-24	.	19096	174	.
	25-54	.	28198	267	.
1975	10-17	1507	2427	24	3958
	18-19	1758	4693	43	6494
	20-24	2702	19137	162	22001
	25-54	2161	28746	238	31145
1976	10-17	2060	2309	22	4391
	18-19	2511	4469	37	7017
	20-24	3643	18630	158	22431
	25-54	2895	29678	264	32837
1977	10-17	2274	2280	19	4573
	18-19	2693	4604	50	7347
	20-24	4528	19863	133	24524
	25-54	3529	32492	261	36282
1978	10-17	2186	2069	16	4271
	18-19	3054	4644	40	7738
	20-24	5066	19851	141	25058
	25-54	3872	33710	267	37849
1979	10-17	2308	2035	21	4364
	18-19	3293	4720	44	8057
	20-24	5683	20938	126	26747
	25-54	4355	35823	245	40423

* Source: Raw data provided by the Minnesota Department of Health. Reported abortions, births, (fetal deaths) and pregnancies are those occurring in Minnesota, with non-residents and women of unknown age excluded. Pregnancies = abortions + births + fetal deaths. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Table 1 (Continued)
Abortions, Births, and Pregnancies

YEAR	AGE	ABORTIONS	BIRTHS	(FETAL DEATHS)	PREGNANCIES
1980	10-17	2327	1974	14	4315
	18-19	3380	4883	38	8301
	20-24	6054	21899	140	28093
	25-54	4716	37236	246	42198
1981	10-17	1820	1876	18	3714
	18-19	3064	4602	31	7697
	20-24	6047	21638	135	27820
	25-54	4881	38654	269	43804
1982	10-17	1564	1727	16	3307
	18-19	2799	4216	37	7052
	20-24	5983	21161	132	27256
	25-54	5180	39581	242	45003
1983	10-17	1432	1538	17	2987
	18-19	2547	3641	35	6223
	20-24	5487	19319	137	24943
	25-54	5012	39309	260	44581
1984	10-17	1395	1617	19	3031
	18-19	2586	3502	24	6112
	20-24	6032	18864	136	25032
	25-54	5525	40941	282	46748
1985	10-17	1570	1537	15	3122
	18-19	2531	3401	26	5958
	20-24	6067	18409	109	24585
	25-54	5812	42157	281	48250
1986	10-17	1545	1573	15	3133
	18-19	2372	3096	25	5493
	20-24	5724	16959	109	22792
	25-54	6035	42269	240	48544

* Source: Raw data provided by the Minnesota Department of Health. Reported abortions, births, (fetal deaths) and pregnancies are those occurring in Minnesota, with non-residents and women of unknown age excluded. Pregnancies = abortions + births + fetal deaths. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Figure 1a
Abortions, Births, and Pregnancies
Ages 10–17

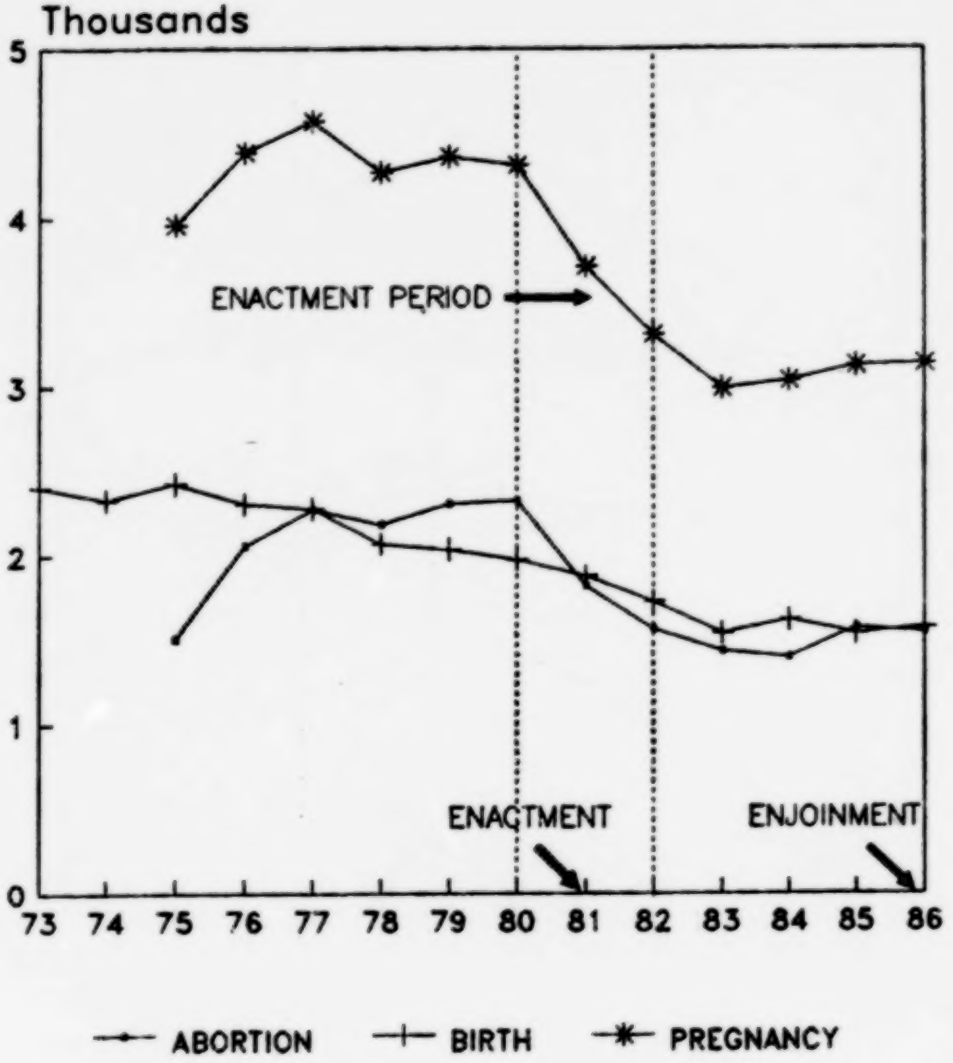


Figure 1b
Abortions, Births, and Pregnancies
Ages 18–19

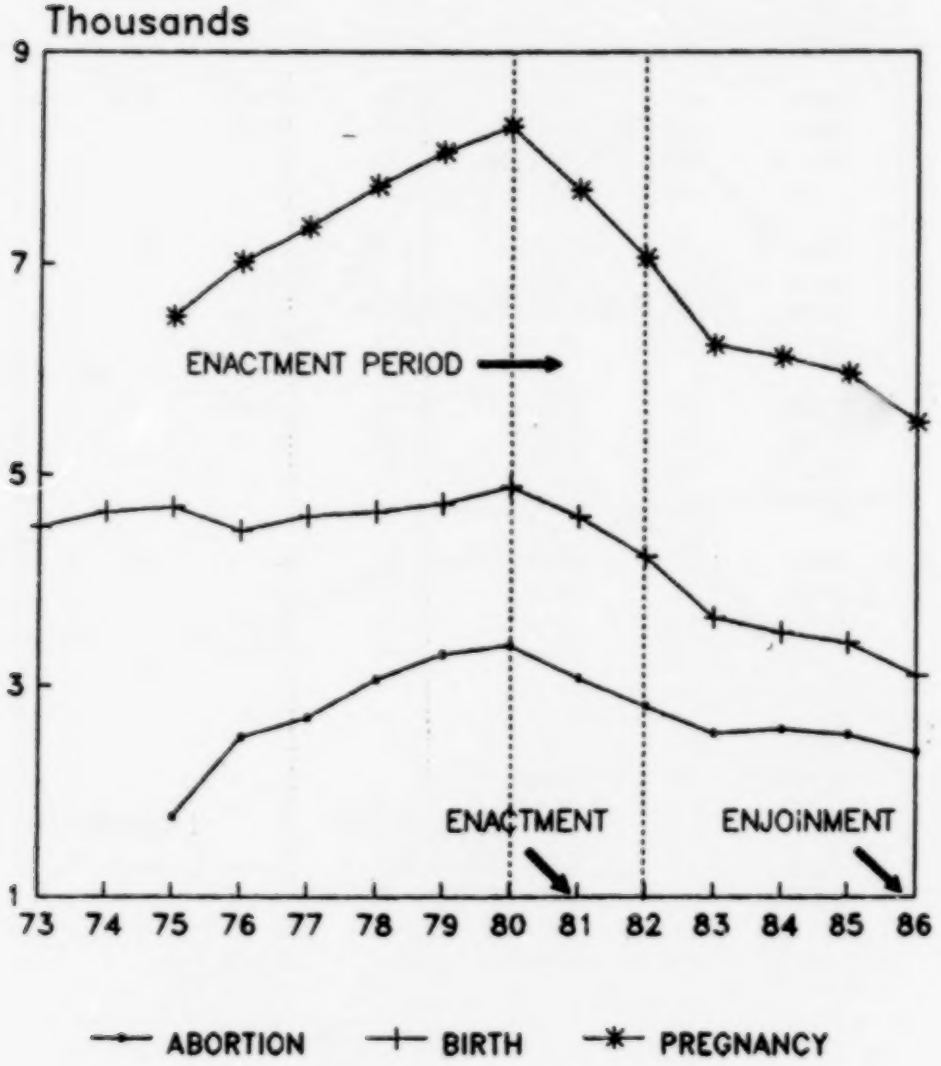


Figure 1c
Abortions, Births, and Pregnancies
Ages 20–24

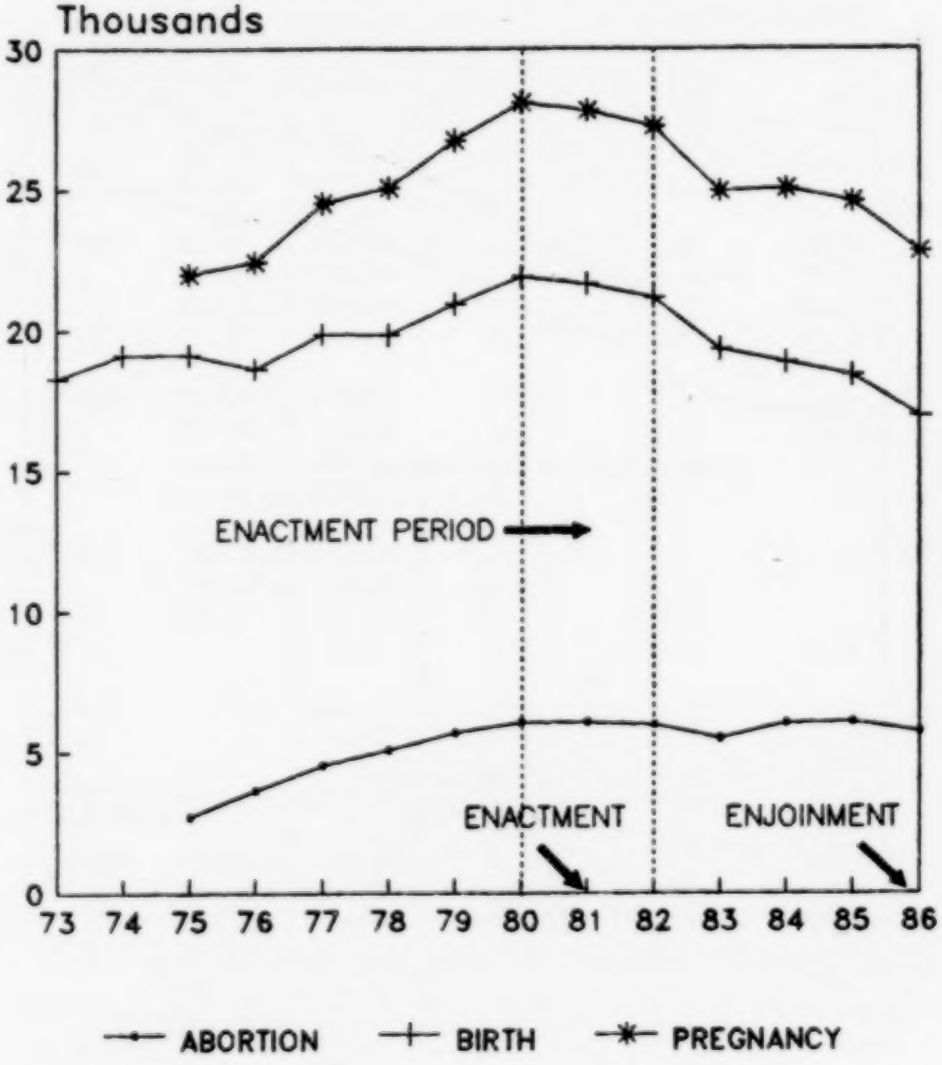


Figure 1d
Abortions, Births, and Pregnancies
Ages 25–54

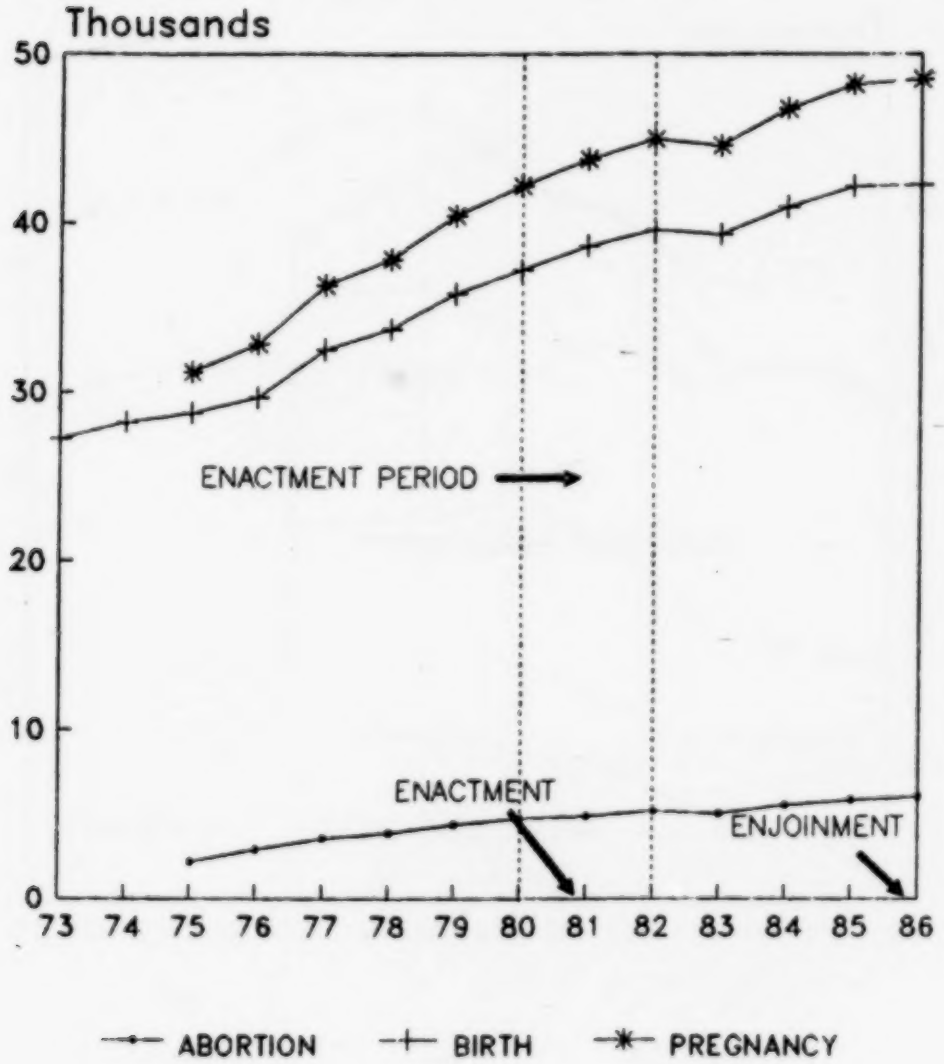


Table 2
Abortion, Birth, and Pregnancy Rates*

YEAR	AGE	POPULATION	ABORTION RATE	BIRTH RATE	PREGNANCY RATE
1973	10-17	319596	.	7.5	.
	18-19	72982	.	61.8	.
	20-24	177400	.	103.0	.
	25-54	652953	.	41.7	.
1974	10-17	318010	.	7.3	.
	18-19	73248	.	63.5	.
	20-24	179011	.	106.7	.
	25-54	659470	.	42.8	.
1975	10-17	310605	4.9	7.8	12.7
	18-19	85997	20.4	54.6	75.5
	20-24	178645	15.1	107.1	123.2
	25-54	683332	3.2	42.1	45.6
1976	10-17	305394	6.8	7.6	14.4
	18-19	86924	28.9	51.4	80.7
	20-24	183437	19.9	101.6	122.3
	25-54	699068	4.1	42.5	47.0
1977	10-17	296203	7.7	7.7	15.4
	18-19	86249	31.2	53.4	85.2
	20-24	187586	24.1	105.9	130.7
	25-54	709131	5.0	45.8	51.2
1978	10-17	288244	7.6	7.2	14.8
	18-19	85698	35.6	54.2	90.3
	20-24	192125	26.4	103.3	130.4
	25-54	724824	5.3	46.5	52.2
1979	10-17	282243	8.2	7.2	15.5
	18-19	85227	38.6	55.4	94.5
	20-24	196312	29.0	106.7	136.3
	25-54	744422	5.9	48.1	54.3

* Rate per 1000 female population. Source: Raw data provided by the Minnesota Department of Health. Rates reflect abortions, births, (fetal deaths), and pregnancies occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Table 2 (Continued)
Abortion, Birth, and Pregnancy Rates*

YEAR	AGE	POPULATION	ABORTION RATE	BIRTH RATE	PREGNANCY RATE
1980	10-17	276088	8.4	7.2	15.6
	18-19	84247	40.1	58.0	98.5
	20-24	198731	30.5	110.2	141.4
	25-54	754692	6.3	49.3	55.9
1981	10-17	267488	6.8	7.0	13.9
	18-19	80222	38.2	57.4	96.0
	20-24	198269	30.5	109.1	140.3
	25-54	770544	6.3	50.2	56.9
1982	10-17	262199	6.0	6.6	12.6
	18-19	77282	36.2	54.6	91.3
	20-24	197924	30.1	106.9	137.7
	25-54	787094	6.6	50.3	57.2
1983	10-17	263225	5.4	5.8	11.4
	18-19	77506	32.9	47.0	80.3
	20-24	198460	27.7	97.3	125.7
	25-54	789802	6.4	49.8	56.5
1984	10-17	249162	5.6	6.5	12.2
	18-19	74080	34.9	47.3	82.5
	20-24	199312	30.3	94.7	125.6
	25-54	798979	6.9	51.2	58.5
1985	10-17	251107	6.3	6.1	12.4
	18-19	74610	33.9	45.6	79.9
	20-24	200994	30.2	91.6	122.3
	25-54	806028	7.2	52.3	59.9
1986	10-17	251825	6.1	6.3	12.4
	18-19	74689	31.8	41.5	73.5
	20-24	201415	28.4	84.2	113.2
	25-54	808824	7.4	52.3	60.0

* Rate per 1000 female population. Source: Raw data provided by the Minnesota Department of Health. Rates reflect abortions, births, (fetal deaths), and pregnancies occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above. Abortion data unavailable for 1973 and 1974.

Figure 2a
Abortion, Birth, and Pregnancy Rates
Ages 10–17

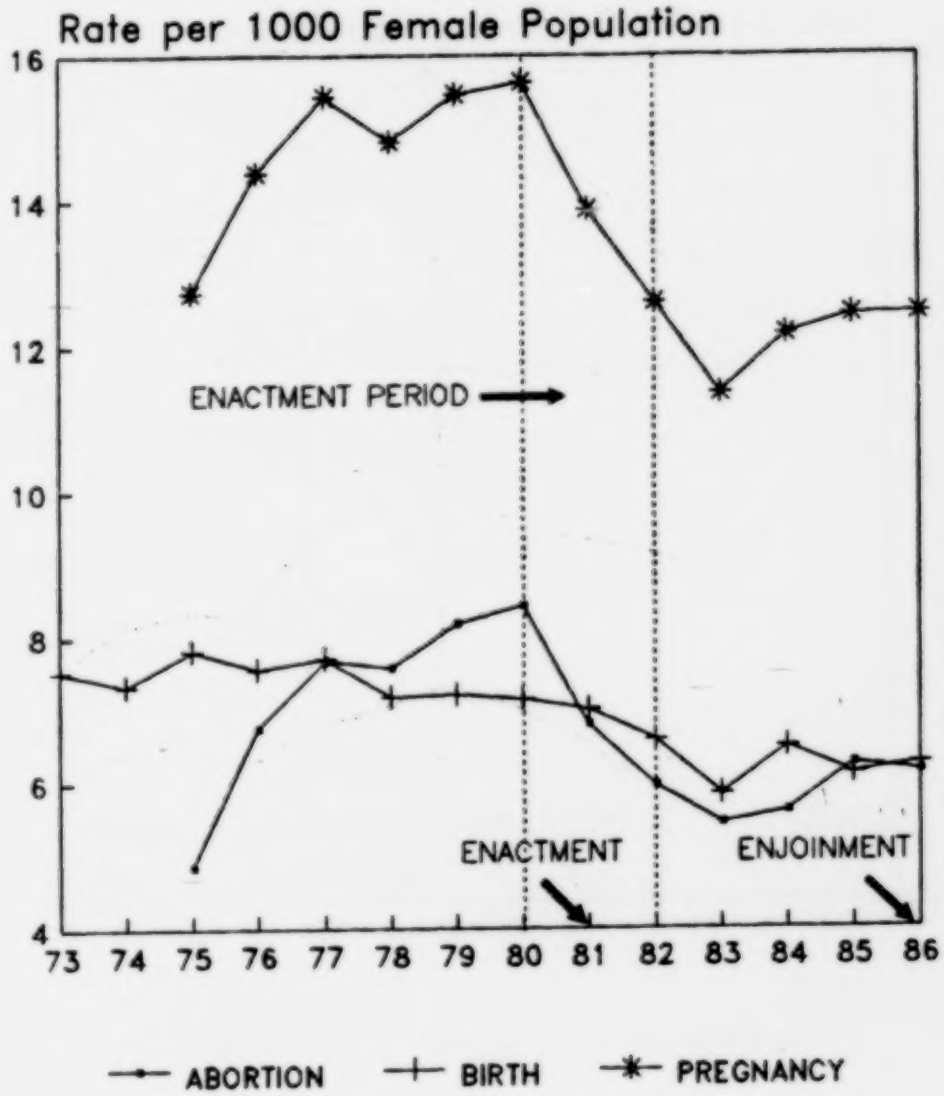


Figure 2b
Abortion, Birth, and Pregnancy Rates
Ages 18–19

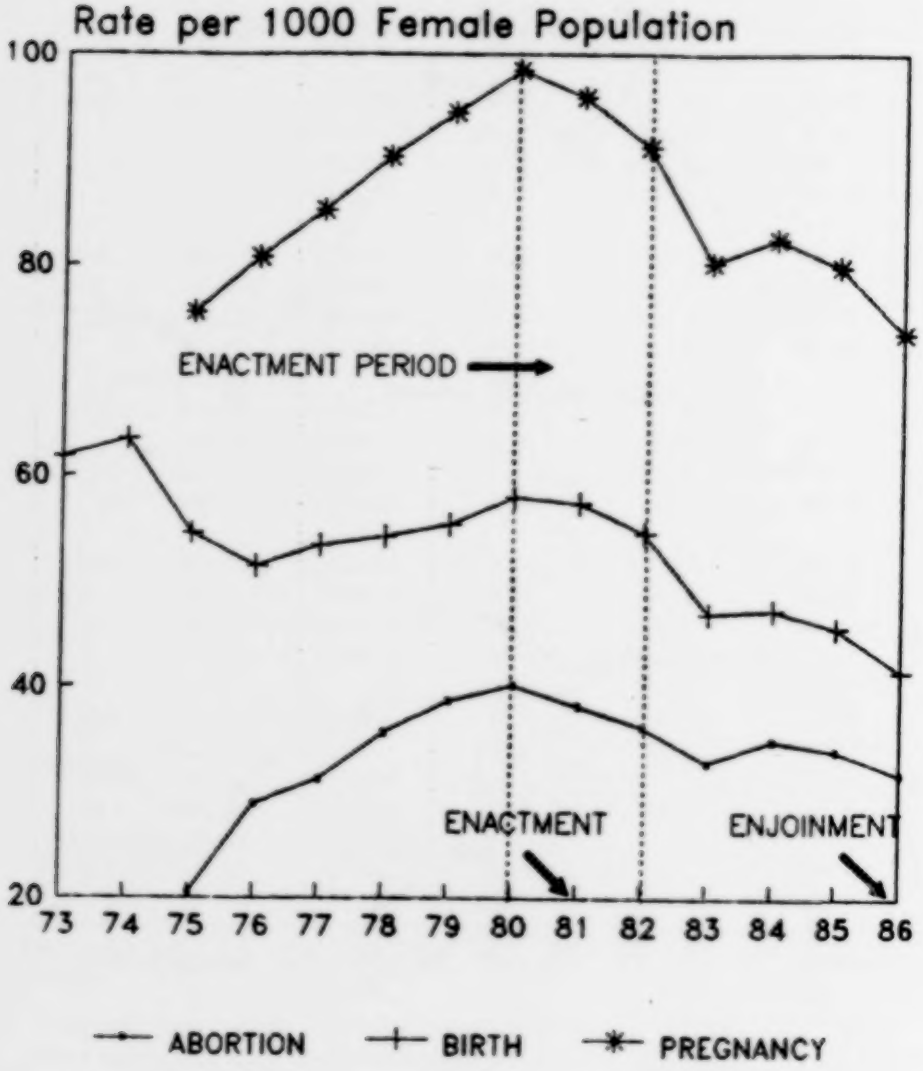


Figure 2c
Abortion, Birth, and Pregnancy Rates
Ages 20–24

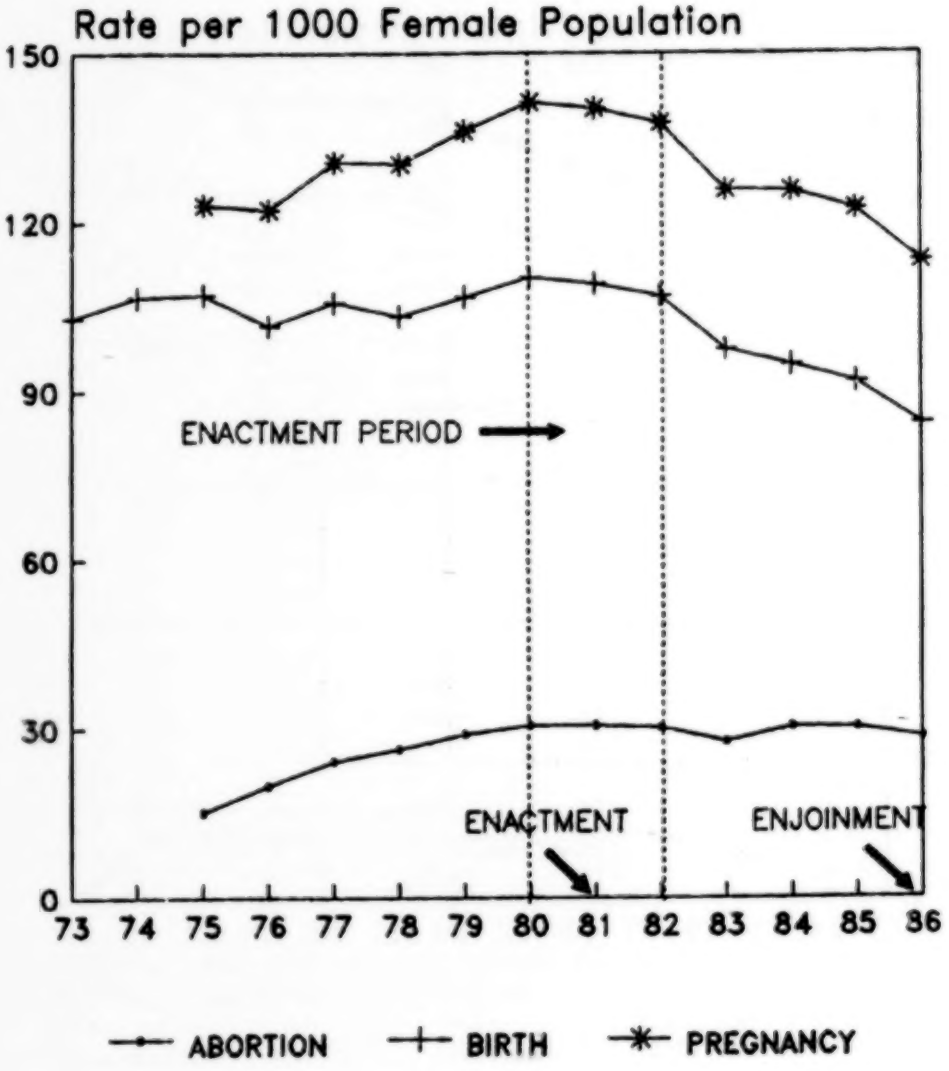


Figure 2d
Abortion, Birth, and Pregnancy Rates
Ages 25–54

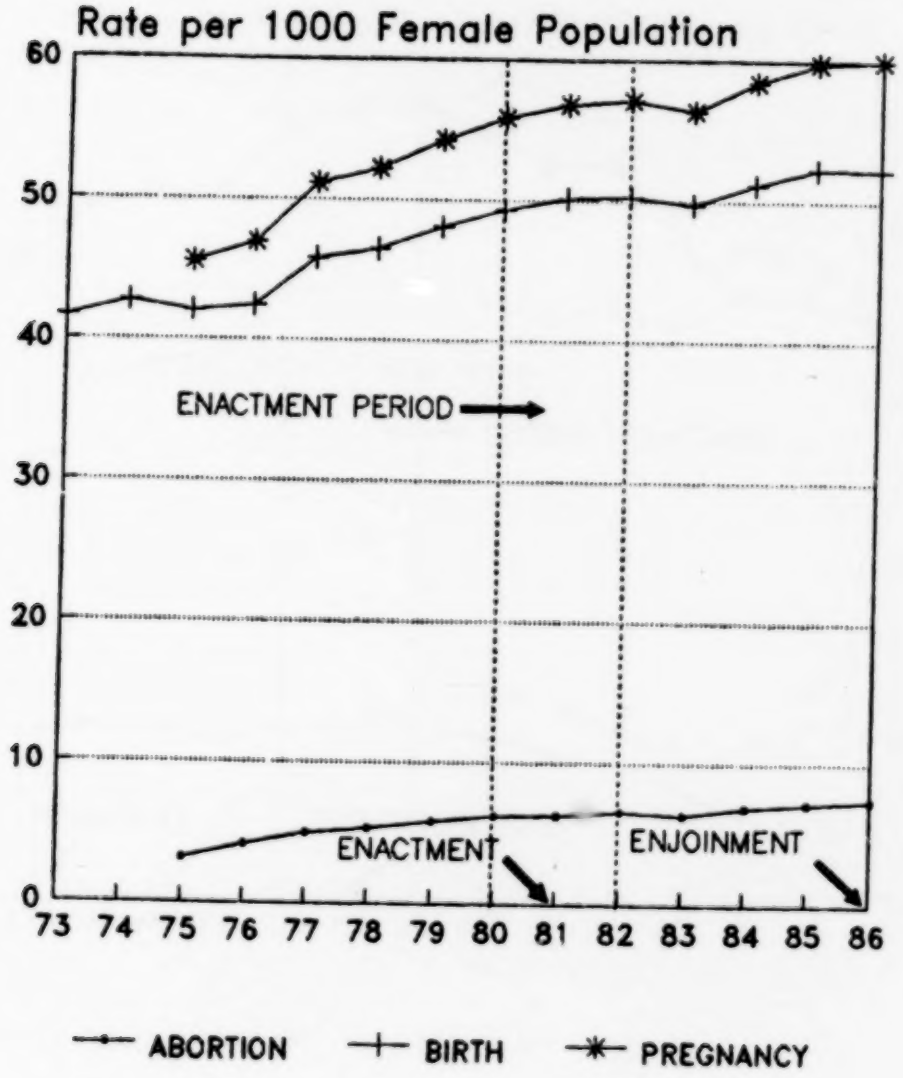


Table 3
Number and Percentage of Abortions with Gestation Age > 12 Weeks*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS PERFORMED AT > 12 WKS GESTATION	PERCENTAGE OF ABORTIONS PERFORMED AT > 12 WKS GESTATION
1975	10-17	1507	270	17.9
	18-19	1758	228	13.0
	20-24	2702	275	10.2
	25-54	2161	189	8.7
1976	10-17	2060	470	22.8
	18-19	2511	426	17.0
	20-24	3643	446	12.2
	25-54	2895	306	10.6
1977	10-17	2274	474	20.8
	18-19	2693	464	17.2
	20-24	4528	512	11.3
	25-54	3529	368	10.4
1978	10-17	2186	403	18.4
	18-19	3054	449	14.7
	20-24	5066	505	10.0
	25-54	3872	302	7.8
1979	10-17	2308	432	18.7
	18-19	3293	460	14.0
	20-24	5683	591	10.4
	25-54	4355	327	7.5
1980	10-17	2327	510	21.9
	18-19	3380	562	16.6
	20-24	6054	681	11.2
	25-54	4716	403	8.5

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Table 3 (Continued)
Number and Percentage of Abortions with Gestation Age > 12 Weeks*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS PERFORMED AT > 12 WKS GESTATION	PERCENTAGE OF ABORTIONS PERFORMED AT > 12 WKS GESTATION
1981	10-17	1820	365	20.1
	18-19	3064	462	15.1
	20-24	6047	625	10.3
	25-54	4881	363	7.4
1982	10-17	1564	322	20.6
	18-19	2799	425	15.2
	20-24	5963	631	10.6
	25-54	5180	412	8.0
1983	10-17	1432	334	23.3
	18-19	2547	419	16.5
	20-24	5487	626	11.4
	25-54	5012	370	7.4
1984	10-17	1395	360	25.8
	18-19	2586	489	18.9
	20-24	6032	786	13.0
	25-54	5525	461	8.3
1985	10-17	1570	361	23.0
	18-19	2531	441	17.4
	20-24	6067	723	11.9
	25-54	5812	458	7.9
1986	10-17	1545	333	21.6
	18-19	2372	435	18.3
	20-24	5724	668	11.7
	25-54	6035	516	8.6

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Figure 3a
Number of Abortions with Gestation Age > 12 Weeks

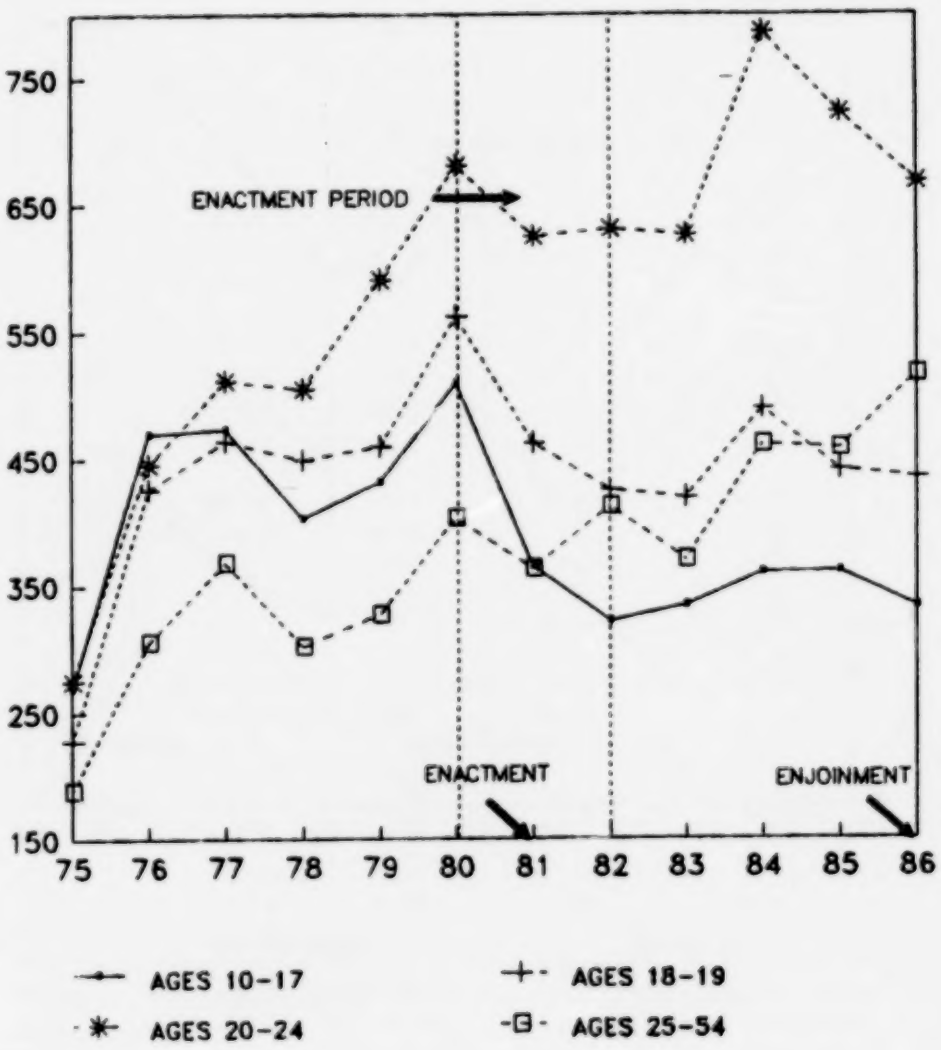


Figure 3b
Percentage of Abortions with Gestation Age > 12 Weeks

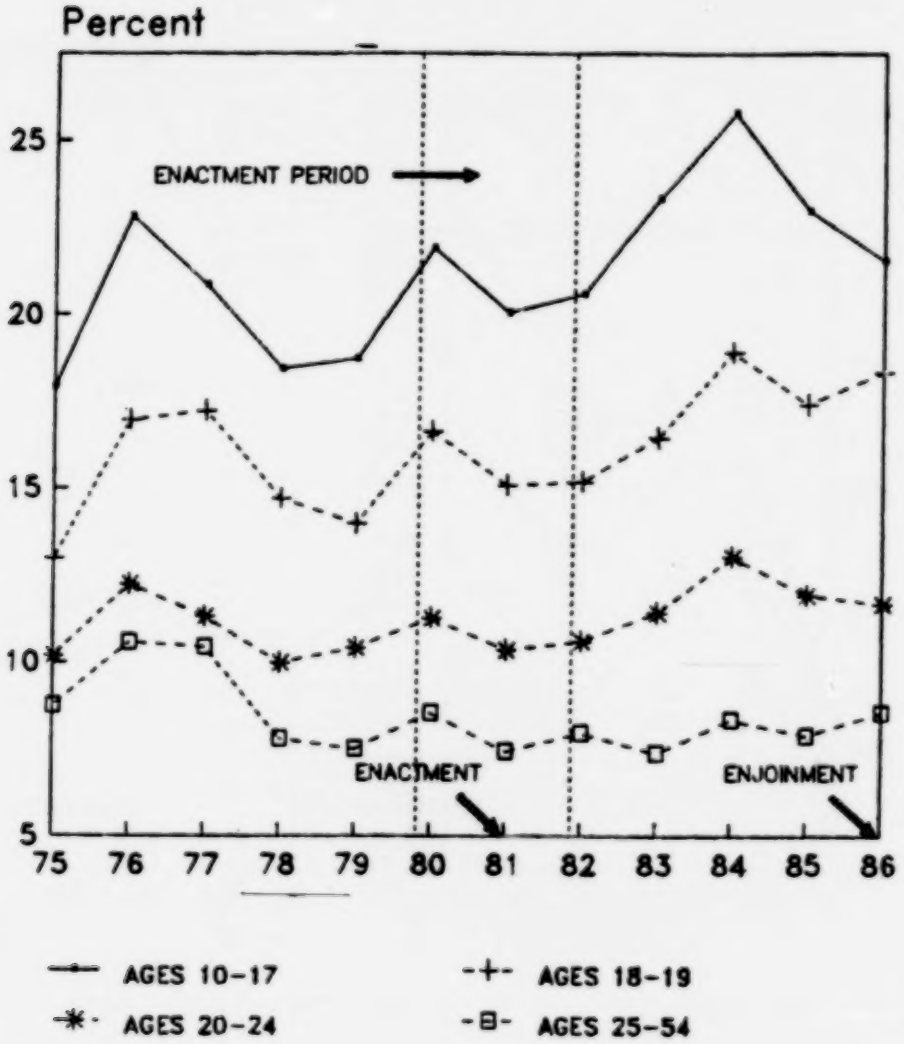


Table 4
Number and Percentage of Abortions with Reported Medical Complications*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS WITH MEDICAL COMPLICATIONS	PERCENTAGE OF ABORTIONS WITH MEDICAL COMPLICATIONS
1975	10-17	1507	16	1.06
	18-19	1758	25	1.42
	20-24	2702	32	1.18
	25-54	2161	26	1.20
1976	10-17	2060	11	0.53
	18-19	2511	7	0.28
	20-24	3643	20	0.55
	25-54	2885	21	0.73
1977	10-17	2274	5	0.22
	18-19	2693	6	0.22
	20-24	4528	14	0.31
	25-54	3529	11	0.31
1978	10-17	2186	8	0.37
	18-19	3054	19	0.62
	20-24	5066	26	0.51
	25-54	3872	19	0.49
1979	10-17	2308	3	0.13
	18-19	3293	2	0.06
	20-24	5683	8	0.14
	25-54	4355	5	0.11
1980	10-17	2327	6	0.26
	18-19	3380	10	0.30
	20-24	6054	8	0.13
	25-54	4716	14	0.30

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Table 4 (Continued)
Number and Percentage of Abortions with Reported Medical Complications*

YEAR	AGE	TOTAL NUMBER OF ABORTIONS	ABORTIONS WITH MEDICAL COMPLICATIONS	PERCENTAGE OF ABORTIONS WITH MEDICAL COMPLICATIONS
1981	10-17	1820	0	0.00
	18-19	3064	8	0.26
	20-24	6047	21	0.35
	25-54	4881	11	0.23
1982	10-17	1564	10	0.64
	18-19	2799	10	0.36
	20-24	5963	38	0.64
	25-54	5180	46	0.89
1983	10-17	1432	10	0.70
	18-19	2547	20	0.79
	20-24	5487	49	0.89
	25-54	5012	51	1.02
1984	10-17	1395	14	1.00
	18-19	2586	29	1.12
	20-24	6032	62	1.03
	25-54	5525	66	1.19
1985	10-17	1570	13	0.83
	18-19	2531	12	0.47
	20-24	6067	76	1.25
	25-54	5812	60	1.03
1986	10-17	1545	8	0.52
	18-19	2372	15	0.63
	20-24	5724	48	0.84
	25-54	6035	74	1.23

* Source: Raw data provided by the Minnesota Department of Health. Table reflects abortions occurring in Minnesota, with non-residents and women of unknown age excluded. Assumes negligable occurrence of abortion to those of age 9 and below and age 55 and above.

Figure 4a
Number of Abortions with Reported Medical Complications

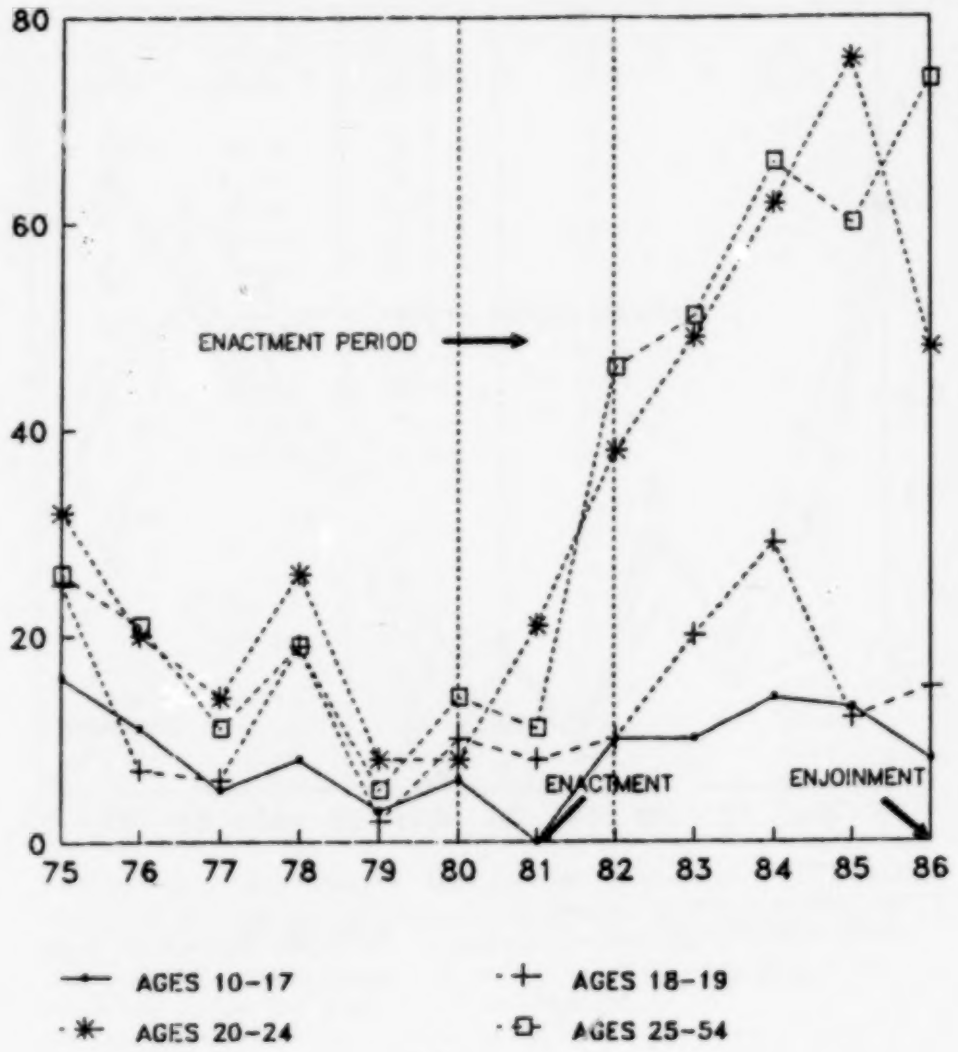


Figure 4b
Percentage of Abortions with Reported Medical Complications

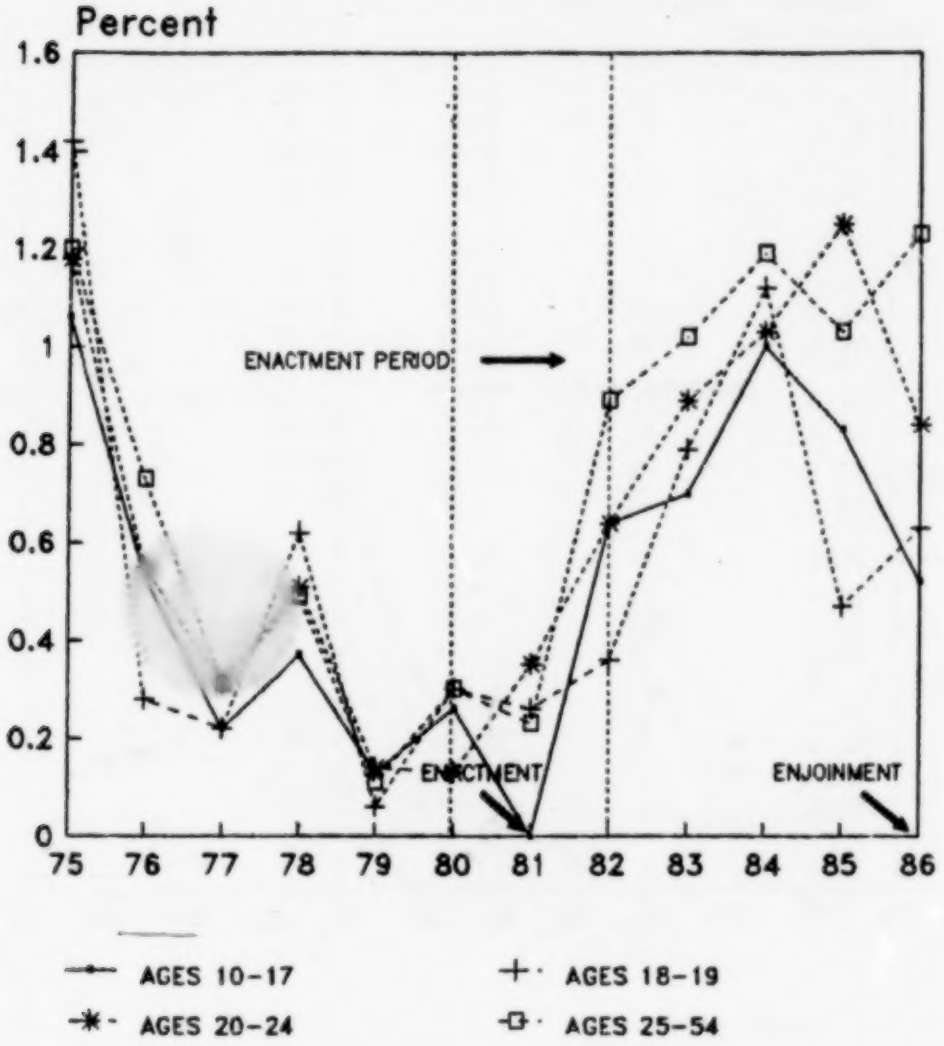


Table 5
Birth Rate
for Different Regions of Minnesota*

YEAR	AGE	MINNESOTA	METROPOLITAN MINNEAPOLIS**	MINNEAPOLIS
1973	10-14	0.4	0.4	.
	15-17	20.4	20.4	.
	18-19	63.7	53.8	.
	20-24	106.0	96.1	.
	25-34	95.4	82.2	.
1974	10-14	0.3	0.3	.
	15-17	19.1	19.1	.
	18-19	64.5	57.4	.
	20-24	109.3	106.0	.
	25-34	97.8	83.3	.
1975	10-14	0.4	0.4	.
	15-17	21.0	18.7	.
	18-19	56.1	48.7	.
	20-24	110.2	91.3	.
	25-34	93.9	86.9	.
1976	10-14	0.4	0.4	1.7
	15-17	19.7	18.2	36.7
	18-19	52.9	47.0	48.8
	20-24	104.5	85.0	62.9
	25-34	93.6	85.8	67.9
1977	10-14	0.3	0.3	1.1
	15-17	19.6	18.3	39.4
	18-19	55.1	48.1	58.1
	20-24	108.1	86.5	64.4
	25-34	98.6	89.6	72.9

* Rate per 1000 female population. Sources: Raw data provided by the Minnesota and Minneapolis Departments of Health. Non-residents and women of unknown age are excluded. Minneapolis data were provided in a form unsuitable for figuring rates for ages 35-44 or above.

** Metropolitan Minneapolis is defined as a seven-county region including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington Counties.

Table 5 (Continued)
Birth Rate
for Different Regions of Minnesota*

YEAR	AGE	MINNESOTA	METROPOLITAN MINNEAPOLIS**	MINNEAPOLIS
1978	10-14	0.4	0.4	1.3
	15-17	17.8	16.0	35.4
	18-19	55.6	51.7	61.5
	20-24	106.6	85.3	63.2
	25-34	100.3	90.0	73.7
1979	10-14	0.3	0.4	1.7
	15-17	17.8	17.6	39.7
	18-19	56.9	52.6	56.3
	20-24	110.0	88.4	67.8
	25-34	102.8	91.9	74.6
1980	10-14	0.3	0.4	1.6
	15-17	17.5	17.4	39.1
	18-19	59.3	53.8	62.9
	20-24	113.4	92.3	71.3
	25-34	104.7	95.3	77.5
1981	10-14	0.3	0.4	1.3
	15-17	17.5	17.2	41.2
	18-19	59.1	53.9	65.0
	20-24	112.4	94.0	71.5
	25-34	105.8	98.9	82.7
1982	10-14	0.4	0.5	2.2
	15-17	16.6	17.2	42.7
	18-19	56.2	52.1	65.9
	20-24	109.9	88.8	69.8
	25-34	104.6	97.3	84.6

* Rate per 1000 female population. Sources: Raw data provided by the Minnesota and Minneapolis Departments of Health. Non-residents and women of unknown age are excluded. Minneapolis data were provided in a form unsuitable for figuring rates for ages 35-44 or above.

** Metropolitan Minneapolis is defined as a seven-county region including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington Counties.

Table 5 (Continued)
Birth Rate
for Different Regions of Minnesota*

YEAR	AGE	MINNESOTA	METROPOLITAN MINNEAPOLIS**	MINNEAPOLIS
1983	10-14	0.3	0.5	1.9
	15-17	14.6	15.1	47.3
	18-19	48.5	45.4	58.1
	20-24	100.0	80.1	64.3
	25-34	103.3	97.3	83.2
1984	10-14	0.3	0.5	1.3
	15-17	16.1	17.4	54.1
	18-19	48.7	45.7	63.1
	20-24	97.4	79.5	66.4
	25-34	106.6	102.3	85.9
1985	10-14	0.4	0.6	2.1
	15-17	15.1	16.5	58.2
	18-19	47.0	45.8	73.4
	20-24	94.4	80.1	69.7
	25-34	108.6	106.1	89.8
1986	10-14	0.4	0.5	2.0
	15-17	15.6	17.8	62.2
	18-19	42.6	44.0	81.2
	20-24	86.6	74.2	70.6
	25-34	107.6	106.3	87.5
1987	10-14	.	.	2.2
	15-17	.	.	64.5
	18-19	.	.	92.2
	20-24	.	.	67.5
	25-34	.	.	84.2

* Rate per 1000 female population. Sources: Raw data provided by the Minnesota and Minneapolis Departments of Health. Non-residents and women of unknown age are excluded. Minneapolis data were provided in a form unsuitable for figuring rates for ages 35-44 or above.

** Metropolitan Minneapolis is defined as a seven-county region including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington Counties.

Figure 5a
Birth Rate
for Different Regions of Minnesota
Ages 15–17

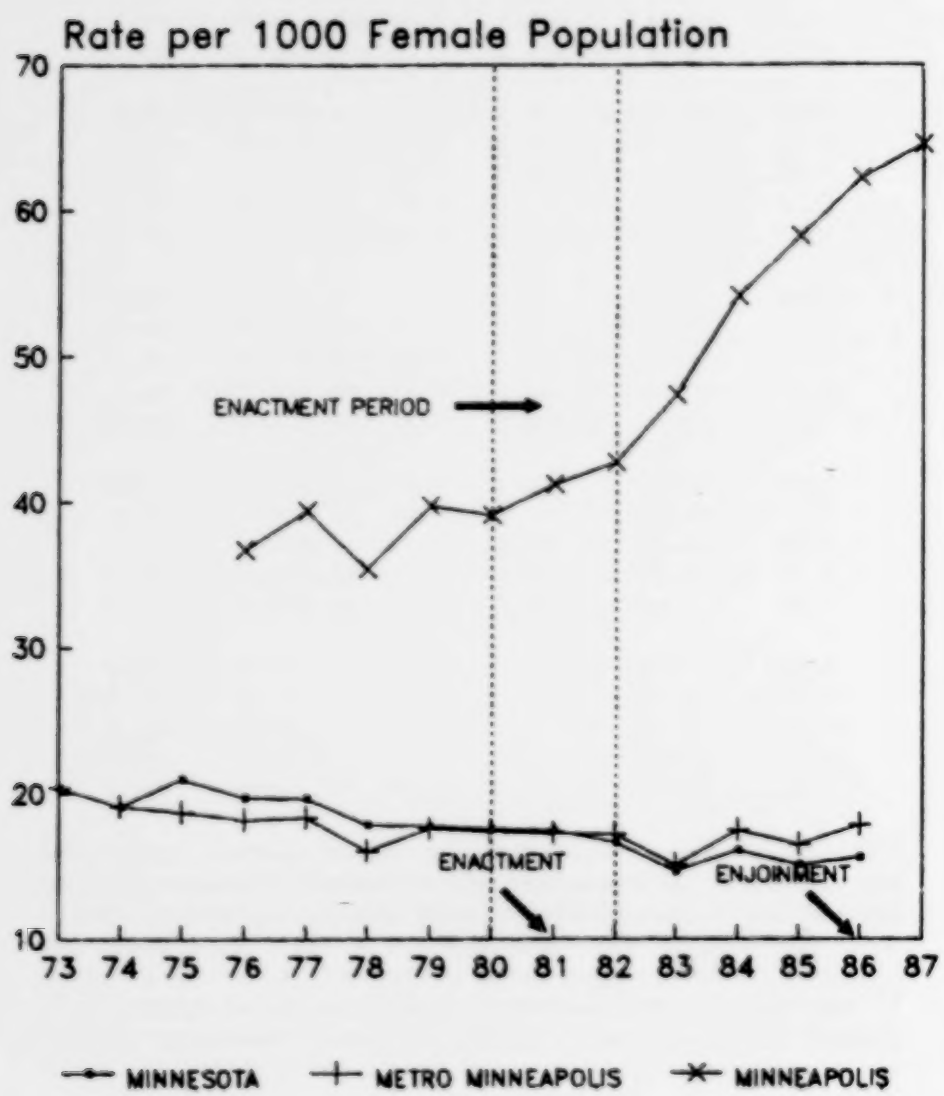


Figure 5b
Birth Rate
for Different Regions of Minnesota
Ages 10–14

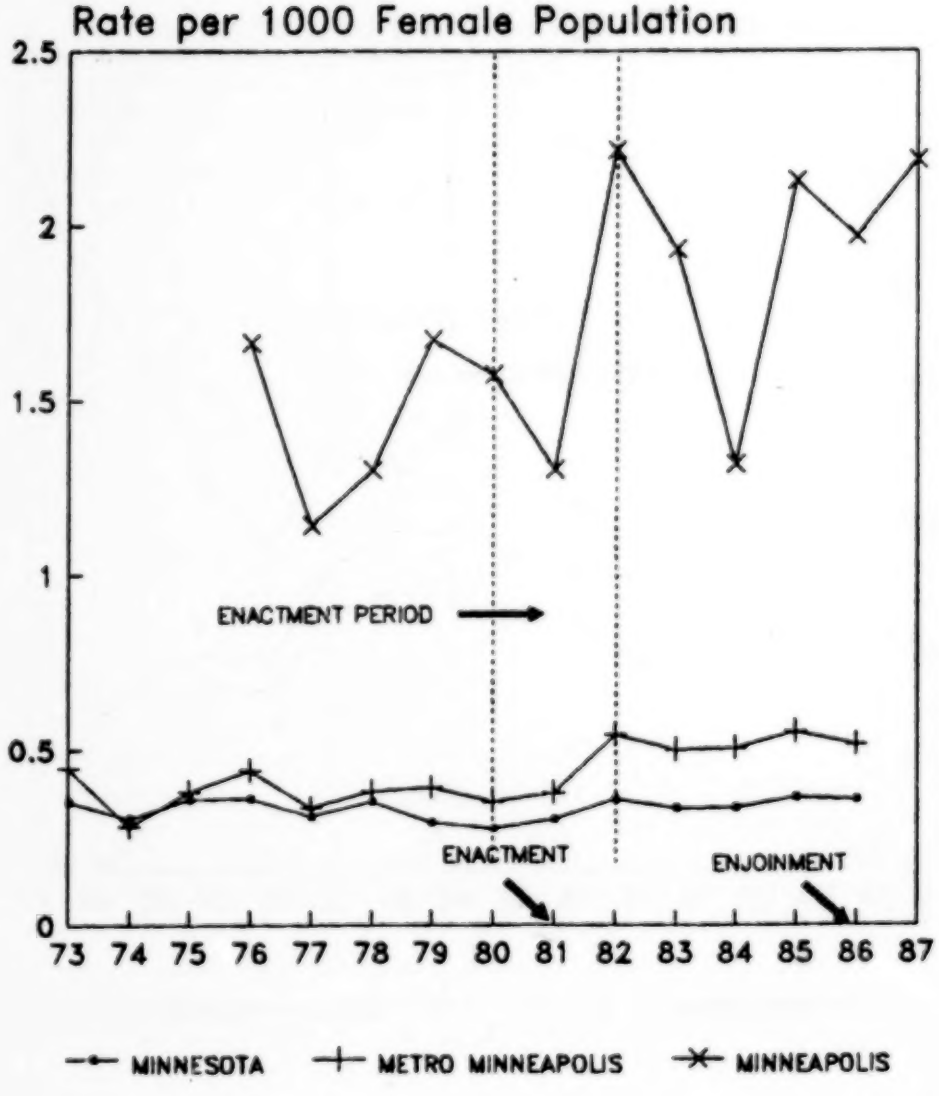


Figure 5c
Birth Rate
for Different Regions of Minnesota
Ages 18–19

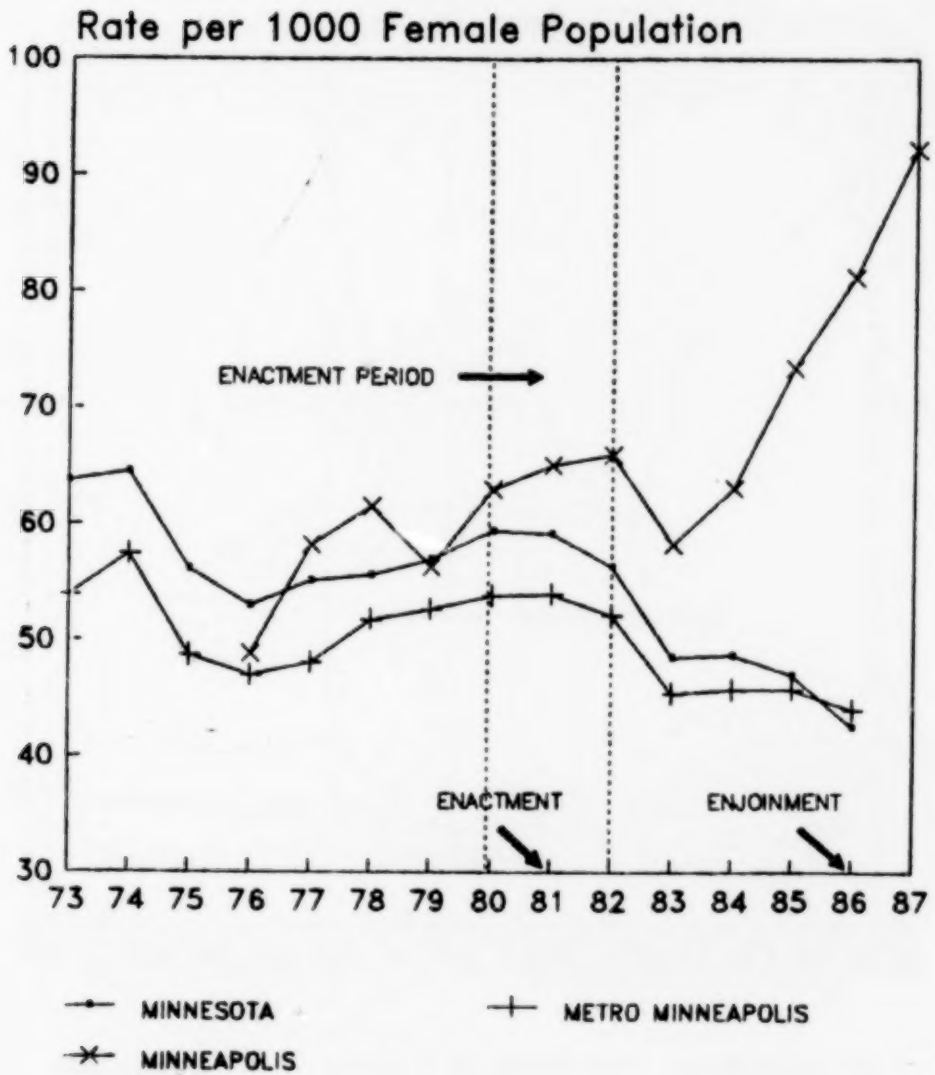


Figure 5d
Birth Rate
for Different Regions of Minnesota
Ages 20–24

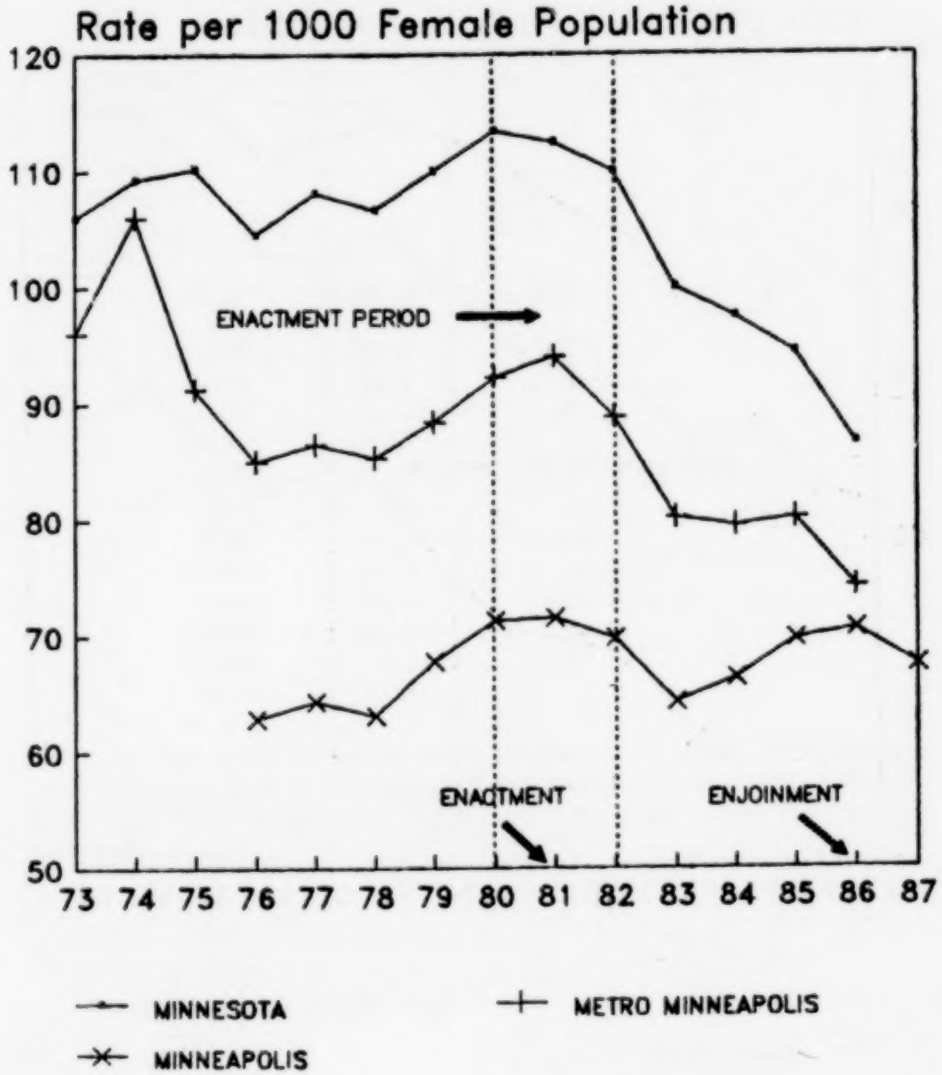


Figure 5e
Birth Rate
for Different Regions of Minnesota
Ages 25–34

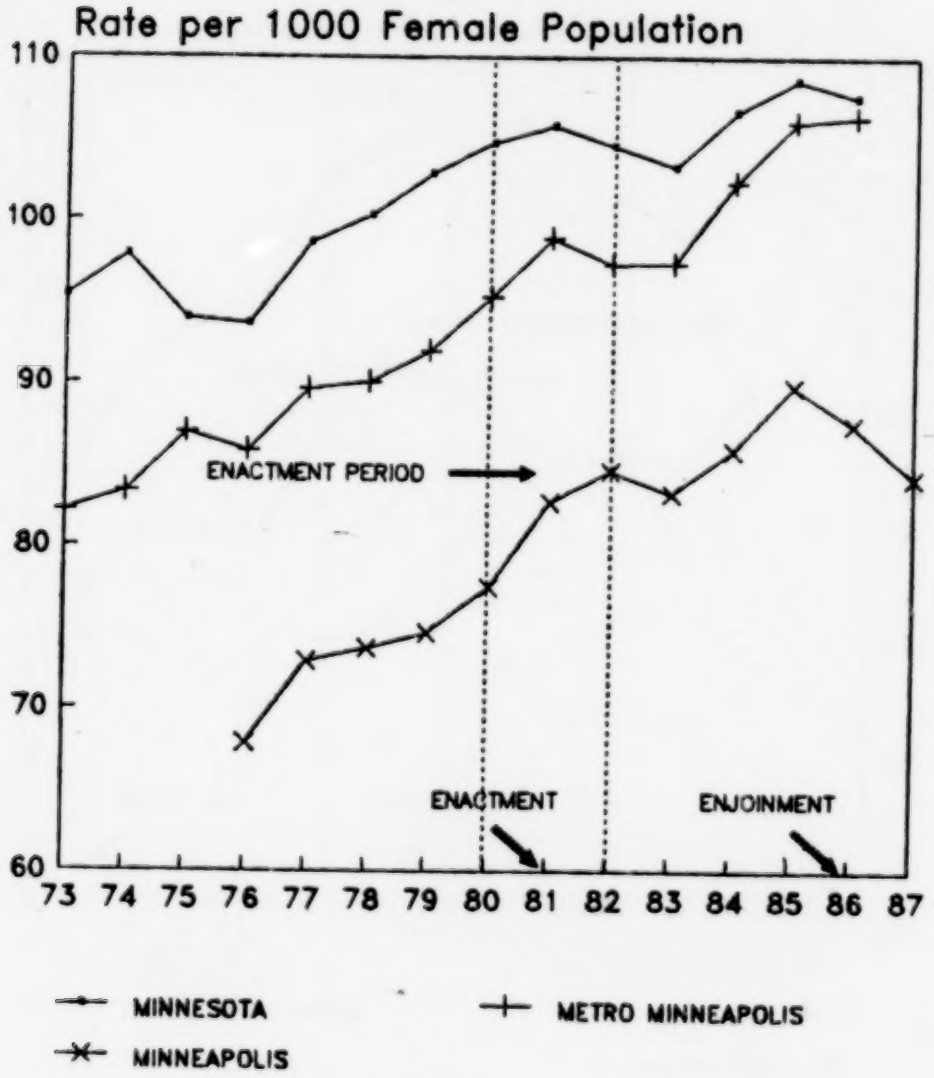


Table 6
Birth Rate for Minneapolis Residents by Age Group*

YEAR	AGES 10-14	AGES 15-17	AGES 18-19
1976	1.7	38.7	48.8
1977	1.1	39.4	58.1
1978	1.3	35.4	61.5
1979	1.7	39.7	56.3
1980	1.6	39.1	62.9
1981	1.3	41.2	65.0
1982	2.2	42.7	65.9
1983	1.9	47.3	58.1
1984	1.3	54.1	63.1
1985	2.1	58.2	73.4
1986	2.0	62.2	81.2
1987	2.2	64.5	92.2

YEAR	AGES 20-24	AGES 25-34
1976	62.9	67.9
1977	64.4	72.9
1978	63.2	73.7
1979	67.8	74.6
1980	71.3	77.5
1981	71.5	82.7
1982	69.8	84.6
1983	64.3	83.2
1984	66.4	85.9
1985	69.7	89.8
1986	70.8	87.5
1987	67.5	84.2

* Rate per 1000 female population. Source: Raw data provided by the Minneapolis Department of Health. Data provided in a from unsuitable for figuring rates for ages 35-44 or above.

Figure 6
Birth Rate for Minneapolis Residents by Age Group

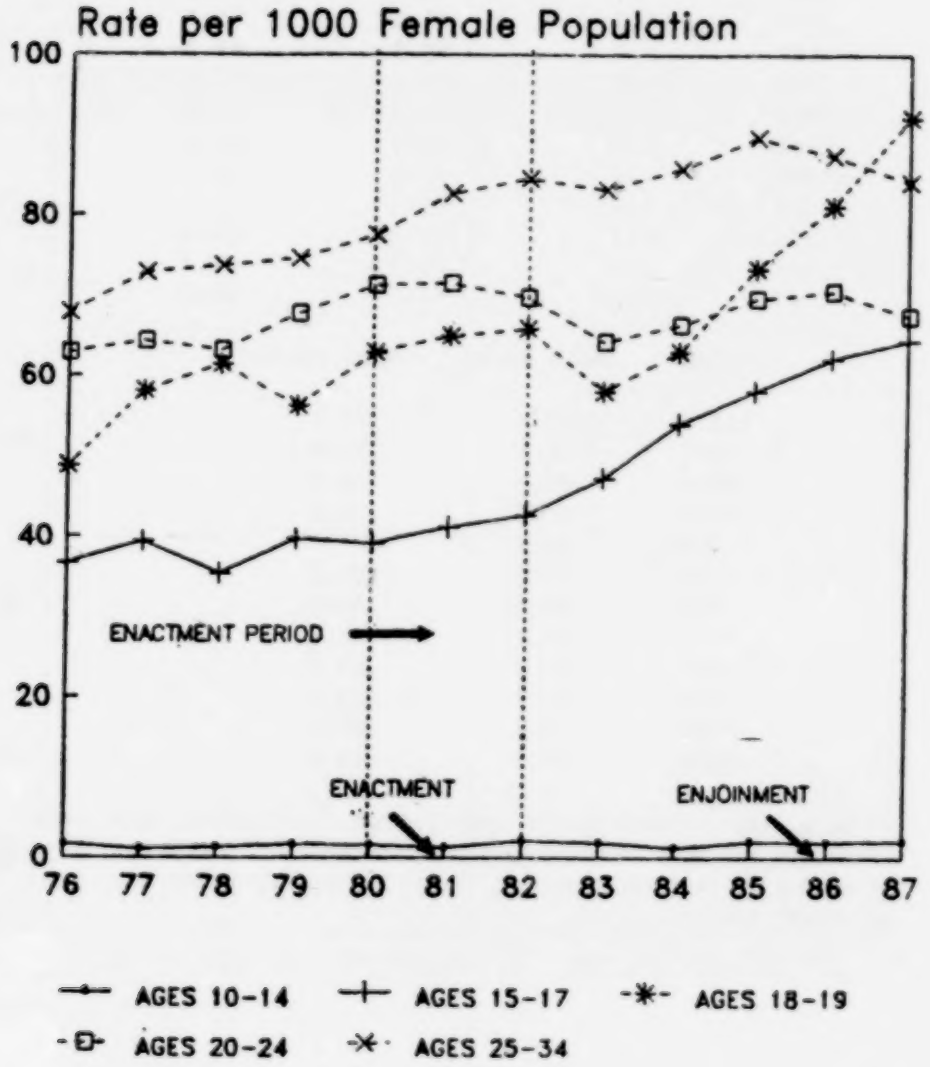


Table 7
Births to Mothers < 18 Years of Age as Percentage of Total Births*

	MINNEAPOLIS	U.S.	MINNESOTA
1970		6.3	
1973			4.6
1974			4.2
1975		7.6	4.4
1976	6.2		4.2
1977	5.9		3.9
1978	5.1		3.4
1979	5.3		3.2
1980	4.7	5.8	3.0
1981	4.5	5.4	2.8
1982	4.3	5.2	2.6
1983	4.4	5.0	2.4
1984	4.4	4.8	2.5
1985	4.5	4.7	2.3
1986	4.8	4.8	2.5
1987	5.1		2.4

MINNEAPOLIS BY RACE

	WHITE	BLACK	ASIAN/PACIFIC ISLAND	AMERICAN INDIAN
1976	4.0	15.3	0.0	12.9
1977	4.1	13.7	1.4	13.9
1978	3.4	11.5	0.0	12.9
1979	2.9	13.5	3.0	15.3
1980	2.9	11.4	1.7	13.3
1981	2.6	11.4	4.6	13.0
1982	2.3	11.0	5.0	11.0
1983	2.2	11.0	4.9	13.7
1984	2.3	10.6	6.5	11.2
1985	2.2	10.4	7.1	11.1
1986	2.3	11.9	5.8	9.3
1987	1.9	12.4	6.5	10.8

* Sources: National Center for Health Statistics: *Health, United States, 1988.* DHHS Pub. No. (PHS) 89-1232. Public Health Service. Washington. U.S. Government Printing Office, Mar. 1989. p.47. Minneapolis raw data provided by the Minneapolis Department of Health. Data for some years not available.

Table 7 (Continued)
Births to Mothers < 18 Years of Age as Percentage of Total Births*

UNITED STATES BY RACE

	WHITE	BLACK	ASIAN/PACIFIC ISLAND	AMERICAN INDIAN
1970	4.8	14.7	3.3	7.5
1975	6.0	16.1	2.7	11.0
1980	4.5	12.2	1.7	8.8
1981	4.3	11.4	1.8	8.5
1982	4.1	11.1	1.8	8.0
1983	3.9	10.9	1.7	7.9
1984	3.7	10.6	1.8	7.4
1985	3.7	10.3	1.8	7.1
1986	3.7	10.4	1.9	7.4

* Sources: National Center for Health Statistics: *Health, United States, 1988*. DHHS Pub. No. (PHS) 89-1232. Public Health Service. Washington. U.S. Government Printing Office, Mar. 1989. p.47. Minneapolis raw data provided by the Minneapolis Department of Health. Data for some years not available.

Figure 7a
Births to Mothers < 18 Years of Age as Percentage of Total Births Minneapolis, Minnesota, and U.S.

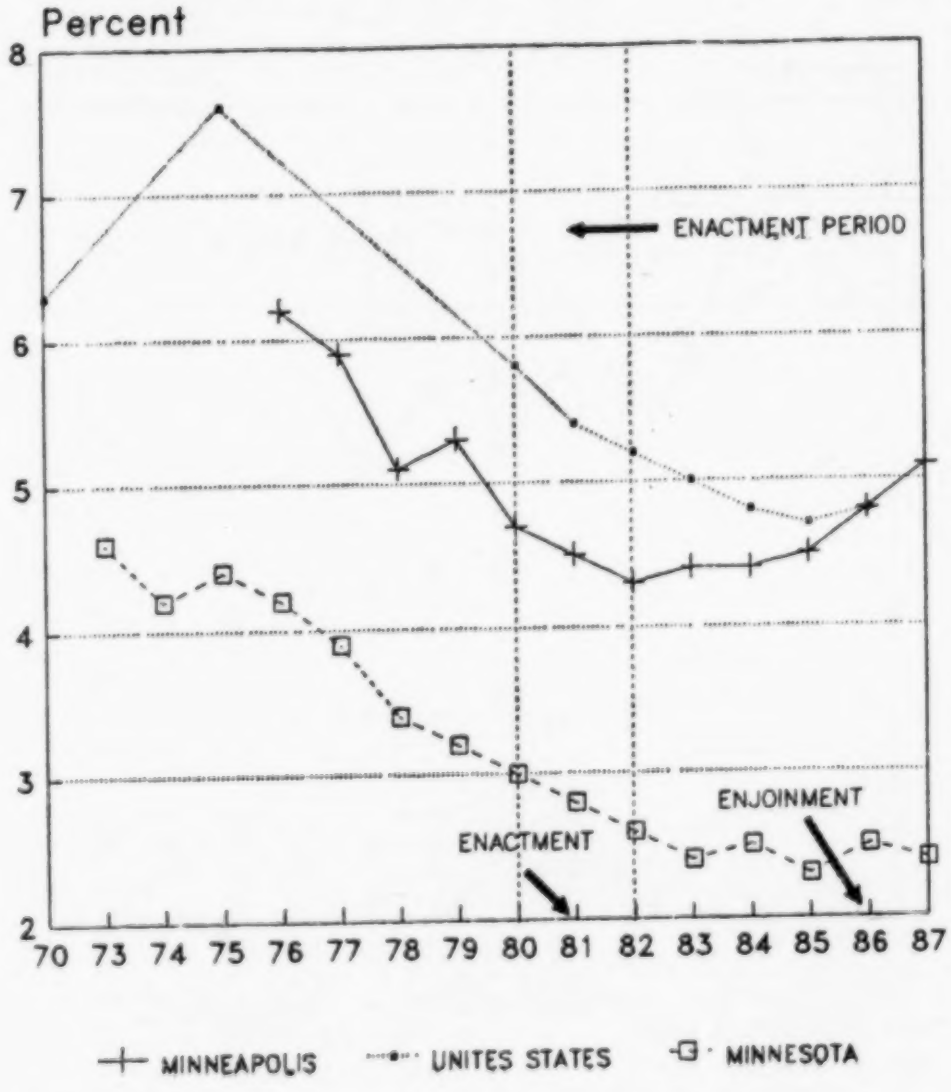


Figure 7b
Births to Mothers < 18 Years of Age as Percentage of Total Births by Race/Ethnicity Minneapolis and U.S.

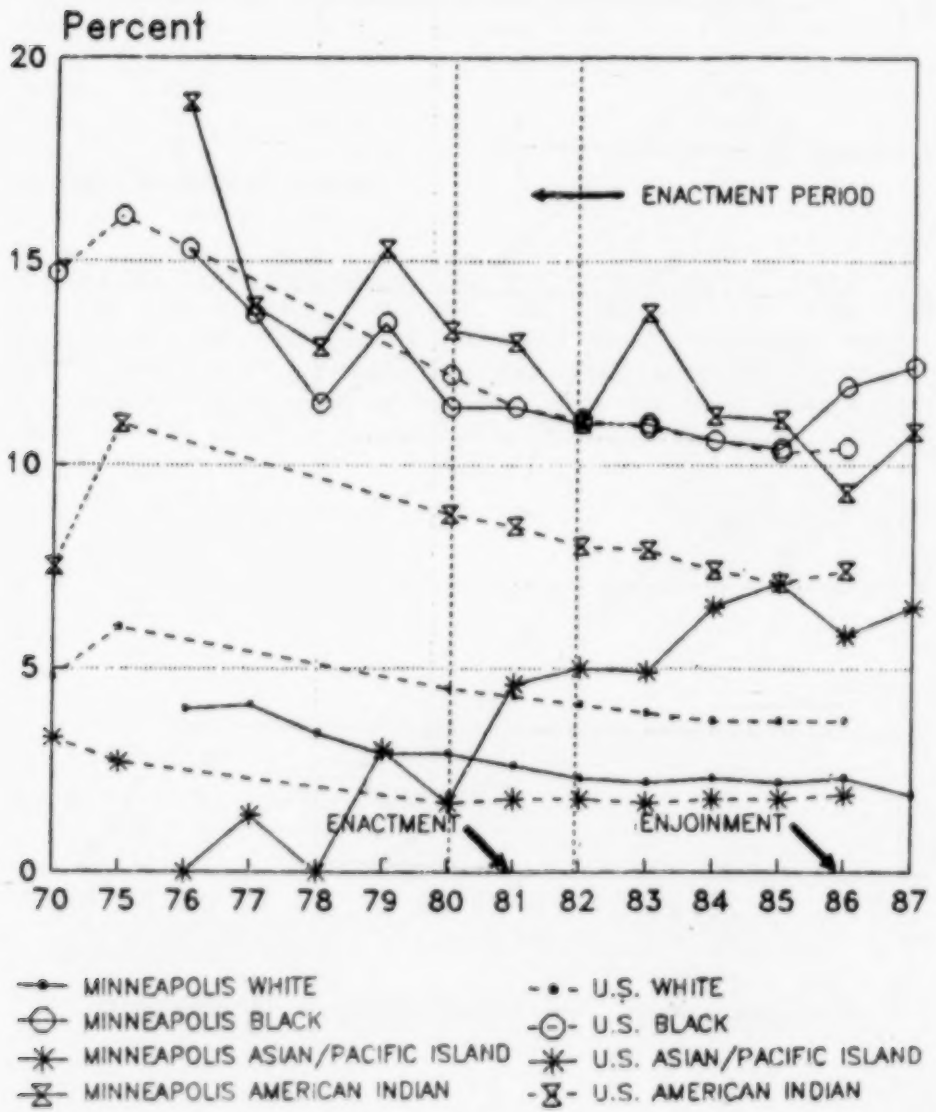
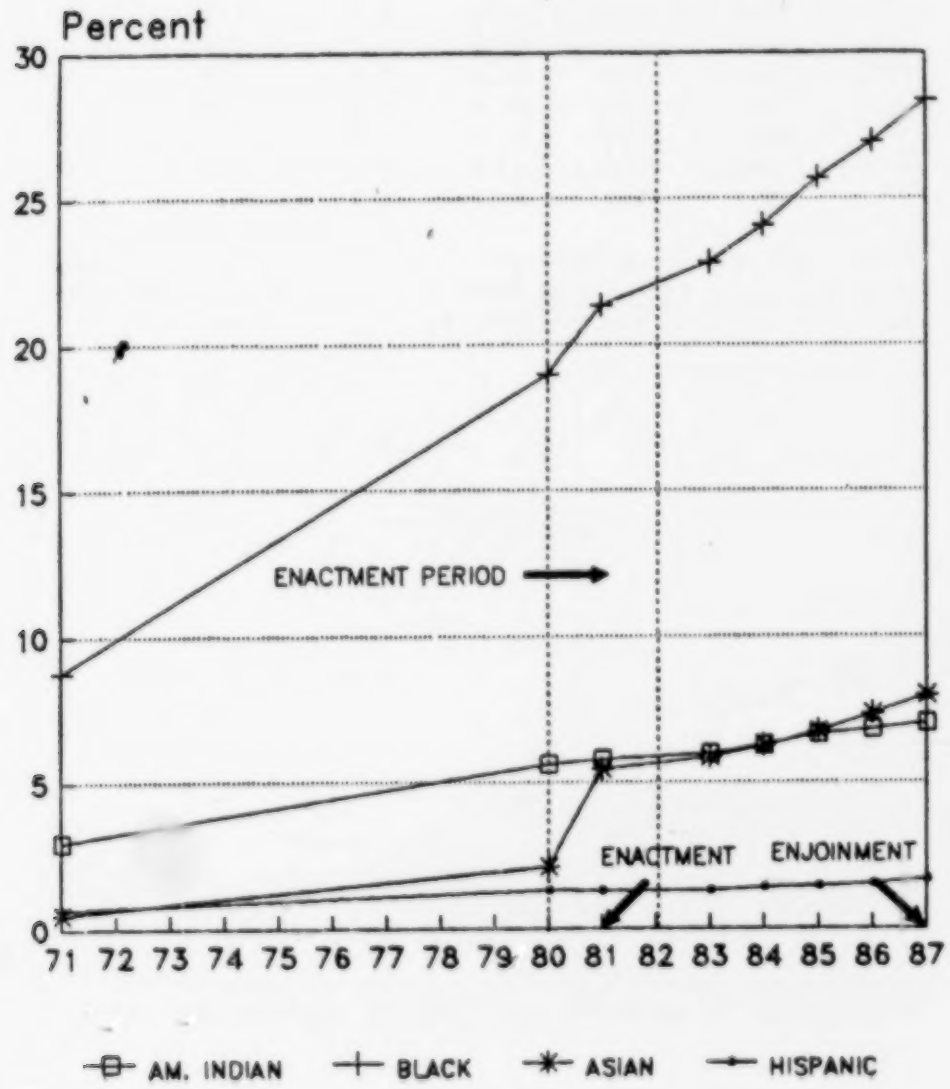


Table 8
Percent Racial/Ethnic Enrollment Minneapolis Public School District*

	AMERICAN INDIAN	BLACK	ASIAN	HISPANIC
1971	3.0	8.8	0.5	0.7
1980	5.6	19.0	2.1	1.3
1981	5.8	21.3	5.4	1.3
1983	6.0	22.8	5.8	1.3
1984	6.3	24.1	6.2	1.4
1985	6.6	25.7	6.7	1.4
1986	6.8	26.9	7.3	1.5
1987	7.0	28.4	8.0	1.7

* Source: Raw data provided in *Racial-Ethnic Enrollment Trends in Twin Cities Area Schools, 1986-1987.* Pub. No. 620-88-115. Metropolitan Council, St. Paul, Minnesota.

Figure 8
Percent Racial/Ethnic Enrollment
Minneapolis Public School District



IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

JANE HODGSON, M.D., *et al.*,
Petitioners,
v.
THE STATE OF MINNESOTA, *et al.*,
Respondents.

THE STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,
v.
JANE HODGSON, M.D., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS*	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY	5
A. Marriage	5
B. Travel	8
C. Contract	10
II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION	11
III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED	16
A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases	16
B. The Lower Courts' Decisions Highlight The Flaws In *Roe*	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES:

	Page
Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983)	18
Akron Center for Reproductive Health v. *Slaby*, 854 F.2d 852 (6th Cir. 1988)	2
Bellotti v. *Baird*, 428 U.S. 132 (1976)	17
Bellotti v. *Baird*, 443 U.S. 622 (1979)	*passim*
Ginsberg v. *New York*, 390 U.S. 629 (1968)	14, 20
Haig v. *Agee*, 453 U.S. 280 (1981)	10
H.L. v. *Matheson*, 450 U.S. 398 (1981)	18
Hodgson v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*)	2, 22
Loving v. *Virginia*, 388 U.S. 1 (1967)	5
McNeil v. *Director Patuxent Institution*, 407 U.S. 245 (1972)	13
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	12, 14
Michael H. v. *Gerald D.*, 109 S.Ct. 2333 (1989)	11, 15
O'Connor v. *Donaldson*, 442 U.S. 563 (1975)	13
Parham v. *J.R.*, 442 U.S. 584 (1979)	13, 19, 20
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925)	*passim*
Planned Parenthood Ass'n of Kansas City v. *Ashcroft*, 462 U.S. 476 (1983)	18
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976)	*passim*
Poe v. *Ullman*, 367 U.S. 497 (1961)	21
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	15, 20
Roe v. *Wade*, 410 U.S. 113 (1973)	4, 21, 22
Rowan v. *Post Office Dep't.*, 397 U.S. 728 (1970)	14
Santosky v. *Kramer*, 455 U.S. 745 (1982)	15, 16
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	8
Smith v. *Organization of Foster Families*, 431 U.S. 816 (1977)	4, 20
Stanley v. *Illinois*, 405 U.S. 645 (1972)	15
Thornburgh v. *American College of Obst. & Gyn.*, 476 U.S. 747 (1986)	21, 22
Turner v. *Safley*, 107 S.Ct. 2254 (1987)	5
Webster v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989)	21, 22
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	12

TABLE OF AUTHORITIES—Continued

	Page
Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987)	18
U.S. CONSTITUTIONAL PROVISIONS:	
Amendment I	12
Amendment XIII	11
Amendment XIV	11
STATUTES AND REGULATIONS:	
10 U.S.C. § 505 (1982)	10
10 U.S.C. § 2104 (1982)	10
10 U.S.C. § 2107 (1982)	10
10 U.S.C. § 2107a (1982)	10
42 U.S.C. § 1981 (1982)	10
22 C.F.R. § 51.27 (1988)	10
Ala. Code § 30-1-5 (1983)	7
Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989)	9
Alaska Stat. § 25.05.171 (1988)	8
Alaska Stat. §§ 47.15.010 - 47.15.080 (1988)	9
Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989)	9
Ariz. Rev. Stat. Ann. § 25-102 (West 1976)	7
Ark. Stat. Ann. §§ 9-11-102 - 105 (1987)	7
Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987)	9
Cal. Bus. & Prof. Code § 22-706 (Deering 1989)	10
Cal. Civ. Code § 4101 (West 1983)	7
Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989)	9
Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987)	7
Colo. Rev. Stat. §§ 24-60-701 - 708 (1988)	9
Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989)	9
Conn. Gen. Stat. Ann. § 46b-30 (West 1986)	7
Del. Code Ann. Tit. 13, § 123 (1981)	7
Del. Code Ann. Tit. 18, § 2707 (1988)	10
Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985)	9

TABLE OF AUTHORITIES—Continued

	Page
D.C. Code Ann. § 30-111 (1988)	7
D.C. Code Ann. §§ 32-1101 - 32-1106 (1988)	9, 10
Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988)	9
Fla. Stat. Ann. § 741.04-0405 (West 1988)	7
Ga. Code Ann. § 19-3-2 (1982)	7
Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982)	9
Haw. Rev. Stat. § 572-1 (1985)	7
Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988)	9
Idaho Code §§ 16-901 - 16-1910 (1979)	9
Idaho Code § 32-202 (1983)	7
Ill. Rev. Stat. ch. 23, ¶¶ 2591-2597 (Smith-Hurd 1988)	9
Ill. Rev. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982)	7
Ind. Code Ann. §§ 31-6-10-1 - 31-6-23-4 (West 1979 & Supp. 1989)	9
Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986)	7
Iowa Code § 232.171-72 (Supp. 1989)	9
Iowa Code § 595.2 (1980 & Supp. 1989)	7
Kan. Stat. Ann. § 23-106 (1988)	7
Kan. Stat. Ann. §§ 38-1001 - 1007 (1986)	9
Ky. Rev. Stat. § 402-210 (1988)	7, 8
La. Rev. Stat. Ann. § 9:211 (Supp. 1989)	7
La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982)	9
Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988)	7
Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988)	9
Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988)	7
Md. Code Ann. Art. 83c, §§ 3-101 - 3-110 (1989)	9
Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969)	9
Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989)	8
Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981)	9

TABLE OF AUTHORITIES—Continued

	Page
Mich. Comp. Laws Ann. § 551.51 (West 1988)	7
Minn. Stat. Ann. §§ 260.51 - 260.57 (West 1982 & Supp. 1989)	9
Minn. Stat. § 517.02 (1969 & Supp. 1989)	7
Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988)	7
Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981)	9
Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983)	9
Mo. Ann. Stat. § 451.090 (Vernon 1986)	7
Mont. Code Ann. § 40-1-213 (1989)	7
Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987)	7
Neb. Rev. Stat. § 42-105 (1988)	7
Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988)	9
Nev. Rev. Stat. §§ 122.020 - 122.025 (1985)	8
Nev. Stat. §§ 214.010 - 214.060 (1986)	9
N.H. Rev. Stat. Ann. §§ 169-A:1-11 (1978 & Supp. 1988)	9
N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988)	8
N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976)	9
N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989)	8
N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986)	8
N.M. Stat. Ann. §§ 32-3-1 - 32-3-8 (1986 & Supp. 1988)	9
N.Y. Dom. Rel. Law § 15 (McKinney 1988)	7
N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989)	9
N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988)	7
N.D. Cent. Code § 14-03-02 (1981)	7
N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974)	9
Ohio Rev. Code Ann. §§ 2151.56 - 2151.61 (Baldwin 1989)	9
Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984)	7, 8
Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987)	9
Okla. Stat. Ann. Tit. 43 § 3 (West 1979)	7
Or. Rev. Stat. § 106.060 (1983 & Supp. 1988)	7
Or. Rev. Stat. §§ 417.010 - 417.080 (1987)	9

TABLE OF AUTHORITIES—Continued

	Page
Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989)	8
Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1981)	9
R.I. Gen. Laws §§ 14-6-1 - 14-6-11 (1989)	9
R.I. Gen. Laws § 15-2-11 (1989)	8
S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985)	7
S.C. Code Ann. § 27-17-10 (1976)	9
S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989)	7
S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989)	9
Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988)	9
Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988)	8
Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989)	8
Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986)	9
Utah Code Ann. § 30-1-2 (1989)	7
Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986)	9
Vt. Stat. Ann. Tit. 18 § 5142 (1987)	8
Vt. Stat. Ann. Tit. 33 §§ 551 - 575 (1981)	9
Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988)	9
Va. Code Ann. § 20-48, 49 (1989)	7
Wash. Code § 26.04.010 (1988)	7
Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962)	9
West Va. Code § 48-1-1 (1986)	8
Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988)	7
Wyo. Stat. § 20-1-102 (1987)	7
Lord Hardwicke's Act, 1753, 26 Geo. 2, ch. 33	5, 6
LEGISLATIVE MATERIALS:	
Cong. Globe, 38th Cong., 1st Sess. (1864)	11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:	Page
W. Blackstone, *Commentaries*	5
J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* (1973)	19
Hobbes, *Leviathan* (Fuller, ed. 1952)	4
Locke, *Concerning Civil Government* (Brit. ed. 1952)	4
Restatement (2d) Contracts, §§ 6, 14 (1981)	10
J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951)	11
2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

No. 88-1125

JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass procedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honored doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

---

[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed. 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their children arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty*; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

---

[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

---

after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

---

[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark Stat. Ann. § 9-11-102 - 105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-111 (1988); Fla. Stat. Ann. § 741.04 - 0405 (West 1988); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988); N.D. Cent. Code § 14-03-02 (1981); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. Tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989); Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (West 1976) (same); Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. § 572-1 (1985) (same); Idaho Code § 32-202 (1983) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 18); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

---

minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. §§ 122.020 - 122.025 (1985) (same); N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (minors under 18 require parents' consent, girls under 16 also require court's consent); Vt. Stat. Ann. Tit. 18 § 5142 (1987) (same); West Va. Code § 48-1-1 (1986) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified circumstances); N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14, girls over 13 in its discretion); Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause"); Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. § 37:1 - 6 (West 1968 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. § 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-five states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures for a "parent . . . entitled to legal custody of a juvenile

---

[5] *See* Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989); Alaska Stat. §§ 47.15.010 - 47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989); Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987); Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701 - 708 (1988); Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989); Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985); D.C. Code Ann. §§ 32-1101 - 32-1106 (1988); Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988); Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982); Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901 - 16-1910 (1979); Ill. Rev. Stat. ch. 23 ¶¶ 2591 - 2597 (Smith-Hurd 1988); Ind. Code Ann. §§ 31-6-10-1 - 31-6-10-4 (West 1979 & Supp. 1989); Iowa Code § 232.171-72 (Supp. 1989); Kan. Stat. Ann. §§ 38-1001 - 1007 (1986); La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988); Md. Code Ann. Art. 83c, §§ 3-101 - 110 (1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969); Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981); Minn. Stat. Ann §§ 260.51 - 260.57 (West 1982 & Supp. 1989); Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981); Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983); Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987); Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988); Nev. Rev. Stat. §§ 214.010 - 214.060 (1986); N.H. Rev. Stat. Ann. § 169-A:1-11 (1978 & Supp. 1988); N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976); N.M. Stat. Ann. 32-3-1 - 32-3-8 (1986 & Supp. 1988); N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989); N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974); Ohio Rev. Code Ann. §§ 2151.56 - 2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987); Or. Rev. Stat. §§ 417.010 - 417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989); R.I. Gen. Laws § 14-6-1 - 14-6-11 (1981); S.C. Code Ann. § 24-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989); Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551 - 575 (1981); Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962). The exceptions are Kentucky and North Carolina, which repealed their enactments of the Compact, and West Virginia, Wisconsin and Wyoming.

. . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passport. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104(b)(4), 2107(b)(4), 2107a(b)(4) (1982).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have

---

[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22-706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for [his] additional obligations.*

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (" 'the Con-

---

[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued the natural evils of slavery that the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951). Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

stitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition' ") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court held, interfered "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce*. . . ." *Id.* at 231-32

(citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see also O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. *See* 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder.*" 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED.

Danforth and its progeny are at odds with both the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the

physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, *quoting Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents*." *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (emphasis added).

---

[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent; (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion; and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry, for ex-

[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

ample.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in *Danforth* that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity*. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). Cf. *Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live to profoundly regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham, supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith, supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsburg, supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince, supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, *etc.*, thus do not *delegate* anything. Rather, they recognize and reinforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. Cf. *Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. *See, e.g., Hodgson*, 853 F.2d at 1456.[15] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debilitating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

---

[15] *Amicus* submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate

CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

(24) (19) (20)

Nos. 88-805, 88-1125, 88-1309

Supreme Court, U.S.
FILED
OCT - 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

JANE HODGSON, M.D., *et al.*,
Petitioners and Cross-Respondents,
v.
THE STATE OF MINNESOTA,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON CROSS-RESPONDENTS AND AKRON APPELLEE FOR 13 INDIVIDUAL MEMBERS OF THE PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING OR THE COMMITTEE ON CHILD DEVELOPMENT RESEARCH AND PUBLIC POLICY

(Complete list of *amici curiae* appears on inside cover)

HANNAH E.M. LIEBERMAN
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae

October 14, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29 pp

LIST OF REPRESENTED AMICI

Panel Members

Ezra C. Davidson, Jr.

Joy G. Dryfoos

Daniel D. Federman

Jacqueline Darroch Forrest

Frank F. Furstenberg, Jr.

Richard Jessor

Judith E. Jones

Committee Members

Eugene S. Bardach

Herbert P. Ginsburg

William Kessen

John Modell

Barbara Starfield

Carol K. Whalen

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
DESCRIPTION AND INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. INTRODUCTION	6
II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION	7
III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS	11
A. The Psychological Considerations	11
B. The Counseling Considerations	14
IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS	16
A. Notification Requirements Result In Delays Which May Lead to Increased Health Risks	16
B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Akron Center for Reproductive Health v. Slaby, et al., 854 F.2d 852 (6th Cir. 1988) 19
Bellotti v. Baird, 428 U.S. 132 (1976) 15
Bellotti v. Baird, 443 U.S. 622 (1979) 6
Carey v. Population Services International, 431 U.S. 678 (1977) 6
H.L. v. Matheson, 450 U.S. 398 (1981) 6, 11, 12
Hodgson v. Minnesota, 648 F.Supp. 756 (D.Minn. 1986) 17, 18, 19, 20
Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983) 6
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 6, 15
Roe v. Wade, 410 U.S. 113 (1973) 6

STATUTES:

Minn. Stat. § 133.343 (1988) 14, 18
Ohio Rev. Code Ann. § 2919.12(B) (1) (a) (i) (1989) 18

MISCELLANEOUS:

Adler & Dolcini, *Psychological Issues in Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986) 12
Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981) 17, 19
Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) 13
Ambuel & Rappaport, Developmental Change in Adolescents Psychological and Legal Competence Consent to Abortion (1989) (Paper presented at American Psychological Association Convention) 13

TABLE OF AUTHORITIES—Continued

Page

APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987) 13
Blum, Resnick & Stark, The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking (1985) (Unpublished manuscript, University of Minnesota) 10
Chamie, Eisman, Forrest, Orr & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982) 10
National Research Council, *Risking the Future, Adolescent Sexuality, Pregnancy and Childbearing*, Vol. I (1987) ..... *passim*
Orr, *Private Physicians and the Provision of Contraceptives to Adolescents*, 16 Fam. Plan. Persp. 83 (1984) 14
Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?*, 15 Adolescence 43 (1980) 9
Steinhoff, Premarital Pregnancy and the First Birth (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of larger study, Hawaii Pregnancy, Birth Control and Abortion Study, Univ. of Hawaii) 9
Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980) 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH,

Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

Nos. 88-1125 and 88-1309

JANE HODGSON, M.D., *et al.*,

Petitioners and Cross-Respondents,

v.

THE STATE OF MINNESOTA,

Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON CROSS-RESPONDENTS AND AKRON APPELLEE FOR 13 INDIVIDUAL MEMBERS OF THE PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING OR THE COMMITTEE ON CHILD DEVELOPMENT RESEARCH AND PUBLIC POLICY

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

Amici are individuals who were members of either the Panel on Adolescent Pregnancy and Childbearing ("Panel") or the Committee on Child Development Research and Public Policy ("Committee") of the National Research Council.[1] Seven members of the Panel and six members of the Committee are *amici* here.[2]

The Committee on Child Development Research and Public Policy is an interdisciplinary body within the National Research Council. In 1983, the Committee established an expert, interdisciplinary panel to study the problems of adolescent pregnancy and childbearing.[3] The study was initiated, in part, to correct a perceived imbalance between general beliefs about the problems associated with adolescent sexuality and the scientific and other empirical data that had been collected about those issues. *Risking the Future* at ix-x.

The Committee selected Panel members who could bring a diverse range of expertise, experience, and political and philosophical points of view to the study. *Id.* at x. These Panel members included physicians, psychologists, professors of medicine, social scientists, a professor of law, an historian, and an economist. *Id* at iii-iv.

---

[1] The National Research Council is the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in the conduct of their services to the government, the public, and the scientific and engineering communities.

[2] This brief is filed on behalf of the listed *amici* as individuals, not on behalf of the Panel (which was disbanded in 1986 upon completion of its study), the National Research Council or the National Academy of Sciences.

[3] National Research Council, *Risking the Future, Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. I at x (1987) (hereinafter cited as "*Risking the Future*").

The Panel members are authors of numerous textbooks, scholarly articles, and research reports in the areas of medicine, science, sociology, adolescent development and sexuality, and child psychology and are affiliated with over twenty universities (including law and medical schools) and research institutes. Many of the institutions and organizations with which the Panel members are affiliated have a specific focus on children and adolescents.

The Panel was charged with a three-fold mission: (1) to collect, integrate and evaluate data on trends in teenage sexual behavior; (2) to review and synthesize research on the antecedents and consequences of adolescent pregnancy and childbearing; and (3) to review and assess alternative preventive and ameliorative policies and programs. *Id.* at x. Over a two-year period, the Panel studied the initiation of sexual activity among adolescents, contraceptive use, pregnancy, pregnancy resolution, and the consequences of teenage pregnancy, childbearing, and parenting as well as the cost and effectiveness of policies and programs designed to address those areas. *Id.*[4]

In conducting its study, the Panel acknowledged that the issues surrounding adolescent pregnancy are both complex and controversial. As a scientific body, the Panel sought to "clarify the issues, sharpen awareness of crucial decision points, and define limits of existing knowledge" without injecting moral, philosophical or political ideology into its report. *Id.* at xi. The Panel's objective was "to inform the policy debate by clarifying the scientific issues." *Id.* at 5.

---

[4] Five private foundations, the Rockefeller Foundation, the Ford Foundation, the William and Flora Hewlett Foundation, the Robert Wood Johnson Foundation, and the Charles Stewart Mott Foundation provided support for the study. *Id.* at x, xiii.

Risking the Future, Vol. I (1978), is the Panel's final report.[5] In the report, the Panel members unanimously endorsed three comprehensive policy goals, within which they set forth specific conclusions and recommendations. *Id.* at 5. In order of priority, the Panel's primary goals were to:

(1) Reduce the rate and incidence of unintended pregnancy among adolescents, especially among school-age teenagers;

(2) Provide alternatives to adolescent childbearing and parenting;

(3) Promote positive social, economic, health, and developmental outcomes for adolescent parents and their children.

Consistent with its overall approach, the Panel studied information regarding the availability of abortion services to adolescents in a non-ideological context. While the Panel stressed that it "strongly prefers prevention of pregnancy to avoid parenthood," it recognized that abortion is a legal alternative for adolescents for whom pregnancy prevention fails and devoted some attention to the issues associated with pregnancy termination. *Id.* at 6.

As individual members of the Panel or the Committee, *amici* wish to direct this Court's attention to the conclusions set forth in *Risking the Future* and the studies described therein. Specifically, the undersigned *amici* believe that the data reviewed by the Panel and the conclusions that can be drawn therefrom may provide the

[5] Before it was issued, *Risking the Future* was reviewed by several independent bodies, including the Committee, the review board of the Commission on Behavioral and Social Sciences and Education, a report review committee of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine, and a number of independent, outside reviewers.

Court with relevant empirical evidence which will assist it in its examination of the parental notification provisions that are currently before the Court.

SUMMARY OF ARGUMENT

There is no empirical evidence that mandatory parental notification provisions foster parent-child communications about abortion. Many teenage girls voluntarily choose to inform one or both parents about an unwanted pregnancy. Teenagers who do not wish, for whatever reason, to consult with their parents, go to great lengths to avoid complying with statutes that would require them to do so. There is no basis for concluding that the interests of these minors are well-served by the notification statutes that are intended to protect them.

There also is no scientific evidence that pregnant minors are especially vulnerable to psychological harm from an abortion, are unable to make a reasoned decision about whether to obtain an abortion or are more likely than adults to suffer adverse medical consequences from an abortion. There is, however, empirical data that indicates that parental notification requirements increase the likelihood that a pregnant teenager will delay obtaining an abortion. Teenagers appear to suffer a disproportionate burden from such delay, including, in some cases, postponement of abortions until the second trimester, when health risks increase. Thus, a fair reading of the available empirical data tends to indicate that parental notification requirements actually may harm pregnant minors without conferring substantial off-setting benefits.

ARGUMENT

I. INTRODUCTION

Since 1973, abortion has been a legal option for all women in the United States. Pregnant minors, as well as adult women, have a constitutionally protected right to choose to have an abortion, for "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Nevertheless, the circumstances under and the manner in which minors may take advantage of their legal option to terminate an unwanted pregnancy have remained special and emotional issues for policy makers and the courts. *See Risking the Future* at 9. The perception that a minor's decision to obtain an abortion raises unique emotional, health or family-interest issues has spawned legislation specifically regulating the manner in which minors may obtain abortion services. *See generally Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Such regulations often are based on the articulated goals of promoting the emotional and physical welfare of the minor and the state's interest in intra-family harmony and unity. *See, e.g.*, Brief of Cross-Petitioners, State of Minnesota, *et al.* at 22-34 (hereinafter "Minn. Br."); Brief of Appellant, State of Ohio at 24 (hereinafter "Ohio Br."). When state regulations impinge upon a constitutionally protected right, however, they must be narrowly tailored to serve a legitimate state interest. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

No one, including *amici*, would quarrel with the laudable goals of promoting family communication and protecting pregnant minors. It is the opinion of these *amici*, however, that these articulated goals are not well-served by the forced intervention of parents or the state into the abortion decision. In the opinion of these *amici*, the doubtful efficacy of notification requirements, particularly when weighed against the burdens they impose on a minor's right to obtain an abortion, raises serious constitutional questions.

These *amici* believe that the comprehensive study of adolescent pregnancy set forth in *Risking the Future* brings a unique and empirically-based perspective to these controversial issues. On the basis of the available data, the *Risking the Future* Panel concluded that parental involvement in an adolescent's decision to seek an abortion should not be mandated; that "minor adolescents should be encouraged, but not required, to involve their parents and partners in the decision-making process." *Risking the Future* at 9-10, 278-79. The Panel's conclusion was based on two subsidiary findings—the lack of a scientific basis for restricting the availability of abortion to adolescents and the delay and attendant health risks which often accompany parental consent requirements. *Id.* As set forth below, it is the opinion of *amici* that the findings set forth in *Risking the Future* and described herein cast grave doubts on the effectiveness and desirability of such restrictions.

II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION

A purported purpose of both Minnesota and Ohio's parental notice requirements is the furtherance of parent-child communication. *See, e.g.*, Minn. Br. at 4; Ohio Br. at 24. *Amici* share the view that communication between adolescents and their parents is important and may have salutory effects on many aspects of adolescent sexual be-

havior.[6] Indeed, the Panel concluded that adolescents should be encouraged to involve their parents in the process of pregnancy testing and counseling, *Risking the Future*, at 279, in decision-making with respect to pregnancy resolution options, *id.*, *see also id.* at 281, and in decisions concerning childrearing for those minors who become parents. *Id.* at 286-87.

However, the empirical evidence analyzed by the Panel does not support the proposition that compulsory parental notification will make an appreciable difference in parent-child communications concerning an abortion decision. With or without compulsory notification requirements, parental attitudes about abortion appear to have a significant influence on a pregnant minor's decision to terminate a pregnancy. *Id.* at 113. The data compiled by the Panel indicates that "[m]ost school-age adolescents, especially very young teenagers, consult their parents in deciding to obtain an abortion." *Id.* at 114. For example, in one study,[7] a majority of the 1,170 un-

[6] However, there is little scientific evidence as to the actual effects of parent-child communication on adolescent decisions regarding sexual activity. Research on the effects of parent-child communication on sexual topics "has produced conflicting and inconclusive results." *Risking the Future* at 245-46; *see also id.* at 102-04, 149, 150. Although school- and community-based family planning programs reflect increasing efforts to involve parents, there is limited evidence upon which the effectiveness of these approaches may be measured. *Id.* at 145-46. The Panel stressed that "there is little scientific basis for understanding how these [communication-enhancement programs] are likely to affect teenagers' decisions to delay initiation of sexual activity or to be more diligent contraceptors." *Id.* at 246. While there is evidence that close parent-child relationships may be associated with less sexual activity among younger teenagers, *id.* at 103, this may not be true with respect to older minors. *Id.* Other analyses have not been able to establish a correlation between parent-child communication and the sexual activity of the child. *Id.* at 103.

[7] *Citing* Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services* 12 Fam. Plan. Persp. 284 (1980) ("Torres").

married, minor abortion patients under the age of 18 surveyed indicated that their parents knew that they were obtaining an abortion. *Id.* at 192. Among very young teenagers, parental influence is particularly strong. *Id.* at 113.[8] Survey data suggests that the younger the patient, the more likely she was to report that her parents knew that she was seeking an abortion and the more likely it was that she was referred to the abortion clinic by her parents. *Id.* at 192.[9]

Indeed, adolescents tend to involve their parents in other areas pertaining to sexual activity even in the absence of parental notification requirements. For example, data indicate that 59% of teenagers seeking contraceptive services from clinics or other organized providers "are sure" or "think" their parents know of their intentions. *Id.* at 158. Of this group, a majority voluntarily told their parents, while for most of the others—and particularly in the case of girls 15 and under—their parents suggested the visit. *Id.*

However, the evidence also suggests that those adolescents who do not voluntarily consult with parents about abortion or other issues relating to their sexual activity probably would continue to avoid such notification, even were it legally required. In the case of abortion decisions, the Panel noted that approximately 25 percent of the teenagers surveyed in the Torres study said their parents did not know of their decision to terminate their pregnancy "and that they would not have come to the clinic if parental consent or notification were required."

[8] *Citing* Steinhoff, Premarital Pregnancy and the First Birth (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of a larger study, Hawaii Pregnancy, Birth Control and Abortion Study. University of Hawaii); Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 Adolescence 43 (1980).

[9] *Citing* Torres, n.7, *supra*.

Id. at 192. A study reviewed by the Panel of the impact of Minnesota's parental notification requirement—the very statute at issue in *Hodgson*—similarly indicated that a sizeable minority of pregnant minors seeking abortions avoid notification requirements. *Id.*[10] Approximately 43 percent of adolescent minors surveyed in the Minnesota study took advantage of the judicial bypass alternative to parental notification instead of informing *both* parents of their desire to obtain an abortion; about a quarter of these minors reported having notified one parent. *Id.* at 192.

Similarly, among the substantial minority (41%) of teenagers surveyed who sought contraceptive services but did not tell their parents, a majority say they would not have come to a clinic if parental notification were required. *Id.* at 159.[11] Moreover, the second most common reason teenagers choose a family planning clinic rather than a private physician for contraceptive services, according to one study, is to ensure privacy. *Id.* at 160 (26% of adolescents went to clinics over private doctors because they feared doctors would tell their parents; 65% made the decision on the basis of cost).[12] *See also id.* at 273.

A reluctance to tell their parents also causes adolescents to postpone pregnancy testing, *id.* at 173, or, for those who choose to carry their child to term, to delay prenatal care. *Id.* at 198. Such delay is undesirable and

---

[10] *Citing* Blum, Resnick & Stark, The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking (1985) (Unpublished manuscript, University of Minnesota).

[11] Some teens in the latter group would have foregone contraception entirely if required to tell their parents, *Risking the Future* at 159, thus substantially increasing the risk of an unintended pregnancy.

[12] *Citing* Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982).

dangerous both for teenagers who choose to carry their child and for those who ultimately decide to terminate the pregnancy. *See infra* at 16-20.

In sum, a majority of adolescents involve their parents in many decisions relating to their sexual activity, including, but not limited to, abortion. Younger adolescents are particularly likely to consult and be guided by their parents. However, a significant minority will avoid parental notification when such notification is required, often choosing to forego or delay seeking services instead of involving their parents. This evidence indicates to *amici* that parental notification statutes are unlikely to foster parent-child communication beyond that which already occurs voluntarily.[13]

III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS

A. The Psychological Considerations

Among the justifications Minnesota and Ohio offer for the challenged statutes are that notification may, in various ways, ameliorate alleged adverse psychological consequences of an abortion. *See, e.g.*, Minn. Br. at 13-15; Ohio Br. at 46. In the opinion of these *amici*, such concerns are not based on scientific fact.

---

[13] Pregnant minors are not a monolithic group. *Risking the Future* at 2, 19. *See also H.L. v. Matheson, supra*, 450 U.S. at 419 (1981) (concurring opinion) ("When a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like."). For this reason parental notification requirements affect different minors in different and possibly unpredictable ways. Broad-brush legislation, including the Ohio and Minnesota statutes at issue here seem, to these *amici*, particularly ill-suited to address such an inherently individualized and idiosyncratic issue.

At the time the Panel undertook its analysis, there were few studies of the psychological effects of abortion on adolescents, *Risking the Future* at 195, and most did not distinguish between adolescents and adults. *Id.* at 244. While a very few of the studies found that abortion had a slight but measurably more negative effect on the short-term emotional well-being of teenagers than on adult women, *id.* at 196, 244, most studies indicated that the abortion experience is simply not likely to cause severe emotional problems. *Id.*[14] One study suggested that the negative reactions of teenagers to an abortion (primarily depression) are generally mild.[15] Indeed, for all women, including teenagers, a frequent reaction to having an abortion is relief. *Id.* at 195.

After examining the available data, the Panel concluded that existing research simply does not support the assumption that minors are especially likely to experience adverse psychological reactions to an abortion. *Id.* at 277 ("On the basis of existing research . . . the contention that adolescents . . . are especially vulnerable to serious psychological harm as a result of an abortion is not supported.") In particular, scientific research has not shown

---

[14] At least some of the few studies which suggested that there may be measurable differences in the short-term emotional well-being of adult women and adolescents following an abortion did not control for other potentially explanatory variables, such as the timing of the procedure. *Id.* at 244. Other factors, which may contribute to the slight differences in effect include gestational age, delay and social support. *Id.* at 196.

These studies cast serious doubt on the assumption articulated in *H.L. v. Matheson*, that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." 450 U.S. at 411. Significantly, the studies upon which the *Matheson* court relied, *id.* at n.20, pre-date those examined by the Panel by at least a decade.

[15] *Citing* Adler & Dolcini, *Psychological Issues In Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986).

that mandated parental involvement helps adolescents cope with their decision to have an abortion. *Id.*[16] Similarly, the Panel found that the concern that adolescents are unlikely or unable to make well-reasoned conclusions lacks empirical support. *Id.* Given the absence of evidence to support or refute the belief that adolescents lack the cognitive capacity to make rational decisions about pregnancy termination, *id.* at 9, the Panel concluded that there is no scientific basis for restricting the availability of abortion on the basis of age. *Id.*

What the evidence does show is that confidentiality is a factor in a minor's choice of abortion providers. *Id.* at 279. ("Factors of cost and confidentiality lead most teenagers to clinics for [abortion] services."). The need to protect the confidentiality of an adolescent's decision to seek health care services relating to sexual activity has been widely recognized. At the time *Risking the Future* was written, 29 other states and the District of Columbia specifically allowed minors to give their own consent for family planning services. *Id.* at 157. The same sensitivity to the privacy interests of minors causes the vast majority of contraceptive providers to provide services to adolescents, particularly to teenagers over 15, without the

---

[16] Since the Panel completed its work, more recent studies have been conducted, the results of which appear to be consistent with the findings of the Panel. *See, e.g.*, Brief for *Amici Curiae* American Psychological Association, et al., filed September 1, 1989, *citing* Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l); Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper presented at American Psychological Association Convention); APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987). Neither these *amici* as individuals, nor the Panel as a group, have independently reviewed these subsequent studies.

minor's parents' consent.[17] *Id.* at 155-56. Indeed, the Minnesota legislature has expressly relieved minors of the need to obtain parental or other adult consent "for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. § 144.343 (1988).

The Panel recognized that the preservation of confidentiality is important to adolescents seeking assistance with respect to choices concerning their sexual behavior. *See, e.g., Risking the Future* at 8, 169, 170. It stressed the importance of privacy in every aspect of adolescent decision-making related to their sexual activity, emphasizing that "the girl or woman should be treated with the same dignity, *confidentiality*, kindness, and excellence of health care that are due any patient." *Id.* at 9 (emphasis added). *See also id.* at 278.

B. The Counseling Considerations

Both Ohio and Minnesota emphasize a need to protect teenagers from making an uninformed decision to terminate a pregnancy. *See, e.g.*, Minn. Br. at 32; Ohio Br. at 13 ("state's interest [is] in protecting a minor from the

---

[17] Only one percent of Planned Parenthood affiliates, 10 percent of public health departments and other providers and 19 percent of hospitals required parental consent or notification. *Id.* at 155. More agencies require parental consent or notification for teenagers under 15 years of age. The figure for private physicians is lower: 59 percent of a national sample of physicians (including obstetrician-gynecologists, general practitioners and pediatricians) were willing to provide services to unmarried minors without parental consent. *Risking the Future* at 156-57. Physicians were less likely to serve minors without requiring parental consent in states which had not enacted legislation permitting minors to provide their own consent. *Id.* at 157. *Citing* Orr, *Private Physicians and the Provision of Contraceptives to Adolescents*, 16 Fam. Plan. Persp. 83 (1984).

long range consequences of an ill-advised abortion decision"). Relying heavily on Justice Stewart's comment in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (concurring opinion), that "[i]t seems unlikely that [a teenage girl] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place," [18] both states suggest that parental notification helps ensure that a pregnant teenager has been adequately counseled prior to the abortion procedure. *See* Minn. Br. at 35; Ohio Br. at 27 (unlikely that minor will obtain adequate counsel from clinic).

The Panel's research does not support the assumption that non-parental counseling, particularly that of abortion providers, will necessarily be inadequate. The Panel found abortion clinics typically provide extensive counseling:

> All clinics make abortion counseling available on request; such counseling generally consists of describing the procedure and explaining its risks, obtaining informed consent, and confirming that it was the patient's own decision to have the procedure. [One researcher] reports that 90 percent of clinics routinely counsel all first-abortion patients; 88 percent of clinics provide decision counseling to help a young woman explore the various factors that are involved in making an informed decision about the termination of her pregnancy. Nonprofit clinics appear to place greater emphasis on counseling than for-profit facilities. As a matter of policy, 68 percent of clinics provide a pregnancy test before per-

---

[18] Justice Stewart's sweeping conclusion is based on an excerpt from the record in *Bellotti v. Baird*, 428 U.S. 132 (1976), describing the counseling procedures in one abortion clinic. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 91 n.2. The empirical evidence suggests that the procedures described in *Bellotti* may not be representative of the counseling generally provided to pregnant minors.

forming an abortion, even when a test has been provided elsewhere. In addition, 93 percent routinely provide a post-abortion clinic visit.

Risking the Future at 191-92. "Adherence to principles of voluntarism and informed consent" requires family planning/abortion clinics to engage in comprehensive counseling, embracing "an account of the possible risks, benefits, and consequences of maternity and abortion, the available alternatives, including adoption, and the resources available for needed care." *Id.* at 174. Thus, the evidence compiled by the Panel does not support the presumption that non-parental counseling available to minors seeking to terminate an unwanted pregnancy is inadequate.

IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS

As discussed above, in the opinion of these *amici*, the relevant scientific literature does not provide support for the proposition that parental notification or consent requirements actually foster familial communication, are necessary to reduce the likelihood of adverse psychological consequences to pregnant minors or contribute substantially to the minor's ability to make an informed decision about abortion. There is, however, one measurable effect of consent or notification provisions—delay and increased burden for the pregnant minor who seeks to obtain an abortion. *Id.* at 194.

A. Notification Requirements Result In Delays Which May Lead To Increased Health Risks

Where performed early in a pregnancy, abortion is a relatively safe procedure. Little risk of medical complications attaches to abortions performed by qualified professionals in the first trimester of pregnancy. *Id.* at 278. The health risks associated with early, legal abortions are

no greater for adolescents than for adults and generally appear to be lower. *Id.* at 125, 278.[19]

Delays in seeking advice about pregnancy termination or in obtaining an abortion can have adverse consequences, however. *Id.* at 194, 277. For instance, in *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986), the Court found as a matter of fact that "[e]ven delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk." 648 F. Supp. at 765.

Ironically, the delays associated with notification or consent requirements have an especially devastating effect on the very class of individuals that such procedures are intended to protect. As a group, teenagers are far less likely than older women to obtain abortions during the first trimester of their pregnancies. *Risking the Future* at 114. The younger the pregnant minor, the more likely she is to delay. According to one source, 34 percent of abortions to girls age 15 and younger are performed during the first eight weeks of gestation, compared with 41 percent of abortions among girls ages 15-19 and 51 percent of those among women ages 20-24. *Id.*[20] The delay has been attributed to the inability of teenagers, particularly younger teenagers, to recognize the signs of pregnancy or to distinguish them from normal menstrual irregularities. Teenagers also tend to deny that they are pregnant. *Id.*

Whatever the reason for the initial delay, statutorily imposed parental notification requirements appear to exacerbate a troublesome situation by increasing the like-

---

[19] By contrast, the health risks of pregnancy and child birth are substantially higher for very young mothers than for adult women. *See generally id.* at 123-125.

[20] *Citing* Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

lihood that a pregnant teenager will delay obtaining an abortion. *Id.* at 194, 278. The requirements (or the perception of such requirements) are thought to inhibit some teenagers from seeking and obtaining abortions. *Id.* at 114. In addition, the statutory schemes typically impose waiting periods after parental notification has been accomplished. For instance, the statute enacted by the Minnesota legislature requires that both parents be given forty-eight hours written notice, with notice commencing at the time of delivery or on the next day, if notice is mailed. Minn. Stat. § 144.343. The trial court found that this procedure delayed the minor's abortion by at least forty-eight hours or more commonly seventy-two hours. *Hodgson v. State of Minnesota*, 648 F. Supp. 765, (D. Minn. 1986). The Ohio legislation requires that notification be provided to parents at least twenty-four hours prior to the abortion. Ohio Rev. Code Ann. § 2919.12(B)(1)(a)(i) (1989).

Moreover, as discussed above, many teenagers who do not voluntarily consult with their parents choose to use a judicial bypass proceeding rather than to comply with the notification provision. *Risking the Future* at 192. Judicial bypass proceedings allow a minor to establish that she is mature enough to make the decision without consulting her parents or to establish that parental consultation would not serve her best interests.[21] Minors who avail themselves of the judicial bypass alternative to parental notification are often found to be mature. *Id.* at 195. For those minors deemed immature, abortions are almost always found to be in their best interest. *Id.*[22]

---

[21] To serve the best interests of minors, the proceeding should be expeditious, confidential and accessible.

[22] In Massachusetts, for example, between April 1981, when the consent statute took effect, and February 1983, about 1,300 minors sought an abortion through the judicial bypass procedure. In 90 percent of the cases the minor was judged to be mature; in the remaining cases, all but five requests for abortions were approved, according to the best interest standard. In three of the cases denied, the trial court's decision was overturned on appeal; in one case the judge invited the minor to seek approval from another judge, who granted the petition; and in the last case the minor decided to go to a neighboring state for an abortion (Mnookin, 1985). Similar findings have been reported in Minnesota (Donovan, 1983).

Risking the Future at 195.

A judicial bypass proceeding may require the minor to travel to another jurisdiction and wait for some period prior to obtaining access to the courts. *Id. See Hodgson v. Minnesota*, 648 F. Supp. at 763 (initial stages of proceeding may take a week or more; minor may need to travel to another jurisdiction). In the case of the Ohio proceeding, delays of twenty-two days are likely. *Akron Center for Reproductive Health v. Slaby, et al.*, 854 F.2d 852, 867 (6th Cir. 1988). Delays of this magnitude, especially when combined with some pregnant teenagers' delays in recognizing or taking decisive action when confronted with an unwanted pregnancy, could result in postponement of the abortion until the second trimester.

B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities

Teenagers generally have less access to abortion providers than do adult women. *Risking the Future* at 114.[23] Geographical constraints as well as costs hinder minors seeking abortion services. *Id.*[24] *Hodgson v. Minnesota, supra*, 648 F. Supp. at 761.

---

[23] *Citing* the Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

[24] The district court in *Hodgson* found that 94% of the counties in Minnesota had no readily available abortion providers and that virtually all of the abortion providers in Minnesota were located in Duluth or Minneapolis-St. Paul. 648 F. Supp. at 761.

Where the delay imposed by parental notification requirements results in postponement until and within the second trimester, access to abortion services becomes even more limited. One study reviewed in *Risking the Future* found that while seventy-two percent of abortion providers surveyed will perform an abortion at ten weeks, only thirty-two percent will perform one at thirteen weeks, twenty-one percent at fifteen weeks and only five percent at twenty-one weeks. Eighty-two percent of abortion providers do not perform abortions after the first trimester. *Risking the Future* at 191. Given many minors' already limited access to abortion services, any delay that causes postponement until the second trimester could prevent the minor from exercising her right to obtain an abortion.

Second trimester abortions also are substantially more expensive than first trimester abortions.[25] *Id.* at 193. *See also Hodgson v. Minnesota, supra*, 648 F. Supp. at 761. The increased cost of a second-trimester abortion may prove to be an insurmountable barrier for a pregnant minor. *See Risking the Future* at 114 (geographical distances and costs limit teenagers' access to abortion, especially school-age girls and those from poor families).

In sum, it is the conclusion of these *amici* that parental notification requirements impose substantial and unwarranted burdens on pregnant adolescents by causing delay and postponement of the minor's abortion. These delays not only result in increased health risks but may create insurmountable barriers due to the decreased availability of abortions after the first trimester.

---

[25] In 1981, hospital charges for abortions averaged $735, as opposed to $227-$230 in 1983 for non-hospital facilities. *Risking the Future* at 193.

CONCLUSION

Amici urge the Court to assess the claims of the parties in light of the findings set forth in *Risking the Future*. Specifically, *amici* believe that the scientific studies examined in *Risking the Future* do not support the claim that minors present an increased risk of psychological trauma or adverse medical consequences from abortions. The studies suggest to these *amici* that the statutes will not contribute to constructive intra-family communication. Nor is the available scientific literature consistent with claims that any delay that results from the restrictions will be insignificant. *See* Minn. Br. at 17; Ohio Br. at 37. To the contrary, it appears more likely that the delays in these notification proceedings will result in a higher degree of risk to the health of pregnant adolescents who ultimately obtain an abortion. To these *amici*, this burden of increased risk appears to outweigh any benefit to be derived from parental notification provisions.

Respectfully submitted,

HANNAH E.M. LIEBERMAN *
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae

Dated: October 14, 1989

---

* Robin G. Hayutin, Leslie Stout Tabackman and Nancy Sherbow contributed to the preparation of this brief.

APPENDIX

APPENDIX

Eugene S. Bardach	Professor, School of Public Policy University of California, Berkeley
Davidson, Ezra C., Jr.	Chairman, Department of Obstetrics-Gynecology Drew University of Medicine & Science
Dryfoos, Joy G.	Independent Researcher & Writer
Daniel D. Federman	Professor of Medicine Harvard Medical School
Forrest, Jacqueline Darroch	Vice President for Research The Alan Guttmacher Institute
Furstenburg, Frank F., Jr.	Professor of Sociology University of Pennsylvania
Ginsburg, Herbert P.	Professor of Developmental & Educational Psychology Columbia University
Jessor, Richard	Professor of Psychology & Director, Institute of Behavioral Science University of Colorado
Jones, Judith E.	Associate Professor of Public Health Columbia University
Kessen, William	Higgens Professor of Psychology Yale University
John Modell	Professor of History Carnegie Mellon University
Starfield, Barbara	Professor of Health Policy and Pediatrics The Johns Hopkins University, The Johns Hopkins University School of Medicine
Whalen, Carol K.	Professor, Social Ecology University of California, Irvine

(20) (21)

Nos. 88-805 and 88-1309

Supreme Court, U.S.
FILED
OCT 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit;

THE STATE OF MINNESOTA, *et al.*,

Cross Petitioners,

v.

JANET HODGSON, M.D., *et al.*,

Cross Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN NURSES' ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE NURSES' ASSOCIATION OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AND THE SOCIETY FOR ADOLESCENT MEDICINE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN 88-805 AND IN SUPPORT OF CROSS RESPONDENTS IN 88-1309

[Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

43P

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

STEPHAN E. LAWTON
THOMAS N. BULLEIT, JR.
REED, SMITH, SHAW & MCCLAY
(Counsel to the American Academy of Pediatrics)
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

LAURIE R. ROCKETT
HOLLYER, JONES, BRADY, SMITH, TROXELL, BARRETT & CHIRA
(Counsel to the American Medical Women's Association, Inc.)
342 Madison Avenue
New York, NY 10173
(212) 818-1110

JOEL I. KLEIN
ONEK, KLEIN & FARR
(Counsel to the American Psychiatric Association)
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

CARTER G. PHILLIPS *
ELIZABETH H. ESTY
MARK E. HADDAD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record

October 13, 1989

QUESTION PRESENTED

Amici curiae will address the following question:

Whether a state can burden a minor's constitutional right to decide whether to terminate her pregnancy by requiring in every case that one or both parents be notified of her decision without providing an effective, confidential and expeditious alternative procedure that does not require parental notification.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	2
MEDICAL BACKGROUND	4
A. The Pregnancy And Abortion Rates Among Adolescents Are Significant	4
B. Pregnancy Poses Greater Health Risks To The Woman Than Abortion	5
C. Adolescent Pregnancy Poses Particular Medical Risks, Which Are Due Largely To Delay In Seeking Health Care	7
D. Proper Treatment And Counseling Of Adolescents Requires Individualized Consideration Of Their Special Needs And Developmental Characteristics	10
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. MANDATORY PARENTAL NOTIFICATION IMPOSES A CONSTITUTIONALLY SIGNFICANT BURDEN ON A MINOR WOMAN'S RIGHT TO DECIDE WHETHER TO TERMINATE HER PREGNANCY AND ACCORDINGLY THE STATE MUST PROVIDE AN EXPEDITIOUS AND CONFIDENTIAL ALTERNATIVE TO MANDATORY PARENTAL NOTIFICATION	15
A. Mandatory Parental Notification Imposes A Constitutionally Significant Burden On A Minor Woman's Right To Decide Whether To Terminate Her Pregnancy	18

TABLE OF CONTENTS—Continued

	Page
B. Mandatory Parental Notification Required In All Cases Is Not Tailored To The States' Interests In Protecting The Adolescent's Health Or In Promoting Family Integrity	21
C. In Order To Serve Their Interests, As Required By The Constitution, Both Ohio and Minnesota Are Obliged To Provide Some Opportunity For A Minor To By-Pass Having To Provide Notice To Either Or Both Parents, Respectively	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

	Page
Bellotti v. *Baird*, 443 U.S. 622 (1979)	*passim*
Carey v. *Population Services Int'l*, 431 U.S. 678 (1977)	14, 21
City of Akron v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)	13, 17, 21, 29
H.L. v. *Matheson*, 450 U.S. 398 (1981)	*passim*
Planned Parenthood Ass'n v. *Ashcroft*, 462 U.S. 476 (1983)	14, 21, 29
Roe v. *Wade*, 410 U.S. 113 (1973)	13, 14, 21

STATUTES AND REGULATIONS

45 C.F.R. §§ 46.406, 46.407 (1988)	26
Minn. Stat. Ann. §§ 144.343(1)-(7) (West 1988)	15
Minn. Stat. Ann. § 144.343(1) (West 1988)	19
Ohio Rev. Code Ann. §§ 215.85, 2505.073 and 2919.12 (Anderson Supp. 1989)	15
Ohio Rev. Code Ann. §§ 3709.24.1, 3719.01.2 and 5122.04 (Anderson Supp. 1989)	19

OTHER AUTHORITIES

Abortion, Medicine & the Law (J. Butler & D. Walbert 3d ed. 1986)	6
Adolescent Medicine (A. Hofmann & D. Greydanus 2d ed. 1989)	11
American Academy of Pediatrics, Committee on Adolescence, *Adolescent Pregnancy*, 83 Pediatrics 132 (1989)	8, 9
American Academy of Pediatrics, Committee on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 Pediatrics 135 (1989)	9, 20
American Academy of Pediatrics, Committee on Adolescence, *Role of the Pediatrician in Management of Sexually Transmitted Diseases in Children and Adolescents*, 79 Pediatrics 454 (1987)	25
The American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (7th ed. 1989)	10

TABLE OF AUTHORITIES—Continued

Page

Anglin, *Interviewing Guidelines for the Clinical Evaluation of Adolescent Substance Abuse*, 34 Ped. Clin. N.A. 381 (1987) 11

Binkin, *Trends in Induced Legal Abortion Morbidity & Mortality*, 13 Clin. Obstet. Gynec. 83 (1986) 5

Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Decision-Making*, 77 Am. J. Pub. Health 619 (1987) 24

Brown, *Drawing Women Into Prenatal Care*, 21 Fam. Plann. Persp. 73 (1989) 9, 11

Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985) 7

Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986) 18

Cates, *Abortions for Teenagers*, in Abortion and Sterilization: Medical and Social Aspects (J. Hodgson, ed. 1981) 10

Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization: Medical and Social Aspects (J. Hodgson, ed. 1981) 6, 7, 10

Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266 (1977) 10

Cates, Schulz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Med. 621 (1983) 5, 7

Cavanaugh, *Obtaining a Personal and Confidential History from Adolescents*, 7 J. Adol. Health Care 118 (1986) 11

Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283 (1982) 22, 24

TABLE OF AUTHORITIES—Continued

Page

Croxton, Churchill & Fellin, *Counseling Minors Without Parental Consent*, 67 Child Welfare 3 (1988) 11

D. Danforth & J. Scott, *Obstetrics & Gynecology* (5th ed. 1986) 6

Davis, *Adolescent Pregnancy and Infant Mortality: Isolating the Effects of Race*, 23 Adolescence 899 (1988) 9

Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plann. Persp. 259 (1983) 24

Fisher, Marks, Trieller & Brody, *Are Adolescents Able and Willing to Pay the Fee for Confidential Health Care?*, 107 J. Pediat. 480 (1985) 11

Fost, *Parents as Decision Makers for Children*, 13 Primary Care 285 (1986) 11

Greydanus & Railsback, *Abortion in Adolescence*, 1 Sem. Adol. Med. 213 (1985) 5, 7, 10

Grimes, *Surgical Management of Abortion* in Te Linde's Operative Gynecology (R. Mattingly & J. Thompson eds. 1985) 7, 10

Hakim-Elahi & Tovell, *Complications of First-Trimester Abortion: A Report of 170,000 Cases*, in The American College of Obstetricians and Gynecologists, Abstracts of Current Clinical and Basic Investigation (1989) 6, 7

Harvard, *Medical Confidence*, 11 J. Med. Ethics 8 (1985) 12

Hediger, Scholl, Belsky, Ances & Salmon, *Patterns of Weight Gain in Adolescent Pregnancy: Effects on Birth Weight and Preterm Delivery*, 74 Obstet. Gynec. 6 (1989) 9

Henshaw & Van Vort, *Patterns and Trends in Teenage Abortion and Pregnancy*, in Alan Guttmacher Institute, Teenage Pregnancy in the United States: The Scope of the Problem and State Responses (1989) 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate
CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS*	2
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY	5
A. Marriage	5
B. Travel	8
C. Contract	10
II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION	11
III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED	16
A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases	16
B. The Lower Courts' Decisions Highlight The Flaws In *Roe*	21
CONCLUSION	23

TABLE OF AUTHORITIES

CASES: Page

Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) 18
Akron Center for Reproductive Health v. *Slaby*, 854 F.2d 852 (6th Cir. 1988) 2
Bellotti v. *Baird*, 428 U.S. 132 (1976) 17
Bellotti v. *Baird*, 443 U.S. 622 (1979) ..... *passim*
Ginsberg v. *New York*, 390 U.S. 629 (1968) 14, 20
Haig v. *Agee*, 453 U.S. 280 (1981) 10
H.L. v. *Matheson*, 450 U.S. 398 (1981) 18
Hodgson v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*) 2, 22
Loving v. *Virginia*, 388 U.S. 1 (1967) 5
McNeil v. *Director Patuxent Institution*, 407 U.S. 245 (1972) 13
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 12, 14
Michael H. v. *Gerald D.*, 109 S.Ct. 2333 (1989) 11, 15
O'Connor v. *Donaldson*, 442 U.S. 563 (1975) 13
Parham v. *J.R.*, 442 U.S. 584 (1979) 13, 19, 20
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) ..... *passim*
Planned Parenthood Ass'n of Kansas City v. *Ashcroft*, 462 U.S. 476 (1983) 18
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) ..... *passim*
Poe v. *Ullman*, 367 U.S. 497 (1961) 21
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 15, 20
Roe v. *Wade*, 410 U.S. 113 (1973) 4, 21, 22
Rowan v. *Post Office Dep't.*, 397 U.S. 728 (1970) 14
Santosky v. *Kramer*, 455 U.S. 745 (1982) 15, 16
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 8
Smith v. *Organization of Foster Families*, 431 U.S. 816 (1977) 4, 20
Stanley v. *Illinois*, 405 U.S. 645 (1972) 15
Thornburgh v. *American College of Obst. & Gyn.*, 476 U.S. 747 (1986) 21, 22
Turner v. *Safley*, 107 S.Ct. 2254 (1987) 5
Webster v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989) 21, 22
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 12

TABLE OF AUTHORITIES—Continued

Page

Zbaraz v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) 18

U.S. CONSTITUTIONAL PROVISIONS:

Amendment I 12
Amendment XIII 11
Amendment XIV 11

STATUTES AND REGULATIONS:

10 U.S.C. § 505 (1982) 10
10 U.S.C. § 2104 (1982) 10
10 U.S.C. § 2107 (1982) 10
10 U.S.C. § 2107a (1982) 10
42 U.S.C. § 1981 (1982) 10
22 C.F.R. § 51.27 (1988) 10
Ala. Code § 30-1-5 (1983) 7
Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989) 9
Alaska Stat. § 25.05.171 (1988) 8
Alaska Stat. §§ 47.15.010 - 47.15.080 (1988) 9
Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989) 9
Ariz. Rev. Stat. Ann. § 25-102 (West 1976) 7
Ark. Stat. Ann. §§ 9-11-102 - 105 (1987) 7
Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987) 9
Cal. Bus. & Prof. Code § 22-706 (Deering 1989) 10
Cal. Civ. Code § 4101 (West 1983) 7
Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989) 9
Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) 7
Colo. Rev. Stat. §§ 24-60-701 - 708 (1988) 9
Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989) 9
Conn. Gen. Stat. Ann. § 46b-30 (West 1986) 7
Del. Code Ann. Tit. 13, § 123 (1981) 7
Del. Code Ann. Tit. 18, § 2707 (1988) 10
Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985) 9

TABLE OF AUTHORITIES—Continued

	Page
D.C. Code Ann. § 30-111 (1988)	7
D.C. Code Ann. §§ 32-1101 - 32-1106 (1988)	9, 10
Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988)	9
Fla. Stat. Ann. § 741.04-0405 (West 1988)	7
Ga. Code Ann. § 19-3-2 (1982)	7
Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982)	9
Haw. Rev. Stat. § 572-1 (1985)	7
Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988)	9
Idaho Code §§ 16-901 - 16-1910 (1979)	9
Idaho Code § 32-202 (1983)	7
Ill. Rev. Stat. ch. 23, ¶¶ 2591-2597 (Smith-Hurd 1988)	9
Ill. Rev. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982)	7
Ind. Code Ann. §§ 31-6-10-1 - 31-6-23-4 (West 1979 & Supp. 1989)	9
Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986)	7
Iowa Code § 232.171-72 (Supp. 1989)	9
Iowa Code § 595.2 (1980 & Supp. 1989)	7
Kan. Stat. Ann. § 23-106 (1988)	7
Kan. Stat. Ann. §§ 38-1001 - 1007 (1986)	9
Ky. Rev. Stat. § 402-210 (1988)	7, 8
La. Rev. Stat. Ann. § 9:211 (Supp. 1989)	7
La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982)	9
Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988)	7
Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988)	9
Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988)	7
Md. Code Ann. Art. 83c, §§ 3-101 - 3-110 (1989)	9
Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969)	9
Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989)	8
Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981)	9

TABLE OF AUTHORITIES—Continued

	Page
Mich. Comp. Laws Ann. § 551.51 (West 1988)	7
Minn. Stat. Ann. §§ 260.51 - 260.57 (West 1982 & Supp. 1989)	9
Minn. Stat. § 517.02 (1969 & Supp. 1989)	7
Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988)	7
Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981)	9
Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983)	9
Mo. Ann. Stat. § 451.090 (Vernon 1986)	7
Mont. Code Ann. § 40-1-213 (1989)	7
Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987)	7
Neb. Rev. Stat. § 42-105 (1988)	7
Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988)	9
Nev. Rev. Stat. §§ 122.020 - 122.025 (1985)	8
Nev. Stat. §§ 214.010 - 214.060 (1986)	9
N.H. Rev. Stat. Ann. §§ 169-A:1-11 (1978 & Supp. 1988)	9
N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988)	8
N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976)	9
N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989)	8
N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986)	8
N.M. Stat. Ann. §§ 32-3-1 - 32-3-8 (1986 & Supp. 1988)	9
N.Y. Dom. Rel. Law § 15 (McKinney 1988)	7
N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989)	9
N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988)	7
N.D. Cent. Code § 14-03-02 (1981)	7
N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974)	9
Ohio Rev. Code Ann. §§ 2151.56 - 2151.61 (Baldwin 1989)	9
Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984)	7, 8
Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987)	9
Okla. Stat. Ann. Tit. 43 § 3 (West 1979)	7
Or. Rev. Stat. § 106.060 (1983 & Supp. 1988)	7
Or. Rev. Stat. §§ 417.010 - 417.080 (1987)	9

TABLE OF AUTHORITIES—Continued

	Page
Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989)	8
Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1981)	9
R.I. Gen. Laws §§ 14-6-1 - 14-6-11 (1989)	9
R.I. Gen. Laws § 15-2-11 (1989)	8
S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985)	7
S.C. Code Ann. § 27-17-10 (1976)	9
S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989)	7
S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989)	9
Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988)	9
Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988)	8
Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989)	8
Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986)	9
Utah Code Ann. § 30-1-2 (1989)	7
Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986)	9
Vt. Stat. Ann. Tit. 18 § 5142 (1987)	8
Vt. Stat. Ann. Tit. 33 §§ 551 - 575 (1981)	9
Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988)	9
Va. Code Ann. § 20-48, 49 (1989)	7
Wash. Code § 26.04.010 (1988)	7
Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962)	9
West Va. Code § 48-1-1 (1986)	8
Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988)	7
Wyo. Stat. § 20-1-102 (1987)	7
Lord Hardwicke's Act, 1753, 26 Geo. 2, ch. 33	5, 6
LEGISLATIVE MATERIALS:	
Cong. Globe, 38th Cong., 1st Sess. (1864)	11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:	Page
W. Blackstone, *Commentaries*	5
J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* (1973)	19
Hobbes, *Leviathan* (Fuller, ed. 1952)	4
Locke, *Concerning Civil Government* (Brit. ed. 1952)	4
Restatement (2d) Contracts, §§ 6, 14 (1981)	10
J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951)	11
2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

No. 88-1125

JANE HODGSON, M.D., *et al.*,

Petitioners,

v.

THE STATE OF MINNESOTA, *et al.*,

Respondents.

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, M.D., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT IN NO. 88-805, AND RESPONDENTS-CROSS-PETITIONERS IN NOS. 88-1125 AND 88-1309

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an international organization of 1.4 million members. It has a long history of pro-family advocacy. For example, *amicus* underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, a large percentage of its members are themselves parents. Because of its institutional interest, and the interests of its members, *amicus* believes that it can assist the Court by analyzing the impact of the present cases on the broader area of family rights generally. For these same reasons, *amicus* does not believe its interests will be fully attended to by existing parties. All parties have consented to the filing of this brief.

STATEMENT

In *Akron Center for Reproductive Health* v. *Slaby*, 854 F.2d 852 (6th Cir. 1988), and *Hodgson* v. *Minnesota*, 853 F.2d 1452 (8th Cir. 1988) (*en banc*), the United States Courts of Appeals for the Sixth and Eighth Circuits have held that states may not require that the parents of adolescent girls be notified prior to their daughters' obtaining abortions, unless states provide a so-called "judicial bypass" procedure enabling a judge to determine that the girl is mature enough to decide to have an abortion without telling her parents, or that an abortion is in her best interests. As the Eighth Circuit explained, "[i]n view of the unique nature and consequences of the abortion decision, states do not have the constitutional authority 'to give a third party an absolute, and possibly arbitrary, veto,' over the minor's abortion decision." *Hodgson*, 853 F.2d at 1456, *quoting Bellotti* v. *Baird*, 443 U.S. 622, 643 (1979) (plurality opinion). *See also Akron Center for Reproductive Health*, 854 F.2d at 861 ("we hold that a parental notification statute must provide a bypass procedure that is consistent with the dictates of *Bellotti II*"). The Eighth Circuit upheld Minnesota's parental notification statute, provided that its judicial bypass procedure remains in force. The Sixth Circuit struck down Ohio's statute largely because that court thought the judicial bypass provision inadequate. *Amicus* argues that no "judicial bypass" provision is ever constitutionally required, and thus urges this Court to affirm the Eighth Circuit, except insofar as it found the bypass provision necessary, and to reverse the Sixth Circuit.

SUMMARY OF ARGUMENT

In a nearly unbroken tradition, stretching back to the received English common law, courts and legislatures have recognized that parental authority is not delegated by the state, but rather inheres in the nature of parenthood. Thus, many "fundamental" rights of children have been conditioned on their parents' consent. Children may not marry without their parents' consent. Their interstate travel is largely conditioned on their parents' consent. And their right to enter into contracts is also restricted, and often conditioned on their parents' consent. In a line of cases beginning with *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), this Court has repeatedly emphasized the same principle. Thus, it has insisted that "[t]he child is not the mere creature of the State," but on the contrary, his parents "have the right coupled with the high duty" to direct his education. *Id.* at 535.

Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976), and the cases following it, are incompatible with the *Pierce* line of cases, and with the long-standing tradition of legislative and common-law recognition of inherent parental authority. Most fundamentally, *Danforth* and its progeny err in asserting that the only authority that parents have over their children's abortions is whatever the state is permitted to delegate to them. Parental authority is most emphatically not the product of state delegation, but of nature itself. The lower courts' decisions in these cases further extending *Danforth*'s reasoning to parental notification stat-

utes, like *Danforth* itself, are symptomatic of *Roe* v. *Wade*'s noted tendency for sudden displacement of time-honored doctrines, and are thus symptomatic of *Roe*'s flawed nature. *Danforth* and its progeny, and *Roe* itself, should be reconsidered and overruled.

ARGUMENT

There is a nearly unbroken legal tradition, Constitutional, legislative and common-law, that the family has its "origins entirely apart from the power of the State." *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977). Familial rights are therefore grounded "not in state law, but in *intrinsic* human rights, as they have been understood in 'this Nation's history and tradition.'" *Ibid.* (emphasis added; citations omitted). The family, in short, is logically prior to the State.[1]

That principle has often been codified in legislation recognizing and reinforcing parental authority. Thus, for example, childrens' rights to marry, to travel, and to make certain contracts are conditioned on their parents' consent. With the sole—and rather conspicuous—exceptions of *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and its progeny, this tradition of family autonomy has been nowhere more forcefully expressed than in the precedents of this Court. *Amicus* respectfully urges the Court to resolve the dissonance created in the law by *Danforth* and *Bellotti* v. *Baird*, 443 U.S. 622 (1979), by restating in this case its long-standing theme of familial autonomy.

---

[1] Cf. Hobbes, *Leviathan*, ch. xxii (Fuller, ed. 1952) ("For the father and master being before the institution of the Commonwealth absolute sovereigns in their own families, they lose afterward no more of their authority than the law of the Commonwealth taketh from them"); Locke, *Concerning Civil Government*, ch. VI, par. 58 (Brit. ed. 1952) ("The power, then, that parents have over their children arises from that duty which is incumbent upon them, to take care of their offspring during the imperfect state of childhood").

I. THERE IS A LONG LEGISLATIVE AND COMMON-LAW TRADITION RECOGNIZING AND REINFORCING PARENTAL AUTHORITY.

Through both legislation and common law, both the federal government and the States have long acknowledged parents' authority by requiring their consent for important decisions made by their children.

A. Marriage

The most obvious example is marriage. It is a "fundamental right," *Loving* v. *Virginia*, 388 U.S. 1 (1967), and cannot be denied even to prisoners. *Turner* v. *Safley*, 107 S.Ct. 2254 (1987). Yet the requirement that a child obtain the consent of his or her parents before marrying has remained in force ever since its origins in the English common law.

Blackstone explains that the requirement was designed to reinforce a parent's natural duty:

> [t]he consent or concurrence of the parent to the marriage of his child under age, was . . . directed by our ancient law to be obtained: but now it is absolutely necessary; for without it the contract is void. And this also is *another means, which the law has put into the parents' hands, in order the better to discharge his duty*; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages.

Blackstone's Commentaries, Book 1, Chap. XVI, par. 2 (Oxford 1966) (emphasis added; original emphasis omitted). In 1753, the rule was codified in "An Act for the better prevention of clandestine marriages," which required the consent of a parent or guardian in order for a person under twenty-one to marry.[2] Interestingly,

---

[2] The statute provided, in relevant part, as follows: "And it is hereby further enacted, That all Marriages solemnized by License,

that statute allowed for the Chancellor or other officials to approve a "proper" marriage if a party's parent or guardian had been "induced unreasonably . . . to abuse the Truth reposed in him" and to withhold consent. It did *not*, however, provide for application to them in the first instance. And it certainly did not create a mechanism for them to supply their own consent in secret, without the parents' knowledge.

---

after the said twenty-fifth Day of *March*, one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of the Father of such of the Parties, . . . or if dead, of the Guardian or Guardians . . . and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of *Chancery*; shall be absolutely null and void to all Intents and Purposes whatsoever. XII. And whereas it may happen, that the Guardian or Guardians, Mother or Mothers, of the Parties to be married, or one of them, so under Age as aforesaid, may be *Non compos mentis*, or may be in Part beyond the Seas, or may be induced unreasonably, and by undue Motives to abuse the Truth reposed in him, her or them by refusing or withholding his, her or their Consent to a proper Marriage; Be it therefore enacted, That in case any such Guardian or Guardians, Mother or Mothers, or any of them, whose Consent is made necessary as aforesaid, shall be *Non compos mentis*, or in Parts beyond the Seas, or shall refuse or with-hold his, her or their Consent to the Marriage of any Person, it shall and may be lawful for any Person desirous of marrying, in any of the before-mentioned Cases, to apply by Petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of *Great Britain* for the Time being, who is and are hereby empowered to proceed upon such Petition, in a summary Way; and in case the Marriage proposed, shall upon Examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the Time being, shall judicially declare the same to be so by an Order of Court, and such Order shall be deemed and taken to be as good and effectual to all Intents and Purposes, as if the Guardian or Guardians, or Mother of the Person so petitioning, had consented to such Marriage. Lord Hardwicke's Act, 1753, 26 Geo. 2. ch. 33.

All 50 States and the District of Columbia still require parental consent for children to marry.[3] Only 5 states

---

[3] Twenty-seven States and the District of Columbia simply require parental consent. *See* Ala. Code § 30-1-5 (1983); Ark Stat. Ann. § 9-11-102 - 105 (1987); Cal. Civ. Code § 4101 (West 1983); Del. Code Ann. Tit. 13, § 123 (1981); D.C. Code Ann. § 30-111 (1988); Fla. Stat. Ann. § 741.04 - 0405 (West 1988); Ga. Code Ann. § 19-3-2 (1982); Ill. Ann. Stat. ch. 40, ¶ 203 (Smith-Hurd 1982); Iowa Code § 595.2 (1980 & Supp. 1989); Ky. Rev. Stat. § 402.210 (1988); La. Rev. Stat. Ann. § 9:211 (Supp. 1989); Md. Fam. Law Code Ann. § 2-301 (1984 & Supp. 1988); Mich. Comp. Laws Ann. 551.51 (West 1988); Miss. Code Ann. § 93-1-5 (1972 & Supp. 1988); Mo. Ann. Stat. 451.090 (Vernon 1986); Neb. Rev. Stat. § 42-105 (1988); N.C. Gen. Stat. § 51-2 (1987 & Supp. 1988); N.D. Cent. Code § 14-03-02 (1981); Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984); Okla. Stat. Ann. Tit. 43 § 3 (West 1979); Or. Rev. Stat. § 106.060 (1983 & Supp. 1988); S.C. Code Ann. § 20-1-250 - 270 (Law. Co-op. 1985); S.D. Codified Laws Ann. § 25-1-9, 12, 13 (1984 & Supp. 1989); Utah Code Ann. § 30-1-2 (1989); Va. Code Ann. § 20-48, 49 (1989); Wash. Code § 26.04.010 (1988); Wis. Stat. Ann. § 765.02 (West 1981 & Supp. 1988); Wyo. Stat. 20-1-102 (1987). Eighteen states require a court's consent, in *addition* to parents' consent, in certain circumstances. For example, in New York an 18-year old may not marry without his or her parent's consent, but a 16-year old may not marry without *both* the consent of his or her parent's *and* that of a state superior court or family court judge. *See* N.Y. Dom. Rel. Law § 15 (McKinney 1988); *see also* Ariz. Rev. Stat. Ann. § 25-102 (West 1976) (same); Colo. Rev. Stat. §§ 14-2-106[1][a][I], 108 (1987) (same); Conn. Gen. Stat. Ann. § 46b-30 (West 1986) (same); Haw. Rev. Stat. § 572-1 (1985) (same); Idaho Code § 32-202 (1983) (minors under 18 require parental consent; girls under 16 also require consent of probate court); Ind. Code Ann. §§ 31-7-1-6, 31-7-1-7, 31-7-2 (Burns 1980 & Supp. 1986) (minors between 17 and 18 may marry without parental consent; girl under 15 who is pregnant or has given birth may marry with parental consent and judicial approval); Kan. Stat. Ann. § 23-106 (1988) (both parents' and court's consent required for minors under 18); Me. Rev. Stat. Ann. Tit. 19, § 62 (1981 & Supp. 1988) (minors under 18 require parental consent; minors under 16 also require consent of probate court); Minn. Stat. § 517.02 (1969 & Supp. 1989) (minors under 16 require both consent of parents' and consent of juvenile court); Mont. Code Ann. § 40-1-213 (1989) (minors under 18 require parental consent;

permit a court to consent in lieu of the parents, thus effectively emancipating the minor.[4] None, however, requires such a hearing to be conducted secretly from the parents.

B. Travel

A child's right to interstate travel, which is also a fundamental right, *Shapiro* v. *Thompson*, 394 U.S. 618

---

minors under 16 require both parental and consent of district court judge); Nev. Rev. Stat. §§ 122.020 - 122.025 (1985) (same); N.J. Stat. Ann. §§ 37:1 - 6 (West 1968 & Supp. 1989) (same); N.M. Stat. Ann. §§ 40-1-5, 40-1-6 (1986) (same); Pa. Stat. Ann. Tit. 48 § 1-5 (Purdon 1965 & Supp. 1989) (same); R.I. Gen. Laws § 15-2-11 (1989) (minors under 18 require parents' consent, girls under 16 also require court's consent); Vt. Stat. Ann. Tit. 18 § 5142 (1987) (same); West Va. Code § 48-1-1 (1986) (same). Five states require parental *or* judicial consent. *See infra*, n.4.

[4] Alaska Stat. § 25.05.171 (1988) (minors between 16 and 18 require parental consent; minors between 14 and 18 may receive court approval if marriage is "in best interest" of minor, and parents either have consented or unreasonably refused consent); Mass. Gen. Laws Ann. ch. 207, §§ 7, 24, 25 (West 1987 & Supp. 1989) (minors under 18 require parental consent; court may waive requirement under specified circumstances); N.H. Rev. Stat. Ann. §§ 457:4, 457:5, 457:6 (1983 & Supp. 1988) (marriage by minors under 18 prohibited; court may waive disability for boys over 14, girls over 13 in its discretion); Tenn. Code Ann. § 36-3-106, 107 (1984 & Supp. 1988) (minors between 16 and 18 can marry with parental consent, but court may waive disability "upon good cause"); Texas Fam. Code Ann. §§ 1.51-53 (Vernon 1975 & Supp. 1989) (minors under 18 require either parental consent or court order; minors under 14 require court order). Other states, however, permit judicial consent in the limited circumstances where the girl is pregnant. *See, e.g.*, Ohio Rev. Code Ann. § 3101.01 (Baldwin 1984) (minors under 18 require parental consent; court may consent when girl is pregnant); N.J. Stat. Ann. § 37:1 - 6 (West 1968 & Supp. 1989) (parental consent required for minors under 18; court consent also required for minors under 16; but both requirements waived where girl pregnant); Ky. Rev. Stat. § 402.210 (1988) (parental consent required for minors under 18; district court may waive consent requirement, in its discretion, in case of pregnant girl).

(1969), is likewise largely conditioned on his or her parents' consent. Forty-five states and the District of Columbia have enacted the Uniform Interstate Compact on Juveniles,[5] which provides rather elaborate procedures for a "parent . . . entitled to legal custody of a juvenile

---

[5] *See* Ala. Code §§ 44-2-1 - 44-2-8 (1982 & Supp. 1989); Alaska Stat. §§ 47.15.010 - 47.15.080 (1988); Ariz. Rev. Stat. Ann. §§ 8-361 - 8-367 (West 1989); Ark. Stat. Ann. §§ 9-29-101 - 9-29-108 (1987 & Supp. 1987); Cal. Welf. & Inst. Code § 1300 (West 1984 & Supp. 1989); Colo. Rev. Stat. §§ 24-60-701 - 708 (1988); Conn. Gen. Stat. Ann. §§ 17-75 - 17-81 (West 1988 & Supp. 1989); Del. Code Ann. Tit. 31, §§ 5201, 5221 - 5228 (1985); D.C. Code Ann. §§ 32-1101 - 32-1106 (1988); Fla. Stat. Ann. §§ 39.511 - 39.516 (West 1988); Ga. Code Ann. §§ 39-3-1 - 39-3-7 (1982); Haw. Rev. Stat. §§ 582-1 - 582-8 (1985 & Supp. 1988); Idaho Code §§ 16-1901 - 16-1910 (1979); Ill. Rev. Stat. ch. 23 ¶¶ 2591 - 2597 (Smith-Hurd 1988); Ind. Code Ann. §§ 31-6-10-1 - 31-6-10-4 (West 1979 & Supp. 1989); Iowa Code § 232.171-72 (Supp. 1989); Kan. Stat. Ann. §§ 38-1001 - 1007 (1986); La. Rev. Stat. Ann. §§ 46:1451 - 46:1458 (West 1982); Me. Rev. Stat. Ann. Tit. 34-A, §§ 9001 - 9016 (1988); Md. Code Ann. Art. 83c, §§ 3-101 - 110 (1989); Mass. Gen. Laws Ann. ch. 119 App., §§ 1-1 - 1-7 (West 1969); Mich. Comp. Laws Ann. §§ 3.701 - 3.706 (West 1981); Minn. Stat. Ann §§ 260.51 - 260.57 (West 1982 & Supp. 1989); Miss. Code Ann. §§ 43-25-1 - 43-25-17 (1981); Mo. Ann. Stat. §§ 210.570 - 210.610 (Vernon 1983); Mont. Code Ann. §§ 41-6-101 - 41-6-106 (1987); Neb. Rev. Stat. §§ 43-1001 - 43-1009 (1988); Nev. Rev. Stat. §§ 214.010 - 214.060 (1986); N.H. Rev. Stat. Ann. § 169-A:1-11 (1978 & Supp. 1988); N.J. Stat. Ann. §§ 9:23-1 - 4 (West 1976); N.M. Stat. Ann. 32-3-1 - 32-3-8 (1986 & Supp. 1988); N.Y. Unconsul. Law §§ 1801 - 1806 (1979 & Supp. 1989); N.D. Cent. Code §§ 27-22-01 - 27-22-06 (1974); Ohio Rev. Code Ann. §§ 2151.56 - 2156.61 (Baldwin 1989); Okla. Stat. Ann. Tit. 10, §§ 531 - 537 (West 1987); Or. Rev. Stat. §§ 417.010 - 417.080 (1987); Pa. Stat. Ann. Tit. 62 § 731 (1968 & Supp. 1989); R.I. Gen. Laws § 14-6-1 - 14-6-11 (1981); S.C. Code Ann. § 24-17-10 (1976); S.D. Codified Laws Ann. §§ 26-12-1 - 26-12-14 (1984 & Supp. 1989); Tenn. Code Ann. §§ 37-4-101 - 37-4-106 (1984 & Supp. 1988); Texas Fam. Code Ann. §§ 25.01-09 (Vernon 1986); Utah Code Ann. §§ 55-12-1 - 55-12-6 (1986); Vt. Stat. Ann. Tit. 33 § 551 - 575 (1981); Va. Code Ann. §§ 16.1-323 - 16.1-330 (1988); Wash. Rev. Code Ann. §§ 13.24.010 - 13.24.900 (1962). The exceptions are Kentucky and North Carolina, which repealed their enactments of the Compact, and West Virginia, Wisconsin and Wyoming.

. . . who has run away without the consent of such parent" to petition a state court for a "requisition" securing the minor's return from the state to which he or she has fled. *See, e.g.*, D.C. Code § 32-1102, Art. IV(a) (1988). A child's freedom to leave the country is similarly conditioned.[6] Thus, passport officers may require children under 18 to obtain the consent of a parent or guardian before issuing them a United States passport. 22 C.F.R. § 51.27 (1988).

C. Contract

The right to enter into contracts—one of the basic rights guaranteed by 42 U.S.C. § 1981—is generally either effectively denied to children (the traditional rule), or else is conditioned on their parents' consent. *See, e.g.*, Cal. Ins. Code § 10-112 (Deering 1989) (requiring parental consent for minors to enter into certain insurance contracts); 18 Del. Code § 2707 (1988) (same). *See generally*, 2 Williston, *Contracts* §§ 222-248 (3d ed. 1959 & Supp. 1989) (discussing "infants'" lack of capacity to contract); Restatement (2d) Contracts, §§ 6, 14 (1981) (same). The federal government likewise requires parental consent before allowing minors to enlist in the military or join R.O.T.C. *See* 10 U.S.C. §§ 505(a), 2104 (b)(4), 2107(b)(4), 2107a(b)(4) (1982).

These restrictions, and others like them,[7] are not isolated oddities. Rather, they embody a fundamental tenet of the American legal tradition, namely that parents have

---

[6] The ability to travel out of the country, while not a "right," is nonetheless a constitutionally-protected "freedom." *Haig* v. *Agee*, 453 U.S. 280, 306-307 (1981).

[7] Many restrictions on children are quite mundane. *See, e.g.*, Cal. Bus. & Prof. Code § 22-706 (Deering 1989) (requiring parental consent for use by children under 18 of "tanning devices").

natural authority over their children, which the law recognizes and reinforces.[8]

II. THIS COURT HAS LONG RECOGNIZED THAT PARENTAL AUTHORITY IS AFFIRMATIVELY PROTECTED BY THE CONSTITUTION.

Apart from *Danforth* and its progeny, these same principles of family autonomy and parental authority have been repeated time and again in the precedents of this Court. Faced with a state statute that required all children to attend public schools, this Court insisted that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only. *The child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to . . . prepare him for* [*his*] *additional obligations.*

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (emphasis added). *See also Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (" 'the Con-

---

[8] This same vision of family and state is apparent in the debates surrounding the Thirteenth and Fourteenth Amendments. The abolitionists argued the natural evils of slavery that the law had to remedy were not limited to involuntary servitude; slavery also caused the slave's "authority and responsibility to rear his children [to be] obliterated. The members of his family might be torn from him and scattered." J. TenBroek, *The Antislavery Origins of the Fourteenth Amendment* 122 (1951). Likewise, Senator Harlan, arguing in favor of the Thirteenth Amendment, noted that one of the evils of slavery was the "abolition practically of parental relation, [thus] robbing the off-spring of the care and attention of his parents." Cong. Globe, 38th Cong., 1st Sess. 1439 (1864). Senator Wilson agreed. He thought the Thirteenth Amendment necessary, in part, because "[t]hen the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law . . . ." *Id.* at 1324.

stitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition' ") (citation omitted). Earlier, in *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923), the Court struck down a statute that purported to criminalize instructing children in foreign languages. The Court noted that "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education. . . ." *Id.* at 400. The statute, the Court held, interfered "with the power of parents to control the education of their own." *Id.* at 401.

The Court enforced the same principle, under the aegis of the Free Exercise Clause, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court held that a state could not require Amish children, against their parents' wishes, to attend high school. Reiterating its insistence that "[t]he child is not the mere creature of the State," *id.* at 233 (*quoting Pierce*, 268 U.S. at 535), the *Yoder* Court rejected the state's argument that it should be permitted to determine what type of education best served the Amish children. "[I]t seems clear that if the State is empowered as *parens patriae*, to 'save' a child from . . . his Amish parents . . . the State will in large measure influence, if not determine, the religious future of the child." 406 U.S. at 232. And that, the Court insisted, was well beyond the pale, since the "primary role of the parents in the upbringing of their children is now established beyond doubt. . . ." *Ibid.*

The *Yoder* Court reserved the question of how it would balance a state's right as *parens patriae* with the rights of parents and children in a hypothetical case where Amish children wished to obey a compulsory education statute against their parents' wishes. *Id.* at 231. Nevertheless, the Court warned "that such an intrusion by a State into family decisions . . . would give rise to grave questions of religious freedom comparable to those raised here and those presented in *Pierce*. . . ." *Id.* at 231-32

(citation omitted). Six years later, in *Parham* v. *J.R.*, 442 U.S. 584 (1979), the Court went far towards resolving even that question.

In *Parham*, this Court upheld a state statute that authorized state mental institutions to admit temporarily any minor merely upon the application of that minor's parents or guardians. If, after observation, the institution found evidence of mental illness, it was authorized to admit the minor "for such period and under such conditions as may be authorized by law." 442 U.S. at 591. Any child hospitalized for more than five days, however, could always be discharged simply upon the request of his or her parents. *Ibid.* Several institutionalized children filed a class action challenging the statute as a deprivation of liberty without Due Process. They argued that "the likelihood of parental abuse" in having them committed against their will required a formal adversarial hearing. 442 U.S. at 603.

In rejecting that argument, this Court stressed once again that "our constitutional system long ago rejected any notion that a child is 'the mere creature of the State'. . . ." 42 U.S. at 602, *quoting Pierce*, 268 U.S. at 535. On the contrary, the Court emphasized that its "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." *Ibid.* Thus, an independent evaluation of the child by a staff physician at the hospital was all that due process required. *Id.* at 607.[9] The Court dismissed the argument that, because of the risk that some parents would abuse their children, a more formal procedure was necessary. "The statist notion that

[9] If the person to be committed were an adult instead of a minor, Due Process would require a full-scale adversary hearing. *See* 442 U.S. at 627 (Brennan, J., concurring and dissenting); *see also O'Connor* v. *Donaldson*, 442 U.S. 563, 580 (1975) (Burger, C.J., concurring); *McNeil* v. *Director Patuxent Institution*, 407 U.S. 245 (1972).

governmental power should supercede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* at 603. The Court added it would not

> assume that the result in *Meyer* v. *Nebraska* . . . and *Pierce* v. *Society of Sisters* . . . would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school.

Id. at 603-04 (emphasis omitted). In short, because the child is not "the creature of the State" his parents' authority over him does not derive from the State.

Of course, as this Court has stressed, the State can and should *reinforce* parental authority. In *Ginsberg* v. *New York*, 390 U.S. 629 (1968), the Court upheld a statute that prohibited sales, to persons under 17, of pictures that "depict[ed] nudity" and were "harmful to minors." *Id.* at 632. The Court held that a state could properly accommodate parental authority by applying to minors a different definition of obscenity than that applicable to adults. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* at 639. Thus a "legislature could properly conclude that parents . . . are entitled to the support of laws designed to aid discharge of that responsibility." *Ibid.* Indeed, the Court has even upheld provisions giving parents complete discretion over what *non-obscene* sexual material may be delivered to their minor children. In *Rowan* v. *Post Office Dep't.*, 397 U.S. 728 (1970), it upheld a federal statute giving parents the right to have both their names and the names of their resident children under 19 deleted from mailing lists for material the parents judged to be "erotically arousing or sexually provocative." [10]

[10] Concurring, Justices Brennan and Douglas would have reserved the question of the constitutionality of applying the statute to all minors under nineteen. *See* 397 U.S. at 741 (Brennan, J., concurring).

The above cases all stand for the proposition that parental authority should not be invaded by the state, but instead ought affirmatively to be reinforced by it. None of those cases anywhere suggests that the state must create special mechanisms to "bypass" a child's parents without notice to the parents themselves.

Quite the contrary, where this Court *has* required judicial intervention is in cases where the state seeks to *terminate* parents' rights. Thus, the state may not remove a child from his or her parents, except upon notice and hearing. *Santosky* v. *Kramer*, 455 U.S. 745 (1982). And even then the state's case must meet the "clear and convincing" standard of proof. *Ibid.* Indeed, so profound is a parent's right to raise his or her children that a state may not terminate the parental rights of even certain unwed fathers except after notice and an adversary hearing. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court mandated a hearing on the fitness of a resident, but unwed, father before the state could take custody of his children following their mother's death. "It is cardinal with us," the Court repeated, "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*." 405 U.S. at 651, *quoting Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added). *See Michael H.* v. *Gerald D.*, 109 S.Ct. 2333, 2342 (1989) (plurality opinion) (*Stanley* line of cases rests "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family") (footnote omitted).

III. *DANFORTH* AND *BELLOTTI II*—AS WELL AS *ROE*—ARE ABERRATIONS IN THE LAW, AND SHOULD BE REPUDIATED.

Danforth and its progeny are at odds with both the *Pierce* and the *Santosky* lines of cases. *Danforth* and *Bellotti II* forbid a state to accommodate parents' authority over their daughters' abortions, unless the state simultaneously provides for an *ex parte*—indeed affirmatively secret—proceeding to "bypass" the rights of the parents involved. This departure from an otherwise-settled tradition of protecting family autonomy is all the more remarkable because it was accomplished with so little fanfare.

A. *Danforth* And *Bellotti II* Are Incompatible With The *Pierce* Line Of Cases.

In *Danforth*, the Court struck down, among other things, a Missouri statute that required an adolescent to obtain her parents' consent before having an abortion. Writing for the majority, Justice Blackmun alluded only briefly to the *Pierce* line of cases and the fact that the lower court had upheld the parental consent requirement at issue as justified by the state's interest "in safeguarding the authority of the family relationship." 428 U.S. at 73. The *Danforth* majority then struck down that requirement by announcing simply that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." *Id.* at 74. Earlier in its opinion, the majority elaborated on why it thought that was so. Discussing a spousal consent requirement, which it also invalidated, the majority announced that "since the State cannot regulate or proscribe abortion during the first stage . . . the State cannot delegate authority to any particular person . . . to prevent abortion during that same period." *Id.* at 69. The majority also did not feel that allowing parents to "overrule" a decision "made by the

physician and his minor patient" would "serve to strengthen the family unit." *Id.* at 75. Nor did the majority think that it would "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict . . . ." *Ibid.*

Bellotti v. *Baird*, 443 U.S. 622 (1979) ("*Bellotti II*"),[11] followed *Danforth* and struck down a Massachusetts statute which, as construed, required a minor seeking an abortion to first attempt to get her parents' consent. Failing that, she could still have an abortion if she persuaded a state court judge that the abortion was in her best interests.

The *Bellotti II* plurality struck down those provisions because they "g[a]ve a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy. . . ." 443 U.S. at 643, *quoting Danforth*, 428 U.S. at 74. The plurality then announced that a parental consent requirement would only be constitutional if the minor had the opportunity (1) to substitute a judge's idea of her best interest for that of her parents, or else, (2) to convince the judge that she was mature enough to make the decision on her own even if the judge thought it against her best interest. 443 U.S. at 643-44. The plurality stressed that "every minor must have the opportunity . . . to go directly to a court *without first consulting or notifying her parents*." *Id.* at 647 (emphasis added). And if that court then determines "that she is mature and well enough informed to make intelligently the abortion decision on her own, the court *must authorize her to act without parental consultation* or consent." *Ibid.* (emphasis added).

---

[11] In *Bellotti* v. *Baird*, 428 U.S. 132 (1976) ("*Bellotti I*"), the Court vacated an earlier opinion of the district court, and remanded it to that court for certification of several questions of construction to the Supreme Judicial Court of Massachusetts.

Unlike the *Danforth* majority, the *Bellotti II* plurality paid somewhat more attention to the traditional protection afforded to parental authority. Nevertheless, the plurality said *Pierce* and its progeny were distinguishable because "[t]he abortion decision differs in important ways from other decisions that may be made during minority." 443 U.S. at 642. The plurality reasoned that "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision . . . a pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Ibid.*[12]

At bottom, therefore, *Danforth* and *Bellotti II* justified their departure from the Court's longstanding protection of family autonomy with three arguments: (1) that bearing a child is a decision with implications more profound and more urgent than those of other decisions traditionally conditioned on parental consent; (2) that the state's interest in safeguarding parental authority would not be promoted when the parents and child are "fundamentally in conflict" over the child's desire to have an abortion; and (3) that the state may not *delegate* a right of consent to parents, because the state itself has no such right to give. None of these arguments compels *Danforth*'s conclusion.

1. To be sure, bearing a child has profound consequences for an unwed adolescent. It is, however, quite debatable whether those consequences are necessarily more profound than those of other decisions subject to parental control—whether or whom to marry, for ex-

[12] *Danforth*'s reach, of course, extends beyond *Bellotti II*. *See Planned Parenthood Ass'n of Kansas City* v. *Ashcroft*, 462 U.S. 476, 490-93 (1983); *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 439-42 (1983); *H. L.* v. *Matheson*, 450 U.S. 398 (1981). *See also Zbaraz* v. *Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, 108 S.Ct. 479 (1987) (requiring judicial bypass for parental notification statute).

ample.[13] And the fact that a girl's unwed pregnancy may be a predicament more urgent than others hardly proves that a judge, who presumably has never met her before, is better capable of assisting her in facing it than her parents would be.

In short, neither the importance nor the urgency of a girl's pregnancy supports the notion that parents should be kept in ignorance of it. To the contrary, that a girl's decision to have an abortion will have so profound an impact on her, and that it may be influenced by the pressure of time and other practical considerations, only underscore the value of her parents' involvement.[14]

2. The Court suggested in *Danforth* that recognizing parents' right to "veto" their child's decision to have an abortion would not "enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the

[13] It is not only difficult, but probably fruitless, to guess whether a marriage or an unwed pregnancy, by itself, would have the greater impact on a child's future. For it is surely the entirety of *childhood*, an entirety not separable into discrete decisions amenable to one-at-a-time judicial proceedings, that has the greatest lifelong consequences.

> *To safeguard the right of parents* to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, *is to safeguard each child's need for continuity*. This preference for minimum state intervention and for leaving well enough alone is reinforced by our recognition that *law is incapable of effectively managing, except in a very gross sense, so delicate and complex a relationship* as that between parent and child.

J. Goldstein, A. Freud & A. Solnit, *Beyond The Best Interests Of The Child* 13 (1973) (emphasis added). Cf. *Parham*, 442 U.S. at 504 ("Neither state officials nor federal courts are equipped to review such parental decisions").

[14] *Danforth* seems to presume that an adolescent will suffer adverse consequences only if she proceeds to bear her child. But abortion itself has adverse consequences, and the girl may live to profoundly regret that choice.

pregnancy has already fractured the family structure." 428 U.S. at 75. But there is no reason to assume that the family structure has been "fractured" whenever an adolescent wishes to conceal her pregnancy from her parents. That, no doubt, is the initial reaction of virtually every adolescent who becomes pregnant. Nor does the fact that the parents and their daughter are "in conflict" mean that the State's interest in reinforcing parental authority is somehow diminished. Parents and their children disagree all the time, and it is precisely when they do that parental authority is ordinarily exercised.

3. Most fundamentally, the *Danforth* majority misapprehended the source of parents' rights. It announced that the state cannot "give" to parents a right that it itself does not have—the right to "overrule a determination made by a physician and his minor patient." 428 U.S. at 75. Implicit in that statement is the notion that parents have only such authority as the State gives them to act in its stead. But " 'the child is not the mere creature of the state.' " *Parham, supra*, 442 U.S. at 602, *quoting Pierce*, 268 U.S. at 510. And since the family has its "origins entirely apart from the power of the State," parents' rights have their source "not in state law, but in intrinsic human rights. . . ." *Smith, supra*, 431 U.S. at 845. Thus, parents require no special legislative grace in order to "claim . . . authority in their own household to direct the rearing of their children . . . ." *Ginsburg, supra*, 390 U.S. at 639. Quite the contrary, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince, supra*, 321 U.S. at 166.

The statutes at issue in the present cases, like those limiting childrens' rights to marry, to travel, *etc.*, thus do not *delegate* anything. Rather, they recognize and reinforce the natural authority of parents over their children.

Parental authority is affirmatively undermined by the requirement, which both lower courts said they found in the Constitution, of a "judicial bypass" procedure for hiding childrens' abortions from their parents. That "requirement," as well as *Danforth* and *Bellotti II*, on which it rests, should be seen as the radical departure from constitutional, common-law and legislative tradition that it is. Cf. *Bellotti II*, 443 U.S. at 657 (White, J., dissenting) ("Until now, I would have thought inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision.").

As Justice Harlan once noted, protected liberties are defined

> in the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Danforth* and its progeny constitute just such a departure from a long tradition of protecting family autonomy.

B. The Lower Courts' Decisions Highlight The Flaws In *Roe*.

Amicus recognizes that a majority of the Court in *Webster* v. *Reproductive Health Services*, 109 S.Ct. 3040 (1989), did not believe a full-dress reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), was in order until the Court was presented with a starker conflict with its

holding. *Amicus* nonetheless respectfully suggests that the lower court decisions in this case are so symptomatic of much that is wrong with *Roe* that the Court should take this opportunity to reconsider it.

The decisions of the lower courts in these cases, and *Danforth* and *Bellotti II*, which underlie them, rest on the proposition that there is a constitutional right to abortion sufficiently "unique" to justify departing from the Court's traditional approach to parents' rights. *See, e.g., Hodgson*, 853 F.2d at 1456.[15] That a right to abortion is claimed to be unique in this area of constitutional law—as it is said to be in so many others—demonstrates once again that it does not fit naturally anywhere in the Constitution. Established rules must always be changed to explain its presence. It is "painfully clear that no legal rule or doctrine is safe from *ad hoc* nullification . . . where an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh* v. *American College of Obst. & Gyn.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). The result is that *Roe*'s "scheme for constitutionalizing the regulation of abortion has had [an] institutionally debilitating effect" on the law. *Ibid.* The present case provides the Court with an example of that debilitating effect in the context of over two centuries of family law. Overruling *Danforth* and *Bellotti II* would go far toward resolving that particular anomaly, but a definitive resolution of all such anomalies can result only from overruling *Roe* itself. *Amicus* thus respectfully urges this Court to reconsider and overrule *Roe*, or, if it goes no further, to restore its traditional jurisprudence of respect for parents' rights and family autonomy by at least disavowing, if not overruling, *Danforth* and *Bellotti II*.

---

[15] *Amicus* submits that there is and can be no constitutional right to abortion. See Brief of Knights of Columbus, as *Amicus Curiae*, in *Webster* v. *Reproductive Health Services*, No. 88-605.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed, except insofar as it held a "judicial bypass" to be constitutionally required. The judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Of Counsel:
W. PATRICK DONLIN
Supreme Advocate

CARL A. ANDERSON
Vice President for
Public Policy
Knights of Columbus

BRENDAN V. SULLIVAN, JR.
KEVIN J. HASSON *
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Dated: August 28, 1989

* *Counsel of Record*

(24) (19) (20)

Nos. 88-805, 88-1125, 88-1309

Supreme Court, U.S.
FILED
OCT - 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,
Appellant,
v.
AKRON CENTER FOR REPRODUCTIVE HEALTH,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

JANE HODGSON, M.D., *et al.*,
Petitioners and Cross-Respondents,
v.
THE STATE OF MINNESOTA,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON CROSS-RESPONDENTS AND AKRON APPELLEE FOR 13 INDIVIDUAL MEMBERS OF THE PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING OR THE COMMITTEE ON CHILD DEVELOPMENT RESEARCH AND PUBLIC POLICY

(Complete list of *amici curiae* appears on inside cover)

HANNAH E.M. LIEBERMAN
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae

October 14, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29 pp

LIST OF REPRESENTED AMICI

Panel Members

Ezra C. Davidson, Jr.

Joy G. Dryfoos

Daniel D. Federman

Jacqueline Darroch Forrest

Frank F. Furstenberg, Jr.

Richard Jessor

Judith E. Jones

Committee Members

Eugene S. Bardach

Herbert P. Ginsburg

William Kessen

John Modell

Barbara Starfield

Carol K. Whalen

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
DESCRIPTION AND INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. INTRODUCTION	6
II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION	7
III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS	11
A. The Psychological Considerations	11
B. The Counseling Considerations	14
IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS	16
A. Notification Requirements Result In Delays Which May Lead to Increased Health Risks	16
B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Akron Center for Reproductive Health v. Slaby, et al., 854 F.2d 852 (6th Cir. 1988) 19
Bellotti v. Baird, 428 U.S. 132 (1976) 15
Bellotti v. Baird, 443 U.S. 622 (1979) 6
Carey v. Population Services International, 431 U.S. 678 (1977) 6
H.L. v. Matheson, 450 U.S. 398 (1981) 6, 11, 12
Hodgson v. Minnesota, 648 F.Supp. 756 (D.Minn. 1986) 17, 18, 19, 20
Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983) 6
Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 6, 15
Roe v. Wade, 410 U.S. 113 (1973) 6

STATUTES:

Minn. Stat. § 133.343 (1988) 14, 18
Ohio Rev. Code Ann. § 2919.12(B) (1) (a) (i) (1989) 18

MISCELLANEOUS:

Adler & Dolcini, *Psychological Issues in Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986) 12
Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981) .. 17, 19
Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) 13
Ambuel & Rappaport, Developmental Change in Adolescents Psychological and Legal Competence Consent to Abortion (1989) (Paper presented at American Psychological Association Convention) 13

TABLE OF AUTHORITIES—Continued

Page

APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987) 13
Blum, Resnick & Stark, The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking (1985) (Unpublished manuscript, University of Minnesota) 10
Chamie, Eisman, Forrest, Orr & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982) 10
National Research Council, *Risking the Future, Adolescent Sexuality, Pregnancy and Childbearing*, Vol. I (1987) ..... *passim*
Orr, *Private Physicians and the Provision of Contraceptives to Adolescents*, 16 Fam. Plan. Persp. 83 (1984) 14
Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?*, 15 Adolescence 43 (1980) 9
Steinhoff, Premarital Pregnancy and the First Birth (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of larger study, Hawaii Pregnancy, Birth Control and Abortion Study, Univ. of Hawaii) 9
Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980) 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH,

Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

---

Nos. 88-1125 and 88-1309

JANE HODGSON, M.D., *et al.*,

Petitioners and Cross-Respondents,

v.

THE STATE OF MINNESOTA,

Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON CROSS-RESPONDENTS AND AKRON APPELLEE FOR 13 INDIVIDUAL MEMBERS OF THE PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING OR THE COMMITTEE ON CHILD DEVELOPMENT RESEARCH AND PUBLIC POLICY

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

Amici are individuals who were members of either the Panel on Adolescent Pregnancy and Childbearing ("Panel") or the Committee on Child Development Research and Public Policy ("Committee") of the National Research Council.[1] Seven members of the Panel and six members of the Committee are *amici* here.[2]

The Committee on Child Development Research and Public Policy is an interdisciplinary body within the National Research Council. In 1983, the Committee established an expert, interdisciplinary panel to study the problems of adolescent pregnancy and childbearing.[3] The study was initiated, in part, to correct a perceived imbalance between general beliefs about the problems associated with adolescent sexuality and the scientific and other empirical data that had been collected about those issues. *Risking the Future* at ix-x.

The Committee selected Panel members who could bring a diverse range of expertise, experience, and political and philosophical points of view to the study. *Id.* at x. These Panel members included physicians, psychologists, professors of medicine, social scientists, a professor of law, an historian, and an economist. *Id* at iii-iv.

---

[1] The National Research Council is the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in the conduct of their services to the government, the public, and the scientific and engineering communities.

[2] This brief is filed on behalf of the listed *amici* as individuals, not on behalf of the Panel (which was disbanded in 1986 upon completion of its study), the National Research Council or the National Academy of Sciences.

[3] National Research Council, *Risking the Future, Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. I at x (1987) (hereinafter cited as "*Risking the Future*").

The Panel members are authors of numerous textbooks, scholarly articles, and research reports in the areas of medicine, science, sociology, adolescent development and sexuality, and child psychology and are affiliated with over twenty universities (including law and medical schools) and research institutes. Many of the institutions and organizations with which the Panel members are affiliated have a specific focus on children and adolescents.

The Panel was charged with a three-fold mission: (1) to collect, integrate and evaluate data on trends in teenage sexual behavior; (2) to review and synthesize research on the antecedents and consequences of adolescent pregnancy and childbearing; and (3) to review and assess alternative preventive and ameliorative policies and programs. *Id.* at x. Over a two-year period, the Panel studied the initiation of sexual activity among adolescents, contraceptive use, pregnancy, pregnancy resolution, and the consequences of teenage pregnancy, childbearing, and parenting as well as the cost and effectiveness of policies and programs designed to address those areas. *Id.*[4]

In conducting its study, the Panel acknowledged that the issues surrounding adolescent pregnancy are both complex and controversial. As a scientific body, the Panel sought to "clarify the issues, sharpen awareness of crucial decision points, and define limits of existing knowledge" without injecting moral, philosophical or political ideology into its report. *Id.* at xi. The Panel's objective was "to inform the policy debate by clarifying the scientific issues." *Id.* at 5.

---

[4] Five private foundations, the Rockefeller Foundation, the Ford Foundation, the William and Flora Hewlett Foundation, the Robert Wood Johnson Foundation, and the Charles Stewart Mott Foundation provided support for the study. *Id.* at x, xiii.

Risking the Future, Vol. I (1978), is the Panel's final report.[5] In the report, the Panel members unanimously endorsed three comprehensive policy goals, within which they set forth specific conclusions and recommendations. *Id.* at 5. In order of priority, the Panel's primary goals were to:

(1) Reduce the rate and incidence of unintended pregnancy among adolescents, especially among school-age teenagers;

(2) Provide alternatives to adolescent childbearing and parenting;

(3) Promote positive social, economic, health, and developmental outcomes for adolescent parents and their children.

Consistent with its overall approach, the Panel studied information regarding the availability of abortion services to adolescents in a non-ideological context. While the Panel stressed that it "strongly prefers prevention of pregnancy to avoid parenthood," it recognized that abortion is a legal alternative for adolescents for whom pregnancy prevention fails and devoted some attention to the issues associated with pregnancy termination. *Id.* at 6.

As individual members of the Panel or the Committee, *amici* wish to direct this Court's attention to the conclusions set forth in *Risking the Future* and the studies described therein. Specifically, the undersigned *amici* believe that the data reviewed by the Panel and the conclusions that can be drawn therefrom may provide the

[5] Before it was issued, *Risking the Future* was reviewed by several independent bodies, including the Committee, the review board of the Commission on Behavioral and Social Sciences and Education, a report review committee of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine, and a number of independent, outside reviewers.

Court with relevant empirical evidence which will assist it in its examination of the parental notification provisions that are currently before the Court.

SUMMARY OF ARGUMENT

There is no empirical evidence that mandatory parental notification provisions foster parent-child communications about abortion. Many teenage girls voluntarily choose to inform one or both parents about an unwanted pregnancy. Teenagers who do not wish, for whatever reason, to consult with their parents, go to great lengths to avoid complying with statutes that would require them to do so. There is no basis for concluding that the interests of these minors are well-served by the notification statutes that are intended to protect them.

There also is no scientific evidence that pregnant minors are especially vulnerable to psychological harm from an abortion, are unable to make a reasoned decision about whether to obtain an abortion or are more likely than adults to suffer adverse medical consequences from an abortion. There is, however, empirical data that indicates that parental notification requirements increase the likelihood that a pregnant teenager will delay obtaining an abortion. Teenagers appear to suffer a disproportionate burden from such delay, including, in some cases, postponement of abortions until the second trimester, when health risks increase. Thus, a fair reading of the available empirical data tends to indicate that parental notification requirements actually may harm pregnant minors without conferring substantial off-setting benefits.

ARGUMENT

I. INTRODUCTION

Since 1973, abortion has been a legal option for all women in the United States. Pregnant minors, as well as adult women, have a constitutionally protected right to choose to have an abortion, for "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Nevertheless, the circumstances under and the manner in which minors may take advantage of their legal option to terminate an unwanted pregnancy have remained special and emotional issues for policy makers and the courts. *See Risking the Future* at 9. The perception that a minor's decision to obtain an abortion raises unique emotional, health or family-interest issues has spawned legislation specifically regulating the manner in which minors may obtain abortion services. *See generally Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Such regulations often are based on the articulated goals of promoting the emotional and physical welfare of the minor and the state's interest in intra-family harmony and unity. *See, e.g.*, Brief of Cross-Petitioners, State of Minnesota, *et al.* at 22-34 (hereinafter "Minn. Br."); Brief of Appellant, State of Ohio at 24 (hereinafter "Ohio Br."). When state regulations impinge upon a constitutionally protected right, however, they must be narrowly tailored to serve a legitimate state interest. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

No one, including *amici*, would quarrel with the laudable goals of promoting family communication and protecting pregnant minors. It is the opinion of these *amici*, however, that these articulated goals are not well-served by the forced intervention of parents or the state into the abortion decision. In the opinion of these *amici*, the doubtful efficacy of notification requirements, particularly when weighed against the burdens they impose on a minor's right to obtain an abortion, raises serious constitutional questions.

These *amici* believe that the comprehensive study of adolescent pregnancy set forth in *Risking the Future* brings a unique and empirically-based perspective to these controversial issues. On the basis of the available data, the *Risking the Future* Panel concluded that parental involvement in an adolescent's decision to seek an abortion should not be mandated; that "minor adolescents should be encouraged, but not required, to involve their parents and partners in the decision-making process." *Risking the Future* at 9-10, 278-79. The Panel's conclusion was based on two subsidiary findings—the lack of a scientific basis for restricting the availability of abortion to adolescents and the delay and attendant health risks which often accompany parental consent requirements. *Id.* As set forth below, it is the opinion of *amici* that the findings set forth in *Risking the Future* and described herein cast grave doubts on the effectiveness and desirability of such restrictions.

II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION

A purported purpose of both Minnesota and Ohio's parental notice requirements is the furtherance of parent-child communication. *See, e.g.*, Minn. Br. at 4; Ohio Br. at 24. *Amici* share the view that communication between adolescents and their parents is important and may have salutory effects on many aspects of adolescent sexual be-

havior.[6] Indeed, the Panel concluded that adolescents should be encouraged to involve their parents in the process of pregnancy testing and counseling, *Risking the Future*, at 279, in decision-making with respect to pregnancy resolution options, *id.*, *see also id.* at 281, and in decisions concerning childrearing for those minors who become parents. *Id.* at 286-87.

However, the empirical evidence analyzed by the Panel does not support the proposition that compulsory parental notification will make an appreciable difference in parent-child communications concerning an abortion decision. With or without compulsory notification requirements, parental attitudes about abortion appear to have a significant influence on a pregnant minor's decision to terminate a pregnancy. *Id.* at 113. The data compiled by the Panel indicates that "[m]ost school-age adolescents, especially very young teenagers, consult their parents in deciding to obtain an abortion." *Id.* at 114. For example, in one study,[7] a majority of the 1,170 un-

[6] However, there is little scientific evidence as to the actual effects of parent-child communication on adolescent decisions regarding sexual activity. Research on the effects of parent-child communication on sexual topics "has produced conflicting and inconclusive results." *Risking the Future* at 245-46; *see also id.* at 102-04, 149, 150. Although school- and community-based family planning programs reflect increasing efforts to involve parents, there is limited evidence upon which the effectiveness of these approaches may be measured. *Id.* at 145-46. The Panel stressed that "there is little scientific basis for understanding how these [communication-enhancement programs] are likely to affect teenagers' decisions to delay initiation of sexual activity or to be more diligent contraceptors." *Id.* at 246. While there is evidence that close parent-child relationships may be associated with less sexual activity among younger teenagers, *id.* at 103, this may not be true with respect to older minors. *Id.* Other analyses have not been able to establish a correlation between parent-child communication and the sexual activity of the child. *Id.* at 103.

[7] *Citing* Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services* 12 Fam. Plan. Persp. 284 (1980) ("Torres").

married, minor abortion patients under the age of 18 surveyed indicated that their parents knew that they were obtaining an abortion. *Id.* at 192. Among very young teenagers, parental influence is particularly strong. *Id.* at 113.[8] Survey data suggests that the younger the patient, the more likely she was to report that her parents knew that she was seeking an abortion and the more likely it was that she was referred to the abortion clinic by her parents. *Id.* at 192.[9]

Indeed, adolescents tend to involve their parents in other areas pertaining to sexual activity even in the absence of parental notification requirements. For example, data indicate that 59% of teenagers seeking contraceptive services from clinics or other organized providers "are sure" or "think" their parents know of their intentions. *Id.* at 158. Of this group, a majority voluntarily told their parents, while for most of the others—and particularly in the case of girls 15 and under—their parents suggested the visit. *Id.*

However, the evidence also suggests that those adolescents who do not voluntarily consult with parents about abortion or other issues relating to their sexual activity probably would continue to avoid such notification, even were it legally required. In the case of abortion decisions, the Panel noted that approximately 25 percent of the teenagers surveyed in the Torres study said their parents did not know of their decision to terminate their pregnancy "and that they would not have come to the clinic if parental consent or notification were required."

[8] *Citing* Steinhoff, Premarital Pregnancy and the First Birth (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of a larger study, Hawaii Pregnancy, Birth Control and Abortion Study. University of Hawaii); Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 Adolescence 43 (1980).

[9] *Citing* Torres, n.7, *supra*.

Id. at 192. A study reviewed by the Panel of the impact of Minnesota's parental notification requirement—the very statute at issue in *Hodgson*—similarly indicated that a sizeable minority of pregnant minors seeking abortions avoid notification requirements. *Id.*[10] Approximately 43 percent of adolescent minors surveyed in the Minnesota study took advantage of the judicial bypass alternative to parental notification instead of informing *both* parents of their desire to obtain an abortion; about a quarter of these minors reported having notified one parent. *Id.* at 192.

Similarly, among the substantial minority (41%) of teenagers surveyed who sought contraceptive services but did not tell their parents, a majority say they would not have come to a clinic if parental notification were required. *Id.* at 159.[11] Moreover, the second most common reason teenagers choose a family planning clinic rather than a private physician for contraceptive services, according to one study, is to ensure privacy. *Id.* at 160 (26% of adolescents went to clinics over private doctors because they feared doctors would tell their parents; 65% made the decision on the basis of cost).[12] *See also id.* at 273.

A reluctance to tell their parents also causes adolescents to postpone pregnancy testing, *id.* at 173, or, for those who choose to carry their child to term, to delay prenatal care. *Id.* at 198. Such delay is undesirable and

---

[10] *Citing* Blum, Resnick & Stark, The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking (1985) (Unpublished manuscript, University of Minnesota).

[11] Some teens in the latter group would have foregone contraception entirely if required to tell their parents, *Risking the Future* at 159, thus substantially increasing the risk of an unintended pregnancy.

[12] *Citing* Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 Fam. Plan. Persp. 126 (1982).

dangerous both for teenagers who choose to carry their child and for those who ultimately decide to terminate the pregnancy. *See infra* at 16-20.

In sum, a majority of adolescents involve their parents in many decisions relating to their sexual activity, including, but not limited to, abortion. Younger adolescents are particularly likely to consult and be guided by their parents. However, a significant minority will avoid parental notification when such notification is required, often choosing to forego or delay seeking services instead of involving their parents. This evidence indicates to *amici* that parental notification statutes are unlikely to foster parent-child communication beyond that which already occurs voluntarily.[13]

III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS

A. The Psychological Considerations

Among the justifications Minnesota and Ohio offer for the challenged statutes are that notification may, in various ways, ameliorate alleged adverse psychological consequences of an abortion. *See, e.g.*, Minn. Br. at 13-15; Ohio Br. at 46. In the opinion of these *amici*, such concerns are not based on scientific fact.

---

[13] Pregnant minors are not a monolithic group. *Risking the Future* at 2, 19. *See also H.L. v. Matheson, supra*, 450 U.S. at 419 (1981) (concurring opinion) ("When a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like."). For this reason parental notification requirements affect different minors in different and possibly unpredictable ways. Broad-brush legislation, including the Ohio and Minnesota statutes at issue here seem, to these *amici*, particularly ill-suited to address such an inherently individualized and idiosyncratic issue.

At the time the Panel undertook its analysis, there were few studies of the psychological effects of abortion on adolescents, *Risking the Future* at 195, and most did not distinguish between adolescents and adults. *Id.* at 244. While a very few of the studies found that abortion had a slight but measurably more negative effect on the short-term emotional well-being of teenagers than on adult women, *id.* at 196, 244, most studies indicated that the abortion experience is simply not likely to cause severe emotional problems. *Id.*[14] One study suggested that the negative reactions of teenagers to an abortion (primarily depression) are generally mild.[15] Indeed, for all women, including teenagers, a frequent reaction to having an abortion is relief. *Id.* at 195.

After examining the available data, the Panel concluded that existing research simply does not support the assumption that minors are especially likely to experience adverse psychological reactions to an abortion. *Id.* at 277 ("On the basis of existing research . . . the contention that adolescents . . . are especially vulnerable to serious psychological harm as a result of an abortion is not supported.") In particular, scientific research has not shown

---

[14] At least some of the few studies which suggested that there may be measurable differences in the short-term emotional well-being of adult women and adolescents following an abortion did not control for other potentially explanatory variables, such as the timing of the procedure. *Id.* at 244. Other factors, which may contribute to the slight differences in effect include gestational age, delay and social support. *Id.* at 196.

These studies cast serious doubt on the assumption articulated in *H.L. v. Matheson*, that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." 450 U.S. at 411. Significantly, the studies upon which the *Matheson* court relied, *id.* at n.20, pre-date those examined by the Panel by at least a decade.

[15] *Citing* Adler & Dolcini, *Psychological Issues In Abortion for Adolescents* in *Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986).

that mandated parental involvement helps adolescents cope with their decision to have an abortion. *Id.*[16] Similarly, the Panel found that the concern that adolescents are unlikely or unable to make well-reasoned conclusions lacks empirical support. *Id.* Given the absence of evidence to support or refute the belief that adolescents lack the cognitive capacity to make rational decisions about pregnancy termination, *id.* at 9, the Panel concluded that there is no scientific basis for restricting the availability of abortion on the basis of age. *Id.*

What the evidence does show is that confidentiality is a factor in a minor's choice of abortion providers. *Id.* at 279. ("Factors of cost and confidentiality lead most teenagers to clinics for [abortion] services."). The need to protect the confidentiality of an adolescent's decision to seek health care services relating to sexual activity has been widely recognized. At the time *Risking the Future* was written, 29 other states and the District of Columbia specifically allowed minors to give their own consent for family planning services. *Id.* at 157. The same sensitivity to the privacy interests of minors causes the vast majority of contraceptive providers to provide services to adolescents, particularly to teenagers over 15, without the

---

[16] Since the Panel completed its work, more recent studies have been conducted, the results of which appear to be consistent with the findings of the Panel. *See, e.g.*, Brief for *Amici Curiae* American Psychological Association, et al., filed September 1, 1989, *citing* Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l); Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper presented at American Psychological Association Convention); APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987). Neither these *amici* as individuals, nor the Panel as a group, have independently reviewed these subsequent studies.

minor's parents' consent.[17] *Id.* at 155-56. Indeed, the Minnesota legislature has expressly relieved minors of the need to obtain parental or other adult consent "for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. § 144.343 (1988).

The Panel recognized that the preservation of confidentiality is important to adolescents seeking assistance with respect to choices concerning their sexual behavior. *See, e.g., Risking the Future* at 8, 169, 170. It stressed the importance of privacy in every aspect of adolescent decision-making related to their sexual activity, emphasizing that "the girl or woman should be treated with the same dignity, *confidentiality*, kindness, and excellence of health care that are due any patient." *Id.* at 9 (emphasis added). *See also id.* at 278.

B. The Counseling Considerations

Both Ohio and Minnesota emphasize a need to protect teenagers from making an uninformed decision to terminate a pregnancy. *See, e.g.*, Minn. Br. at 32; Ohio Br. at 13 ("state's interest [is] in protecting a minor from the

---

[17] Only one percent of Planned Parenthood affiliates, 10 percent of public health departments and other providers and 19 percent of hospitals required parental consent or notification. *Id.* at 155. More agencies require parental consent or notification for teenagers under 15 years of age. The figure for private physicians is lower: 59 percent of a national sample of physicians (including obstetrician-gynecologists, general practitioners and pediatricians) were willing to provide services to unmarried minors without parental consent. *Risking the Future* at 156-57. Physicians were less likely to serve minors without requiring parental consent in states which had not enacted legislation permitting minors to provide their own consent. *Id.* at 157. *Citing* Orr, *Private Physicians and the Provision of Contraceptives to Adolescents*, 16 Fam. Plan. Persp. 83 (1984).

long range consequences of an ill-advised abortion decision"). Relying heavily on Justice Stewart's comment in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (concurring opinion), that "[i]t seems unlikely that [a teenage girl] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place,"[18] both states suggest that parental notification helps ensure that a pregnant teenager has been adequately counseled prior to the abortion procedure. *See* Minn. Br. at 35; Ohio Br. at 27 (unlikely that minor will obtain adequate counsel from clinic).

The Panel's research does not support the assumption that non-parental counseling, particularly that of abortion providers, will necessarily be inadequate. The Panel found abortion clinics typically provide extensive counseling:

> All clinics make abortion counseling available on request; such counseling generally consists of describing the procedure and explaining its risks, obtaining informed consent, and confirming that it was the patient's own decision to have the procedure. [One researcher] reports that 90 percent of clinics routinely counsel all first-abortion patients; 88 percent of clinics provide decision counseling to help a young woman explore the various factors that are involved in making an informed decision about the termination of her pregnancy. Nonprofit clinics appear to place greater emphasis on counseling than for-profit facilities. As a matter of policy, 68 percent of clinics provide a pregnancy test before per-

---

[18] Justice Stewart's sweeping conclusion is based on an excerpt from the record in *Bellotti v. Baird*, 428 U.S. 132 (1976), describing the counseling procedures in one abortion clinic. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 91 n.2. The empirical evidence suggests that the procedures described in *Bellotti* may not be representative of the counseling generally provided to pregnant minors.

forming an abortion, even when a test has been provided elsewhere. In addition, 93 percent routinely provide a post-abortion clinic visit.

Risking the Future at 191-92. "Adherence to principles of voluntarism and informed consent" requires family planning/abortion clinics to engage in comprehensive counseling, embracing "an account of the possible risks, benefits, and consequences of maternity and abortion, the available alternatives, including adoption, and the resources available for needed care." *Id.* at 174. Thus, the evidence compiled by the Panel does not support the presumption that non-parental counseling available to minors seeking to terminate an unwanted pregnancy is inadequate.

IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS

As discussed above, in the opinion of these *amici*, the relevant scientific literature does not provide support for the proposition that parental notification or consent requirements actually foster familial communication, are necessary to reduce the likelihood of adverse psychological consequences to pregnant minors or contribute substantially to the minor's ability to make an informed decision about abortion. There is, however, one measurable effect of consent or notification provisions—delay and increased burden for the pregnant minor who seeks to obtain an abortion. *Id.* at 194.

A. Notification Requirements Result In Delays Which May Lead To Increased Health Risks

Where performed early in a pregnancy, abortion is a relatively safe procedure. Little risk of medical complications attaches to abortions performed by qualified professionals in the first trimester of pregnancy. *Id.* at 278. The health risks associated with early, legal abortions are

no greater for adolescents than for adults and generally appear to be lower. *Id.* at 125, 278.[19]

Delays in seeking advice about pregnancy termination or in obtaining an abortion can have adverse consequences, however. *Id.* at 194, 277. For instance, in *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986), the Court found as a matter of fact that "[e]ven delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk." 648 F. Supp. at 765.

Ironically, the delays associated with notification or consent requirements have an especially devastating effect on the very class of individuals that such procedures are intended to protect. As a group, teenagers are far less likely than older women to obtain abortions during the first trimester of their pregnancies. *Risking the Future* at 114. The younger the pregnant minor, the more likely she is to delay. According to one source, 34 percent of abortions to girls age 15 and younger are performed during the first eight weeks of gestation, compared with 41 percent of abortions among girls ages 15-19 and 51 percent of those among women ages 20-24. *Id.*[20] The delay has been attributed to the inability of teenagers, particularly younger teenagers, to recognize the signs of pregnancy or to distinguish them from normal menstrual irregularities. Teenagers also tend to deny that they are pregnant. *Id.*

Whatever the reason for the initial delay, statutorily imposed parental notification requirements appear to exacerbate a troublesome situation by increasing the like-

---

[19] By contrast, the health risks of pregnancy and child birth are substantially higher for very young mothers than for adult women. *See generally id.* at 123-125.

[20] *Citing* Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

lihood that a pregnant teenager will delay obtaining an abortion. *Id.* at 194, 278. The requirements (or the perception of such requirements) are thought to inhibit some teenagers from seeking and obtaining abortions. *Id.* at 114. In addition, the statutory schemes typically impose waiting periods after parental notification has been accomplished. For instance, the statute enacted by the Minnesota legislature requires that both parents be given forty-eight hours written notice, with notice commencing at the time of delivery or on the next day, if notice is mailed. Minn. Stat. § 144.343. The trial court found that this procedure delayed the minor's abortion by at least forty-eight hours or more commonly seventy-two hours. *Hodgson v. State of Minnesota*, 648 F. Supp. 765, (D. Minn. 1986). The Ohio legislation requires that notification be provided to parents at least twenty-four hours prior to the abortion. Ohio Rev. Code Ann. § 2919.12(B)(1)(a)(i) (1989).

Moreover, as discussed above, many teenagers who do not voluntarily consult with their parents choose to use a judicial bypass proceeding rather than to comply with the notification provision. *Risking the Future* at 192. Judicial bypass proceedings allow a minor to establish that she is mature enough to make the decision without consulting her parents or to establish that parental consultation would not serve her best interests.[21] Minors who avail themselves of the judicial bypass alternative to parental notification are often found to be mature. *Id.* at 195. For those minors deemed immature, abortions are almost always found to be in their best interest. *Id.*[22]

---

[21] To serve the best interests of minors, the proceeding should be expeditious, confidential and accessible.

[22] In Massachusetts, for example, between April 1981, when the consent statute took effect, and February 1983, about 1,300 minors sought an abortion through the judicial bypass procedure. In 90 percent of the cases the minor was judged to be mature; in the remaining cases, all but five requests for abortions were approved, according to the best interest standard. In three of the cases denied, the trial court's decision was overturned on appeal; in one case the judge invited the minor to seek approval from another judge, who granted the petition; and in the last case the minor decided to go to a neighboring state for an abortion (Mnookin, 1985). Similar findings have been reported in Minnesota (Donovan, 1983).

Risking the Future at 195.

A judicial bypass proceeding may require the minor to travel to another jurisdiction and wait for some period prior to obtaining access to the courts. *Id. See Hodgson v. Minnesota*, 648 F. Supp. at 763 (initial stages of proceeding may take a week or more; minor may need to travel to another jurisdiction). In the case of the Ohio proceeding, delays of twenty-two days are likely. *Akron Center for Reproductive Health v. Slaby, et al.*, 854 F.2d 852, 867 (6th Cir. 1988). Delays of this magnitude, especially when combined with some pregnant teenagers' delays in recognizing or taking decisive action when confronted with an unwanted pregnancy, could result in postponement of the abortion until the second trimester.

B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities

Teenagers generally have less access to abortion providers than do adult women. *Risking the Future* at 114.[23] Geographical constraints as well as costs hinder minors seeking abortion services. *Id.*[24] *Hodgson v. Minnesota, supra*, 648 F. Supp. at 761.

---

[23] *Citing* the Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

[24] The district court in *Hodgson* found that 94% of the counties in Minnesota had no readily available abortion providers and that virtually all of the abortion providers in Minnesota were located in Duluth or Minneapolis-St. Paul. 648 F. Supp. at 761.

Where the delay imposed by parental notification requirements results in postponement until and within the second trimester, access to abortion services becomes even more limited. One study reviewed in *Risking the Future* found that while seventy-two percent of abortion providers surveyed will perform an abortion at ten weeks, only thirty-two percent will perform one at thirteen weeks, twenty-one percent at fifteen weeks and only five percent at twenty-one weeks. Eighty-two percent of abortion providers do not perform abortions after the first trimester. *Risking the Future* at 191. Given many minors' already limited access to abortion services, any delay that causes postponement until the second trimester could prevent the minor from exercising her right to obtain an abortion.

Second trimester abortions also are substantially more expensive than first trimester abortions.[25] *Id.* at 193. *See also Hodgson v. Minnesota, supra,* 648 F. Supp. at 761. The increased cost of a second-trimester abortion may prove to be an insurmountable barrier for a pregnant minor. *See Risking the Future* at 114 (geographical distances and costs limit teenagers' access to abortion, especially school-age girls and those from poor families).

In sum, it is the conclusion of these *amici* that parental notification requirements impose substantial and unwarranted burdens on pregnant adolescents by causing delay and postponement of the minor's abortion. These delays not only result in increased health risks but may create insurmountable barriers due to the decreased availability of abortions after the first trimester.

---

[25] In 1981, hospital charges for abortions averaged $735, as opposed to $227-$230 in 1983 for non-hospital facilities. *Risking the Future* at 193.

CONCLUSION

Amici urge the Court to assess the claims of the parties in light of the findings set forth in *Risking the Future.* Specifically, *amici* believe that the scientific studies examined in *Risking the Future* do not support the claim that minors present an increased risk of psychological trauma or adverse medical consequences from abortions. The studies suggest to these *amici* that the statutes will not contribute to constructive intra-family communication. Nor is the available scientific literature consistent with claims that any delay that results from the restrictions will be insignificant. *See* Minn. Br. at 17; Ohio Br. at 37. To the contrary, it appears more likely that the delays in these notification proceedings will result in a higher degree of risk to the health of pregnant adolescents who ultimately obtain an abortion. To these *amici,* this burden of increased risk appears to outweigh any benefit to be derived from parental notification provisions.

Respectfully submitted,

HANNAH E.M. LIEBERMAN *
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae

Dated: October 14, 1989

---

* Robin G. Hayutin, Leslie Stout Tabackman and Nancy Sherbow contributed to the preparation of this brief.

APPENDIX

APPENDIX

Eugene S. Bardach	Professor, School of Public Policy University of California, Berkeley
Davidson, Ezra C., Jr.	Chairman, Department of Obstetrics-Gynecology Drew University of Medicine & Science
Dryfoos, Joy G.	Independent Researcher & Writer
Daniel D. Federman	Professor of Medicine Harvard Medical School
Forrest, Jacqueline Darroch	Vice President for Research The Alan Guttmacher Institute
Furstenburg, Frank F., Jr.	Professor of Sociology University of Pennsylvania
Ginsburg, Herbert P.	Professor of Developmental & Educational Psychology Columbia University
Jessor, Richard	Professor of Psychology & Director, Institute of Behavioral Science University of Colorado
Jones, Judith E.	Associate Professor of Public Health Columbia University
Kessen, William	Higgens Professor of Psychology Yale University
John Modell	Professor of History Carnegie Mellon University
Starfield, Barbara	Professor of Health Policy and Pediatrics The Johns Hopkins University, The Johns Hopkins University School of Medicine
Whalen, Carol K.	Professor, Social Ecology University of California, Irvine

(26) (21)

Nos. 88-805 and 88-1309

Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit;

THE STATE OF MINNESOTA, *et al.*,

Cross Petitioners,

v.

JANET HODGSON, M.D., *et al.*,

Cross Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN NURSES' ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE NURSES' ASSOCIATION OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AND THE SOCIETY FOR ADOLESCENT MEDICINE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN 88-805 AND IN SUPPORT OF CROSS RESPONDENTS IN 88-1309

[Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

H3P

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

STEPHAN E. LAWTON
THOMAS N. BULLEIT, JR.
REED, SMITH, SHAW & MCCLAY
(Counsel to the American Academy of Pediatrics)
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

LAURIE R. ROCKETT
HOLLYER, JONES, BRADY, SMITH, TROXELL, BARRETT & CHIRA
(Counsel to the American Medical Women's Association, Inc.)
342 Madison Avenue
New York, NY 10173
(212) 818-1110

JOEL I. KLEIN
ONEK, KLEIN & FARR
(Counsel to the American Psychiatric Association)
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

CARTER G. PHILLIPS *
ELIZABETH H. ESTY
MARK E. HADDAD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record

October 13, 1989

QUESTION PRESENTED

Amici curiae will address the following question:

Whether a state can burden a minor's constitutional right to decide whether to terminate her pregnancy by requiring in every case that one or both parents be notified of her decision without providing an effective, confidential and expeditious alternative procedure that does not require parental notification.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICI CURIAE*	2
MEDICAL BACKGROUND	4
A. The Pregnancy And Abortion Rates Among Adolescents Are Significant	4
B. Pregnancy Poses Greater Health Risks To The Woman Than Abortion	5
C. Adolescent Pregnancy Poses Particular Medical Risks, Which Are Due Largely To Delay In Seeking Health Care	7
D. Proper Treatment And Counseling Of Adolescents Requires Individualized Consideration Of Their Special Needs And Developmental Characteristics	10
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. MANDATORY PARENTAL NOTIFICATION IMPOSES A CONSTITUTIONALLY SIGNFICANT BURDEN ON A MINOR WOMAN'S RIGHT TO DECIDE WHETHER TO TERMINATE HER PREGNANCY AND ACCORDINGLY THE STATE MUST PROVIDE AN EXPEDITIOUS AND CONFIDENTIAL ALTERNATIVE TO MANDATORY PARENTAL NOTIFICATION	15
A. Mandatory Parental Notification Imposes A Constitutionally Significant Burden On A Minor Woman's Right To Decide Whether To Terminate Her Pregnancy	18

TABLE OF CONTENTS—Continued

	Page
B. Mandatory Parental Notification Required In All Cases Is Not Tailored To The States' Interests In Protecting The Adolescent's Health Or In Promoting Family Integrity	21
C. In Order To Serve Their Interests, As Required By The Constitution, Both Ohio and Minnesota Are Obliged To Provide Some Opportunity For A Minor To By-Pass Having To Provide Notice To Either Or Both Parents, Respectively	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES

	Page
Bellotti v. *Baird*, 443 U.S. 622 (1979)	*passim*
Carey v. *Population Services Int'l*, 431 U.S. 678 (1977)	14, 21
City of Akron v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)	13, 17, 21, 29
H.L. v. *Matheson*, 450 U.S. 398 (1981)	*passim*
Planned Parenthood Ass'n v. *Ashcroft*, 462 U.S. 476 (1983)	14, 21, 29
Roe v. *Wade*, 410 U.S. 113 (1973)	13, 14, 21

STATUTES AND REGULATIONS

45 C.F.R. §§ 46.406, 46.407 (1988)	26
Minn. Stat. Ann. §§ 144.343(1)-(7) (West 1988)	15
Minn. Stat. Ann. § 144.343(1) (West 1988)	19
Ohio Rev. Code Ann. §§ 215.85, 2505.073 and 2919.12 (Anderson Supp. 1989)	15
Ohio Rev. Code Ann. §§ 3709.24.1, 3719.01.2 and 5122.04 (Anderson Supp. 1989)	19

OTHER AUTHORITIES

Abortion, Medicine & the Law (J. Butler & D. Walbert 3d ed. 1986)	6
Adolescent Medicine (A. Hofmann & D. Greydanus 2d ed. 1989)	11
American Academy of Pediatrics, Committee on Adolescence, *Adolescent Pregnancy*, 83 Pediatrics 132 (1989)	8, 9
American Academy of Pediatrics, Committee on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 Pediatrics 135 (1989)	9, 20
American Academy of Pediatrics, Committee on Adolescence, *Role of the Pediatrician in Management of Sexually Transmitted Diseases in Children and Adolescents*, 79 Pediatrics 454 (1987)	25
The American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (7th ed. 1989)	10

TABLE OF AUTHORITIES—Continued

Page

Anglin, *Interviewing Guidelines for the Clinical Evaluation of Adolescent Substance Abuse*, 34 Ped. Clin. N.A. 381 (1987) 11

Binkin, *Trends in Induced Legal Abortion Morbidity & Mortality*, 13 Clin. Obstet. Gynec. 83 (1986) 5

Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Decision-Making*, 77 Am. J. Pub. Health 619 (1987) 24

Brown, *Drawing Women Into Prenatal Care*, 21 Fam. Plann. Persp. 73 (1989) 9, 11

Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985) 7

Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397 (1986) 18

Cates, *Abortions for Teenagers*, in Abortion and Sterilization: Medical and Social Aspects (J. Hodgson, ed. 1981) 10

Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization: Medical and Social Aspects (J. Hodgson, ed. 1981) 6, 7, 10

Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266 (1977) 10

Cates, Schulz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Med. 621 (1983) 5, 7

Cavanaugh, *Obtaining a Personal and Confidential History from Adolescents*, 7 J. Adol. Health Care 118 (1986) 11

Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283 (1982) 22, 24

TABLE OF AUTHORITIES—Continued

Page

Croxton, Churchill & Fellin, *Counseling Minors Without Parental Consent*, 67 Child Welfare 3 (1988) 11

D. Danforth & J. Scott, *Obstetrics & Gynecology* (5th ed. 1986) 6

Davis, *Adolescent Pregnancy and Infant Mortality: Isolating the Effects of Race*, 23 Adolescence 899 (1988) 9

Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plann. Persp. 259 (1983) 24

Fisher, Marks, Trieller & Brody, *Are Adolescents Able and Willing to Pay the Fee for Confidential Health Care?*, 107 J. Pediat. 480 (1985) 11

Fost, *Parents as Decision Makers for Children*, 13 Primary Care 285 (1986) 11

Greydanus & Railsback, *Abortion in Adolescence*, 1 Sem. Adol. Med. 213 (1985) 5, 7, 10

Grimes, *Surgical Management of Abortion* in Te Linde's Operative Gynecology (R. Mattingly & J. Thompson eds. 1985) 7, 10

Hakim-Elahi & Tovell, *Complications of First-Trimester Abortion: A Report of 170,000 Cases*, in The American College of Obstetricians and Gynecologists, Abstracts of Current Clinical and Basic Investigation (1989) 6, 7

Harvard, *Medical Confidence*, 11 J. Med. Ethics 8 (1985) 12

Hediger, Scholl, Belsky, Ances & Salmon, *Patterns of Weight Gain in Adolescent Pregnancy: Effects on Birth Weight and Preterm Delivery*, 74 Obstet. Gynec. 6 (1989) 9

Henshaw & Van Vort, *Patterns and Trends in Teenage Abortion and Pregnancy*, in Alan Guttmacher Institute, Teenage Pregnancy in the United States: The Scope of the Problem and State Responses (1989) 4, 5

TABLE OF AUTHORITIES—Continued

	Page
W. Hern, *Abortion Practice* (1984)	5
Hunter, *Time Limits on Abortion*, in Reproductive Laws for the 1990s (S. Cohen & N. Taub eds. 1989)	6, 8
Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* (S. Brown ed. 1989)	9
LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth*, 248 J.A.M.A. 188 (1982)	5
Lee & Corpuz, *Teenage Pregnancy: Trend and Impact on Rates of Low Birth Weight and Fetal, Maternal, and Neonatal Mortality in the United States*, 15 Clin. Perinat. 929 (1988)	7, 8
Lovett & Wald, *Physician Attitudes Toward Confidential Care for Adolescents*, 106 J. Pediat. 517 (1985)	11
Lupfer & Silber, *How Patients View Mandatory Waiting Periods for Abortion*, 13 Fam. Plann. Persp. 75 (1981)	21
Makinson, *Health Consequences of Teenage Fertility*, 17 Fam. Plann. Persp. 132 (1985)	8
McAnarney & Greydanus, *Adolescent Pregnancy and Abortion*, in Adolescent Medicine (A. Hofmann & D. Greydanus 2d ed. 1989)	12
Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psych. 79 (1987)	9, 11
Melton & Pliner, *Adolescent Abortion: A Psychological Analysis*, in Adolescent Abortion (G. Melton ed. 1986)	12
Miller & Field, *Adolescent Pregnancy: Critical Review for the Clinician*, 1 Sem. Adol. Med. 195 (1985)	8, 12
National Academy of Sciences, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. 1 (C. Hayes ed. 1987)	4, 5
National Center on Child Abuse and Neglect, U.S. Dep't of Health and Human Services, *Study of National Incidence and Prevalence of Child Abuse and Neglect 1988* (1989)	23

TABLE OF AUTHORITIES—Continued

	Page
Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clin. Obstet. Gynec. 1161 (1978)	12, 23
C. Pauerstein, *Clinical Obstetrics* (1987)	8
Pediatrics (A. Rudolph 18th ed. 1987)	9, 12
Placek & Taffel, *Recent Patterns in Cesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607 (1988)	6
Roemer, *Legislation on Contraception and Abortion for Adolescents*, 16 Fam. Plann. Persp. 241 (1985)	25
Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 Adolescence 44 (1980)	22, 25
Ryan, *Giving Birth in America, 1988*, 20 Fam. Plann. Persp. 298 (1988)	9
Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in Pregnancy in Adolescence: Needs, Problems and Management (I. Stuart & C. Wells eds. 1982)	7, 8
Scholl, Miller, Salmon, Cofsky & Shearer, *Prenatal Care Adequacy and the Outcome of Adolescent Pregnancy: Effects on Weight Gain, Preterm Delivery and Birth Weight*, 69 Obstet. Gynec. 3[illegible] (1987)	9
Silber, *Ethical and Legal Issues in Adolescent Pregnancy*, 14 Clin. Perinat. 265 (1987)	11
Slap & Schwartz, *Risk Factors for Low Birth Weight to Adolescent Mothers*, 10 J. Adol. Health Care 267 (1989)	9
Stephenson, *Pregnancy Testing and Counseling*, 36 Ped. Clin. N.A. 681 (1989)	7
Strasburger, Eisner, Tilson, Rigg & Kulig, *Teenagers, Physicians, and the Law in New England*, 6 J. Adol. Health Care 377 (1985)	11

TABLE OF AUTHORITIES—Continued

	Page
Strobino, *The Health and Medical Consequences of Adolescent Sexuality and Pregnancy: A Review of the Literature,* in Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, Vol. II (S. Hofferth & C. Hayes eds. 1987)	8
C. Tietze & S. Henshaw, *Induced Abortion: A World Review 1986* (6th ed. 1986)	19, 20
Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services,* 12 Fam. Plann. Persp. 284 (1980)	22
U.S. Dep't of Health and Human Services, Centers for Disease Control, *Abortion Surveillance 1982-83,* 36 M.M.W.R. (Feb. 1987)	10
U.S. Dep't of Health and Human Services, Centers for Disease Control, *Induced Termination of Pregnancy: Reporting States, 1985 and 1986,* 37 Monthly Vital Statistics Rep. 7 (1989)	6
U.S. Dep't of Health and Human Services, 2A *Vital Statistics of the United States 1981*	6
Working Group of Northern Health Region in Current Medical/Ethical Problems, *Consent to Treatment By Parents and Children,* 12 Child 5 (1986)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

Appellant,

v.

AKRON CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit;

No. 88-1309

THE STATE OF MINNESOTA, *et al.*,

Cross Petitioners,

v.

JANET HODGSON, M.D., *et al.*,

Cross Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN NURSES' ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE NURSES' ASSOCIATION OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AND THE SOCIETY FOR ADOLESCENT MEDICINE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES IN 88-805 AND IN SUPPORT OF CROSS RESPONDENTS IN 88-1309

INTEREST OF *AMICI CURIAE*

Amici curiae are eight major organizations of health care professionals. *Amici* share an abiding dedication to promote the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amici's* interest is not in debating the philosophical, ethical, moral or religious issues surrounding abortion, but rather in protecting the fundamental right of every individual to make health care treatment decisions free of state interference unless the state has a compelling justification for the restrictions it imposes and the state acts with particular sensitivity in promoting that interest.

Amicus American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its 28,000 members represent approximately 90 percent of all obstetricians and gynecologists practicing in the United States.

Amicus American Academy of Child and Adolescent Psychiatry ("AACAP") is a national professional organization of over 4,200 child and adolescent psychiatrists, who engage in research, prevention, diagnosis and treatment of developmental and psychiatric disorders in children, adolescents and families.

Amicus American Academy of Pediatrics ("AAP") is a nonprofit association of approximately 30,000 physicians certified in the specialized care of infants, children and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health. While the AAP's members hold widely divergent views on the desirability of abortion, they share an interest in assuring that state laws regulating abortion not impose unjustified and unnecessary burdens which increase risks to the health or well-being of pregnant adolescents.

Amicus American Medical Women's Association, Inc. ("AMWA") is a nonprofit organization of 12,000 women physicians and medical students. One of AMWA's primary missions is to promote quality health care for women. AMWA strongly opposes laws which adversely affect the health of women, or impose constraints on the right of the pregnant patient, in consultation with her physician, to make a personal and medically informed decision whether or not to continue a pregnancy.

Amicus American Nurses' Association ("ANA") is an association of registered nurses that is dedicated to the advancement of the goals and interests of registered nurses and of the nursing profession generally. The ANA is comprised of 53 member organizations which represent the nation's two million registered nurses. In serving clients of all ages, including adolescents, registered nurses share full information and promote the client's confidentiality.

Amicus American Psychiatric Association ("APA") is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

Amicus Nurses' Association of the American College of Obstetricians and Gynecologists ("NAACOG"), is a 23,000 member professional organization for nurses who provide health care for women and infants. NAACOG's purpose is to establish relevant nursing standards and to assist its members in supplying the highest quality nursing care to their clients.

Amicus The Society for Adolescent Medicine, is a multidisciplinary association of approximately 1,000 health care professionals. Its purpose is to promote the development, synthesis and dissemination of scientific and scholarly knowledge unique to the development and health care needs of adolescents.

The statutory schemes at issue in these cases, which require notification of one or both parents before a phy-

sician is authorized to perform an abortion on a minor, raise disturbing questions about the provision of health care services to adolescents. In particular, the breach of confidentiality with an adolescent patient that is mandated by these statutes can lead to a significant increase in medical risk for the adolescent by causing her to delay or even to decline to seek care. Accordingly, *amici*, who are the primary providers of health care to young women, wish to present their views concerning the important issues raised in this appeal and cross petition.[1]

MEDICAL BACKGROUND

A. The Pregnancy And Abortion Rates Among Adolescents Are Significant.

Of the approximately 10 million adolescent women between 15 and 19 in the United States, at least 40% are sexually active and over 1 million have become pregnant each year since 1973.[2] In 1985, the most recent year for which complete data are available, the average daily rate of pregnancies was 2,825.[3] Four out of every ten young women will become pregnant at least once in their teens.[4]

National trends show an increase in adolescent pregnancy rates from 1972 to 1982, especially among the youngest adolescents. During that period, the rate of pregnancy among women 15 to 17 years old increased by 12% and the rate for adolescents under age 15 increased by 20%.[5] Since 1982, these pregnancy rates have remained relatively stable.[6]

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

[2] Henshaw & Van Vort, *Patterns and Trends in Teenage Abortion and Pregnancy*, in Alan Guttmacher Institute, Teenage Pregnancy in the United States: The Scope of the Problem and State Responses 12 (1989); National Academy of Sciences, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. 1, 73 (C. Hayes ed. 1987).

[3] Almost 31,000 of these pregnancies were among teens under age 15. *Henshaw & Van Vort* at 12, 20.

[4] *National Academy of Sciences* at 51.

Approximately 40% of pregnant adolescents each year terminate their pregnancies by an induced abortion.[7] In 1985, 416,170 adolescents terminated their pregnancies; 16,970 of these minors were under age 15.[8] Adolescents obtained 26% of all abortions in 1985. Although younger adolescents are less likely to become pregnant, when they do, they are somewhat more likely than older adolescents to obtain an abortion. Henshaw & Van Vort, *Patterns and Trends in Teenage Abortion and Pregnancy*, in Alan Guttmacher Institute, Teenage Pregnancy in the United States: The Scope of the Problem and State Responses 11-12 (1989).

B. Pregnancy Poses Greater Health Risks To The Woman Than Abortion.

Induced abortion is one of the most common and safest surgical procedures in the United States.[9] The overall risk of dying from abortion is seven times less than the overall risk of dying from childbirth. Greydanus & Railsback, *Abortion in Adolescence*, 1 Sem. Adol. Med. 213, 214 (1985); Cates, Schulz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Med. 621, 623 (1983). In 1981, the risk of dying from an abortion was 0.5 per 100,000 procedures,[10] while the risk

[5] *Id.* at 16.

[6] *Henshaw & Van Vort* at 12. Birth and abortion rates also have not greatly changed since 1982. *Id.*

[7] *National Academy of Sciences* at 58.

[8] *Henshaw & Van Vort* at 10.

[9] Other common surgical procedures pose much greater risks of death than abortion: a tonsillectomy has two times the risk and an appendectomy carries 100 times the risk of death. W. Hern, *Abortion Practice* 23-24 (1984).

[10] Binkin, *Trends in Induced Legal Abortion Morbidity & Mortality*, 13 Clin. Obstet. Gynec. 83, 85 (1986); *see also* LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth*, 248 J.A.M.A. 188, 189 (1982).

of dying in childbirth was 8.5 per 100,000 live births.[11] A recent study found no deaths among 170,000 abortions performed within the first 14 weeks of pregnancy.[12]

Nonfatal adverse health effects also occur more often in childbirth than in abortion.[13] Pregnancy presents risks because it not only causes new complications but also aggravates existing conditions.[14] In fact, appropriate treatment for some preexisting illnesses may be termination of the pregnancy. Hunter, *Time Limits on Abortion*, in Reproductive Laws for the 1990s 133 (S. Cohen & N. Taub eds. 1989).

While abortion may involve adverse health effects, they are less frequent and less severe than those of pregnancy and childbirth. Common effects from abortion are pain, headache and nausea. Minor complications, such as infections, occur about 12% of the time, and about 0.4% of women suffer a major complication, such as hemor-

---

[11] U.S. Dep't of Health and Human Services, 2A *Vital Statistics of the United States 1981* 64.

[12] Hakim-Elahi & Tovell, *Complications of First-Trimester Abortion: A Report of 170,000 Cases*, in The American College of Obstetricians and Gynecologists, Abstracts of Current Clinical and Basic Investigation 20, 20 (1989).

[13] While 63% of women experience medical complications in pregnancy, Placek & Taffel, *Recent Patterns in Cesarean Delivery in the United States*, 15 Obstet. Gynec. Clin. N.A. 607, 612, 615 (1988), approximately 12% of abortions result in a medical complication. Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization: Medical and Social Aspects 159 (J. Hodgson ed. 1981). *See also* U.S. Dep't of Health and Human Services, Centers for Disease Control, *Induced Terminations of Pregnancy: Reporting States, 1985 and 1986*, 37 Monthly Vital Statistics Rep. 7 (1989) (3.3 complications per 1,000 abortions).

[14] For example, pregnancy may increase the risk of death up to 50% for a woman suffering from a congenital heart disease. D. Danforth & J. Scott, *Obstetrics & Gynecology* 494-97 (5th ed. 1986); *Abortion, Medicine & the Law* 251 (J. Butler & D. Walbert 3d ed. 1986).

rhage severe enough to require a blood transfusion.[15] A recent study of first-trimester abortions reported a total complication rate of less than one percent.[16] Several factors affect the risk of complications from abortion, including the gestational age of the fetus and the woman's age. Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14, 19 (1985).

C. Adolescent Pregnancy Poses Particular Medical Risks, Which are Due Largely To Delay In Seeking Health Care.

Pregnancy poses unique, significant risks to the adolescent female compared to the adult woman. Although the rates of mortality and morbidity from abortion are generally lower for adolescents than for older pregnant women,[17] the maternal mortality rate during childbirth is higher for adolescents than older women.[18] Adolescents

---

[15] Buehler, Schulz, Grimes & Hogue, *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14, 16 (1985); *Cates & Grimes* at 159-60.

[16] *Hakim-Elahi & Tovell* at 20. *See also* Grimes, *Surgical Management of Abortion*, in Te Linde's Operative Gynecology 533 (R. Mattingly & J. Thompson eds. 1985) (fewer than two serious complications per 1,000 abortions performed by suction curettage method).

[17] Stephenson, *Pregnancy Testing and Counseling*, 36 Ped. Clin. N.A. 681, 693 (1989); Greydanus & Railsback, *Abortion in Adolescence*, 1 Sem. Adol. Med. 213, 214 (1985); Cates, Schulz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Med. 621, 622-23 (1983). Adolescents under 15, however, may face an increased risk of cervical injury in a suction curettage abortion. *Id.* at 622.

[18] Lee & Corpuz, *Teenage Pregnancy: Trend and Impact on Rates of Low Birth Weight and Fetal, Maternal, and Neonatal Mortality in the United States*, 15 Clin. Perinat. 929, 935-936 (1988); Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in Pregnancy in Adolescence: Needs, Problems and Management 107, 127 (I. Stuart & C. Wells eds. 1982).

who do not terminate their pregnancies are 200% more likely to die in childbirth than women in their twenties [19] and adolescents under the age of 15 face the highest risks of childbirth. Strikingly, their risk of death in childbirth in 1,000% greater than the risk to women in their twenties. See Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in Pregnancy in Adolescence: Needs, Problems and Management 107, 127 (I. Stuart & C. Wells eds. 1982). See also Makinson, *Health Consequences of Teenage Fertility*, 17 Fam. Plann. Persp. 132, 134 (1985).

Certain health risks of pregnancy are highly correlated with youth. For example, adolescents are significantly more likely to have anemia and toxemia during pregnancy than older women.[20] The most frequent complication of adolescent pregnancy is pregnancy-induced hypertension, or preeclampsia.[21] When socioeconomic factors such as poverty, nonmarital status, low education and race are considered,[22] one age-related effect persists:

---

[19] Miller & Field, *Adolescent Pregnancy: Critical Review for the Clinician*, 1 Sem. Adol. Med. 195, 199 (1985); Sacker & Neuhoff, *Medical and Psychosocial Risk Factors in the Pregnant Adolescent*, in Pregnancy in Adolescence: Needs, Problems and Management 107, 127 (I. Stuart & C. Wells eds. 1982). *But see Lee & Corpuz* at 938 (review of data from 1966 to 1980 suggests maternal mortality rates increase as maternal age increases).

[20] *Hunter* at 134.

[21] While 8%-10% of all pregnant women suffer from hypertension, C. Pauerstein, *Clinical Obstetrics* 645 (1987), studies show that up to 17% of adolescents have preeclampsia. Strobino, *The Health and Medical Consequences of Adolescent Sexuality and Pregnancy: A Review of the Literature*, in Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, Vol. II, 112-13 (S. Hofferth & C. Hayes eds. 1987).

[22] Other complications seem to be dependent on socioeconomic status rather than age, except perhaps preeclampsia. American Academy of Pediatrics, Committee on Adolescence, *Adolescent Pregnancy*, 83 Pediatrics 132, 133 (1989). However, adolescents as a group tend to have more than one of these high-risk socio-

an increase in low birthweight infants.[23]

The adolescent's delay in seeking health care largely explains the disparity in risks facing the pregnant adolescent as compared to the adult woman.[24] Timely and complete prenatal care reduces the risks of maternal mortality, infant mortality and low birthweight.[25] While most pregnant women begin prenatal care in the first trimester, Brown, *Drawing Women into Prenatal Care*, 21 Fam. Plann. Persp. 73, 74 (1989); see also Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 29 (S. Brown ed. 1989), adolescents consistently delay seeking care until relatively late in the pregnancy. See *Brown* at 74; Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psych. 79, 80 (1987).

The tendency of adolescents to delay seeking health care when they become pregnant obviously affects when

---

economic factors. Scholl, Miller, Salmon, Cofsky & Shearer, *Prenatal Care Adequacy and the Outcome of Adolescent Pregnancy: Effects on Weight Gain, Preterm Delivery and Birth Weight*, 69 Obstet. Gynec. 312, 312 (1987).

[23] Low birth weight is highly correlated to infant death and disease. Davis, *Adolescent Pregnancy and Infant Mortality: Isolating the Effects of Race*, 23 Adolescence 899, 901-902 (1988). Young maternal age is also highly associated with premature birth, a major cause of low birth weight. Ryan, *Giving Birth in America, 1988*, 20 Fam. Plann. Persp. 298, 299 (1988).

[24] One reason for the delay is that pregnancy symptoms in the adolescent may not be readily apparent due to irregular menses in adolescents. AAP, Comm. on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 Pediatrics 135, 135 (1989); Brown, *Drawing Women Into Prenatal Care*, 21 Fam. Plann. Persp. 73, 75-76 (1989).

[25] Hediger, Scholl, Belsky, Ances & Salmon, *Patterns of Weight Gain in Adolescent Pregnancy: Effects On Birth Weight and Preterm Delivery*, 74 Obstet. Gynec. 6, 9 (1989); Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* 18 (S. Brown ed. 1989); AAP, *Adolescent Pregnancy*, at 133; Slap & Schwartz, *Risk Factors for Low Birth Weight to Adolescent Mothers*, 10 J. Adol. Health Care 267, 271-73 (1989); *Davis* at 901; *Pediatrics* 100 (A. Rudolph 18th ed. 1987).

pregnant adolescents typically seek an abortion. Adolescents are twice as likely as other pregnant women to obtain an abortion in the second trimester. U.S. Dep't of Health and Human Services, Centers for Disease Control, *Abortion Surveillance 1982-83*, 36 M.M.W.R. 39 (Feb. 1987). This increased likelihood of adolescents to delay obtaining an abortion increases the risks of the procedure.[26] The risk of mortality from abortion increases 50% for each week after the eighth week of pregnancy.[27]

D. Proper Treatment And Counseling Of Adolescents Requires Individualized Consideration Of Their Special Needs And Developmental Characteristics.

A vital concern of the adolescent who requires medical diagnosis, counseling and treatment for her pregnancy is the confidentiality of her relationship with a health care provider. Confidentiality is important in all relationships between patients and health care professionals, because successful treatment contemplates a relationship that facilitates communication and the flow of accurate information. In the optimal relationship, the health care provider recognizes the patient's rights of confidentiality, respect, dignity and privacy. The American College of Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* 89 (7th ed. 1989). The maintenance of confidentiality has long been recognized as vital to all such relationships, but it is particularly important for the adolescent patient.

---

[26] *Greydanus & Railsback* at 216; Cates, *Abortions for Teenagers*, in Abortion and Sterilization: Medical and Social Aspects 140, 144 (J. Hodgson ed. 1981).

[27] *Cates & Grimes*, at 155, 171. Compared to the risk of death from abortion at eight weeks, the risk at 9-10 weeks is 2.6 times greater, at 11-12 weeks is 4.2 times greater, and at 13-15 weeks is 9.6 times greater. Grimes, *Surgical Management of Abortion* at 537. *See also* Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 267 (1977) (major complication rate for abortions increases 91% from the eighth to the twelfth week).

A consortium of professional health care organizations, including several of the *amici*, recently adopted a formal policy statement calling on all health care professionals to safeguard the confidentiality of the relationship with the adolescent patient.[28] This policy statement endorses efforts by health care providers to encourage adolescents to seek parental involvement where appropriate, but stresses the overall importance of confidentiality to assure health care treatment. One of the primary reasons cited by the statement for the need to assure the adolescent patient that her confidentiality will be maintained is the direct connection between an adolescent's willingness to seek health care and unqualified assurances of confidentiality.[29] The necessity of ensuring a confidential relationship between the health care provider and an adolescent patient is thus widely recognized within the community of health care professionals.[30]

---

[28] *Confidentiality in Adolescent Health Care*, Joint Policy Statement, approved as policy by the American Academy of Family Physicians, *amicus* AAP, *amicus* ACOG, *amicus* NAACOG and the National Medical Association (1988) (reprinted as Appendix 1).

[29] *Id. See also, Brown* at 76 (adolescents typically cite fear of breach of confidentiality as a major reason for not seeking early prenatal care); Melton, *Legal Regulation of Adolescent Abortion: Unintended Effects*, 42 Am. Psych. 79, 80 (1987); Fisher, Marks, Trieller & Brody, *Are Adolescents Able and Willing To Pay the Fee for Confidential Health Care?*, 107 J. Pediat. 480, 482 (1985); Fost, *Parents as Decision Makers for Children*, 13 Primary Care 285, 290 (1986).

[30] *See Adolescent Medicine* 23-24 (A. Hofmann & D. Greydanus 2d ed. 1989); Croxton, Churchill & Fellin, *Counseling Minors Without Parental Consent*, 67 Child Welfare 3, 11 (1988); Anglin, *Interviewing Guidelines for the Clinical Evaluation of Adolescent Substance Abuse*, 34 Ped. Clin. N.A. 381, 394-95 (1987); Silber, *Ethical and Legal Issues in Adolescent Pregnancy*, 14 Clin. Perinat. 265, 269 (1987); Working Group of the Northern Health Region in Current Medical/Ethical Problems, *Consent to Treatment By Parents and Children*, 12 Child 5, 9 (1986); Cavanaugh, *Obtaining a Personal and Confidential History from Adolescents*, 7 J. Adol. Health Care 118, 119 (1986); Lovett & Wald, *Physician Attitudes Toward Confidential Care for Adolescents*, 106 J. Pediat. 517, 519, 521 (1985); Strasburger, Eisner, Tilson, Rigg & Kulig, *Teen-*

Proper treatment for the pregnant adolescent includes not only confidentiality but also sensitivity to the variations in adolescent development and maturity. Adolescent growth is a complex, rapid and uneven process; development varies according to age and individual circumstances.[31] As she matures, an adolescent's intellectual and emotional capacities change, and she acquires the capability to reason, solve problems rationally and understand the consequences of decisions.[32] Early adolescents aged 10 to 14 years usually lack sufficient cognitive, psychosocial and emotional maturity to understand and bear the responsibilty of pregnancy and childbirth; by contrast, older adolescents typically display the maturity to handle decisions concerning their pregnancy outcomes.[33] Within each age group, however, individual abilities vary, requiring treatment directed towards the individual patient's needs. *Pediatrics* at 46; Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clin. Obstet. Gynec. 1161, 1172 (1978); *Miller & Field* at 195.

SUMMARY OF ARGUMENT

These cases concern the tension between the right of a minor woman to decide, in consultation with her health care provider, whether to have an abortion and the state's interest in encouraging this decision to be made on an informed basis with the assistance and support of the minor's parents. In suggesting how this tension should be

---

agers, Physicians, and the Law in New England, 6 J. Adol. Health Care 377, 380 (1985); *Miller & Field* at 204. The British Medical Association also endorses a policy of confidential treatment for adolescents. Harvard, *Medical Confidence*, 11 J. Med. Ethics 8, 9 (1985).

[31] McAnarney & Greydanus, *Adolescent Pregnancy and Abortion*, in Adolescent Medicine 403-404 (A. Hofmann & D. Greydanus 2d ed. 1989).

[32] *Miller & Field* at 203; Melton & Pliner, *Adolescent Abortion: A Psychological Analysis* in Adolescent Abortion 1 (G. Melton ed. 1986).

[33] *McAnarney & Greydanus* at 403-04.

resolved under the Constitution and the decisions of this Court, *amici* recognize that the state has a strong interest in promoting discussions between minors and their parents concerning any subject as important as health care. *Amici* routinely encourage minors to consult with their parents concerning all important health and life decisions and firmly believe that *voluntary* consultation with parents is highly beneficial to most adolescents. However, because *mandatory* parental notification places an extraordinary burden on many pregnant minors and that burden is not justified by the state's interests, this Court should hold that a state may not mandate parental involvement, whether by means of consent or by notification, without providing an effective, confidential and expeditious alternative procedure.

A. The constitutional right articulated by this Court in a line of cases following *Roe* v. *Wade*, 410 U.S. 113 (1973) ("*Roe*"), protects a woman's decision whether to terminate an unwanted pregnancy free from unwarranted interference by the state. This right extends to pregnant minors, as well as adults, because unwanted motherhood may be "exceptionally burdensome" for young women. *Bellotti* v. *Baird*, 443 U.S. 622, 642 (1979) ("*Bellotti II*"). Accordingly, this Court has recognized that despite the state's interest in furthering parental involvement in the raising of their children, the state may not constitutionally impose a parental *consent* requirement on a pregnant minor who seeks an abortion without providing her with an alternative procedure that eliminates the need to notify her parents. *Id.*

By comparison to a consent requirement, mandatory parental *notification* imposes somewhat different but nevertheless significant burdens on the minor's exercise of her rights, *viz.*, delaying or dissuading minors from seeking necessary medical care. This delay, in turn, increases the health risks to the pregnant minor, which this Court has recognized as a constitutionally significant burden. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 450 (1983) ("*Akron I*").

Thus, as this Court recognized in *Bellotti II*, parental notification, although not equivalent to consent, imposes a significant burden on a minor's abortion rights. 443 U.S. at 647. Moreover, a requirement, such as Minnesota's, to notify both parents, even where one parent is not and has never been involved in the raising of the pregnant minor, is extremely burdensome and poses special risks to the pregnant minor.

B. This Court has held that "[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult,'" *Carey* v. *Population Services Int'l*, 431 U.S. 678, 693 (1977) (citations omitted), and that the state must provide the Court with "more than a bare assertion . . . that the burden is connected to such a policy." *Id.* at 696. Moreover, this Court has generally held that when a fundamental right is infringed, the state must carefully tailor its statute to its legitimate objectives. *Roe*, 410 U.S. at 165; *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 485 n.8 (1983). In an area as sensitive as teenage abortion, the state must not be permitted to apply absolute requirements; the state must make allowances for individual differences. When judged by this standard, both the Ohio and Minnesota mandatory parental notification schemes are invalid in the absence of an effective, confidential and expeditious procedure permitting the minor to bypass notification of one or both parents, because neither statute serves carefully to advance the state's legitimate interests in the health of the minor or in fostering family integrity.

ARGUMENT

I. MANDATORY PARENTAL NOTIFICATION IMPOSES A CONSTITUTIONALLY SIGNIFICANT BURDEN ON A MINOR WOMAN'S RIGHT TO DECIDE WHETHER TO TERMINATE HER PREGNANCY AND ACCORDINGLY THE STATE MUST PROVIDE AN EXPEDITIOUS AND CONFIDENTIAL ALTERNATIVE TO MANDATORY PARENTAL NOTIFICATION.

At their core, the two cases before the Court concern the basic tension between the right of a minor woman to decide, in consultation with her health care provider, whether to have an abortion and the State's interest in encouraging this decision to be made on an informed basis with the assistance and support of the minor's parents. Minnesota has chosen to resolve this delicate issue by requiring, under burden of criminal and civil sanction, that a physician notify *both* biological parents (whether or not the parents were ever married, had custody of the child or participated in the child's rearing in any way) that their minor daughter intends to have an abortion and then wait at least 48 hours after such notice before performing the abortion. Minn. Stat. Ann. §§ 144.343(1)-(7) (West 1988). Ohio has chosen to resolve this same problem by requiring, under burden of criminal and civil sanction, that the physician personally give actual notice to at least one parent and then wait at least 24 hours after notice before performing the abortion. Ohio Rev. Code Ann. §§ 2151.85, 2505.073 and 2919.12 (Anderson Supp. 1989). Both statutes contain provisions establishing a judicial by-pass procedure intended to permit a mature minor or minor whose best interests would not be served by notification to be relieved of the mandatory requirement. Nevertheless, both states have asked this Court to hold that they are not constitutionally obligated to maintain a confidential and expeditious procedure to bypass parental notification.

This Court has clearly established that a state cannot compel a pregnant minor to obtain parental *consent* for

an abortion without providing her an alternative procedure whereby she can obtain authorization for an abortion without notifying her parents. *Bellotti II*, 443 U.S. at 643. The alternative procedure must allow the minor to show:

> either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation, with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.

Id. at 643-44 (footnotes omitted). In addition, the alternative procedure, which can be administrative or judicial in nature,

> must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

Id. at 644. Because the parental consent statute at issue in *Bellotti II* failed to comply with these requirements, the Court found the Massachusetts statute unconstitutional.

This Court did not in *Bellotti II*, and has not since, resolved the exact question posed by the present cases, namely, whether a State can impose the burdens of mandatory parental *notification* on a minor attempting to exercise her constitutional right to choose an abortion without providing an effective, expeditious and anonymous by-pass procedure that does not entail parental involvement.[34] Nevertheless, in *Bellotti II*, this Court explicitly

[34] In both *H.L.* v. *Matheson*, 450 U.S. 398 (1981), and *Bellotti II*, this Court's discussion of notice provisions was in the context of notice to parents of *immature* minors (*Matheson*, 450 U.S. at 411 ("[a]s applied to immature and dependent minors. . . ."); *Bellotti II*, 443 U.S. at 640 ("[a]s immature minors often lack the ability to make fully informed choices . . .")). Moreover, there was no allegation of injury to the immature minor from parental involvement. Thus, neither *Matheson* nor *Bellotti II* resolved the issue presented by the cross petition in *Hodgson* and appeal in *Akron II*, both of which involve statutes that apply to mature minors as well as immature dependent minors whose best interests would not be served by parental involvement. *See Matheson*, 450 U.S. at 414 (Powell, J., concurring).

rejected the statutory scheme there because it did not permit "every minor [to] have the opportunity—if she so desires—to go directly to a court without first *consulting or notifying* her parents." *Id.* at 647 (emphasis added). The Court's holding and reasoning in *Bellotti II* reflect a recognition that mandatory parental involvement, whether in the form of consent, consultation or mere notice, "would impose an undue burden upon the exercise by minors of the right to seek an abortion." *Id.*

Obviously, there is a difference between a statute that gives one or more parents an absolute veto over the minor child's exercise of her constitutional rights and a statute that requires one or more parents to be notified. But the constitutional analysis does not turn on whether the state-imposed obstacle is absolute; that merely makes the case easier to decide. The analysis depends upon whether the statutory scheme imposes a sufficient burden on the exercise of the minor's right to require the state to come forward to justify the restrictions. See *Akron I*, 462 U.S. at 449-51; *Matheson*, 450 U.S. at 414 (Powell, J., concurring) (noting that majority did not decide whether notification requirement burdens minor's rights if notice is not in her best interests). In light of the very substantial burden imposed by a mandatory parental notification requirement, *Bellotti II*, 443 U.S. at 647, and the lack of sufficient justification for such a requirement as applied to a sizable class of mature minors and those for whom it would be in their best interests to have an abortion without notifying their parents, this Court should hold that an effective, confidential and expeditious alternative procedure is required whenever a state burdens a minor's constitutional right to choose an abortion by mandating parental involvement, whether that involvement takes the form of mandatory notification or mandatory consent.

A. Mandatory Parental Notification Imposes A Constitutionally Significant Burden On A Minor Woman's Right To Decide Whether To Terminate Her Pregnancy.

The most serious burden imposed by mandatory parental notification is the impact it has on adolescent health. This burden has two aspects: first, by requiring notification, the statutes deter adolescents from seeking health care and second, the notification requirements cause adolescents to delay seeking care which in turn increases the medical risks to them.

First, the statutes at issue in these cases both clearly abrogate the confidentiality that is at the core of the physician-patient relationship by requiring the physician to notify one (Ohio) or both (Minnesota) of the minor woman's parents of her intent to obtain an abortion. It is well documented that adolescents are particularly concerned with keeping information concerning their sexual/medical history confidential and that perceived threats to confidentiality are a primary factor in an adolescent's propensity to delay or even forgo seeking health care. See *supra* pp. 10-11. Noting that this issue of confidentiality is "a significant access barrier to health care," those in the medical community who primarily provide care to adolescents recently issued guidelines calling for health care professionals, *inter alia*, to accord adolescent patients the same confidentiality as that accorded to adult patients.[35]

---

[35] *See* App., *infra*, 1a-2a. The actual operation of a mandatory parental involvement statute in Massachusetts demonstrates that the concern with erecting barriers to access to health care is more than hypothetical—when confronted with mandatory parental consent, one third of the minors seeking an abortion are traveling outside the state to obtain an abortion in a jurisdiction that does not require parental notice. Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub. Health 397, 400 (1986). Similarly, the impact of the Minnesota statute has been to delay adolescents in obtaining abortions. *See* Hodg. App. 135a.

Most states have recognized the devastating impact on care that occurs when an adolescent patient's confidentiality is breached and have responded explicitly by exempting adolescents from parental consent *or even notification* when adolescents seek medical assistance for prenatal care, venereal disease or sexually transmitted diseases in general, and drug or alcohol abuse.[36] Minnesota and Ohio are among those states.[37] Minn. Stat. § 144.343 (1) (West 1988); Ohio Rev. Code Ann. §§ 3709.24.1, 3719.01 2 and 5122.04 (Anderson Supp. 1989).

Second, the experience of health care providers, the sound judgment of state legislators and the actual operation of parental notification statutes confirm that mandatory parental notification leads many minors significantly to delay obtaining care. The additional delay provoked by a mandatory parental notification statute can cause a significant increase in medical risk for many minors. Although abortion is a relatively low-risk medical procedure for the pregnant woman,[38] health risks increase with the gestational age at the time of the abortion. Mortality due to abortion, although quite low in comparison with other common medical procedures, increases approximately 20 percent for each week of gestation from 8 to 15 weeks and even more after 15 weeks.[39]

---

[36] Hodg. Pet. Brf. App. A-8 to A-18 (listing states in each of these categories). For example, states permit adolescents to consent to confidential childbirth care, including delivery by cesarean section. These procedures pose greater health risks to adolescents than abortion. See *supra* pp. 5-8.

[37] The five-year experience with a two-parent notification requirement in Minnesota illustrates the directness of the correlation between breaches in confidentiality and delay in obtaining an abortion —the percentage of women under the age of 17 who obtained abortions in their second trimester was 18.4 percent in 1978; by 1983, after the statute had been in effect for several years, that figure had increased to 23 percent while the figures for Minnesota women 18 and older showed no such dramatic increase in late abortions. Hodg. App. 135a.

[38] *See supra* pp. 5-6.

[39] C. Tietze & S. Henshaw, *Induced Abortion: A World Review 1986* 109-10 (6th ed. 1986).

As discussed above, it is well-established that adolescents are more likely than adult women to postpone seeking all pregnancy related medical care, including abortions. See *supra* p. 9. Because minors delay seeking an abortion longer than adults, any additional delay will pose a greater risk to their health than would such a delay for adult women seeking an abortion. When added to the other factors that cause adolescents to delay seeking abortions, a mandatory parental notification requirement will push some minors into the second trimester before they receive an abortion.[40] If that occurs, the risk of medical complications increases substantially.[41] Moreover, if the minor ultimately decides not to have an abortion, mandatory parental notification will have delayed her in seeking appropriate prenatal care, causing increased health risks to her and to her baby. See *supra*, at 9.

Mandatory waiting periods, such as the 48-hour requirement in Minnesota and the 24-hour requirement in Ohio, exacerbate the delay. As a practical matter, mandatory waiting periods often result in the minor having to make a second trip to the health care facility with additional delays caused by scheduling.[42] If, as is often

[40] The district court specifically found that the effective delay caused by Minnesota's two-parent notification requirement when coupled with the 48-hour waiting period could reach one week or more. Hodg. App. 23a. Such a delay could, the court found, result in a woman having a second trimester abortion. *Id.*

[41] *C. Tietze & S. Henshaw* at 103-04, 110.

[42] Although in theory a minor can call ahead to the physician, who can then notify the parent or parents and schedule a single appointment for some time after the expiration of the mandatory waiting period, *see, e.g.*, Hodg. Brf. of Cross Pet. 40), many physicians are unwilling to notify the minor's parents that an abortion will be performed on their daughter in 24 or 48 hours, if the physician has never met the minor, examined her, confirmed her pregnancy or discussed alternatives with her. *See, e.g.*, AAP, Comm. on Adolescence, *Counseling the Adolescent About Pregnancy Options*, 83 Pediatrics 135, 136 (1989) ("information [about the existence of a pregnancy] should always be given in a personal and private setting, preferably not by telephone").

the case, the minor must make a second trip to the physician, there will be additional expense and delay. The additional delay, in turn, compounds the increased medical risk of a later abortion.[43]

B. Mandatory Parental Notification Required In All Cases Is Not Tailored To The States' Interests In Protecting The Adolescent's Health Or In Promoting Family Integrity.

The precise formula for reviewing the constitutionality of statutes that substantially burden a pregnant minor's abortion right has never been articulated by this Court, but it is clear that the state must "act with particular sensitivity when it legislates to foster parental involvement" in a minor's decision whether to terminate a pregnancy. *Bellotti II*, 443 U.S. at 642. Thus, the state must advance a "significant state interest" in the burdening regulation, *Carey* v. *Population Services Int'l*, 431 U.S. at 693 (plurality opinion), and the state must do more than simply assert that the statute advances the state's significant interest. *Id.* at 696.

Moreover, when a fundamental right is infringed, this Court has held that the State must carefully tailor its statute to its legitimate objectives. See *Roe*, 410 U.S. at 165; *Ashcroft*, 462 U.S. at 485 n.8, *Akron I*, 462 U.S. at 438. *Amici* submit that no different approach is warranted in dealing with minors, although they recognize that this Court has held that additional state interests exist in the context of minors. *Cf. Matheson*, 450 U.S. at 410-11. And even if a state need not "fine-tune" its statutes in this setting, it would be wholly inconsistent with the fact that the minor is exercising a fundamental right to permit the State to further its interests in ways that are unjustifiably overbroad. Because it is clear that

[43] There is also evidence that a mandatory waiting period itself creates additional stress and anxiety that further compounds the health risks of abortion. Lupfer & Silber, *How Patients View Mandatory Waiting Periods for Abortion*, 13 Fam. Plann. Persp. 75, 77 (1981).

the opportunity for an individualized determination is necessary to permit many minors to exercise their rights and to ensure that the State's interest in protecting their health is achieved, this Court should hold that a state must provide an effective, confidential and expeditious alternative to parental notification.

Minnesota and Ohio attempt to justify the significant burden they impose by arguing that their requirements serve several important state interests. However, even a cursory examination of the parental notification requirement demonstrates that for a significant number of minors, the statutes, if applied without exception, will fail to advance any purported state interest.

1. One of the primary justifications advanced by Minnesota and Ohio is to further parental involvement in raising their children.[44] However, for a significant number of minors, the requirement fails to promote the state's interest. First, studies have shown that a substantial number of adolescents voluntarily notify one or both parents in the absence of any statute and that among younger adolescents—those 15 and younger—over 75 percent voluntarily informed their parents.[45] Because the state's putative interest is in providing guidance to *immature* minors,[46] it is particularly significant that younger adolescents overwhelmingly choose to involve one or both parents voluntarily. For all those minors who voluntarily inform a parent, the statutory notice requirement serves only to delay effectuation of a decision that benefited from familial involvement.[47] And, as amply documented, the delay created by this statutory requirement entails an increased health risk to the minor.

Second, in the absence of an effective by-pass procedure neither statute would provide any exception when notification reasonably can be expected to have disruptive and perhaps dangerous consequences. In most situations, it is helpful to involve parents when a minor is faced with any medical treatment decision, including whether or not to terminate a pregnancy. It is for that reason that several of the *amici* have issued a policy statement directing their members to use "every reasonable effort to encourage the adolescent to involve parents" in providing medical care and counseling. App., *infra*, 1a. However, in that same statement, the health care providers caution that "the health risks to the adolescents are so impelling that . . . deference to parental involvement should not stand in the way of needed health care." *Id.* at 2a.

This policy statement reflects the fact that there are circumstances, unfortunately too frequent, in which parental involvement will be harmful to the patient's health and not beneficial to family relationships. The initial parental reaction to a minor daughter's pregnancy frequently involves anger and can lead to a family crisis.[48] In families with a history of physical or sexual abuse, such an announcement may precipitate a violent reaction.[49] It is thus not surprising that a substantial

---

[44] Mandatory notification is designed "to serve the state's substantial and legitimate interest in the family-based child-rearing process" (Hodg. Brf. of Cross Pet. 8); it assists in "promoting parental consultation" (Akron II Brf. of Appellant 24).

[45] Torres, Forrest & Eismann, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plann. Persp. 284, 287-90 (1980); Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982); Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?*, 15 Adolescence 44 (1980).

[46] *Bellotti II*, 443 U.S. at 640; *Matheson*, 450 U.S. at 411.

[47] In Minnesota, the court found that there was no increase in the proportion of minors who notified their parents because of the law (Hodg. Pet. App. 41a) and, moreover, some minors chose to utilize the by-pass procedure rather than tell both parents although they would have been willing to tell one parent. Hodg. Pet. App. 31a.

[48] Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 Clin. Obstet. Gynec. 1161, 1164-65 (1978).

[49] A recent government study has estimated that at least one million children and adolescents have been harmed by abuse or neglect. National Center on Child Abuse and Neglect, U.S. Dep't of

percentage of the minors who do not voluntarily inform their parents of their pregnancy and planned abortion indicate that their reluctance stems from fear of physical punishment or other extreme response.[50] Obviously, such responses do not promote the minor's health; they seriously jeopardize it. Moreover, even if the fear of a harsh response, in fact, proves incorrect, the fear and attempt to avoid notification can lead to delay in seeking medical care that in turn increases the health risks to the pregnant minor. See *supra* pp. 9-10. Finally, as discussed below at 26, notification to a non-custodial, long absent parent, as required under the Minnesota statute, may well result in familial discord and disruption of the custodial family, which is the antithesis of the family integrity contemplated by the legislature.

2. Many states, including Ohio and Minnesota, have argued that parental notification or consent serves an important state interest in protecting the minor woman's health by allowing one or both parents the opportunity to provide the physician with medical information of which the physician would otherwise be unaware and by ensuring that a parent is alert to the signs of potential medical complications from the procedure. Akron II Brf. of Appellant 46-47. Hodg. Brf. of Cross Pet. 34-35. Although the Court has postulated such an interest, *Matheson*, 450 U.S. at 411, in fact breaching a minor's confidentiality jeopardizes the state's interest in assuring the minor's health. Not only are parents frequently unaware

---

Health and Human Services, *Study of National Incidence and Prevalence of Child Abuse and Neglect 1988* xx (1989).

[50] *Clary* at 284. *See also* Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Decision-Making*, 77 Am. J. Pub. Health 619, 620 (1987) (anticipated family conflict was chief reason adolescents chose not to inform parents of their pregnancy); Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plann. Persp. 259, 262 (1983).

of important aspects of their minor children's medical history, particularly those related to sexual activity, drug and alcohol use,[51] but more importantly, there is a serious risk that by breaching the minor's confidentiality, the statute will operate to deprive health care providers of necessary medical information that only the minor knows if, as is well-documented, she is unwilling to be candid about her relevant medical history without an assurance of confidentiality from the health care provider.[52]

3. A mandatory, two-parent notification requirement, such as Minnesota's, is completely unjustified. As we have shown previously, the burdens imposed by a mandatory parental notification scheme are greatly increased by the addition in Minnesota of a requirement that *both* biological parents must be notified of their minor daughter's intent to obtain an abortion. Thus, even if the Ohio statute could be defended on the ground that the State's interests justify the burden imposed by a one-parent notification requirement, which it cannot, it is clear beyond doubt that Minnesota's two-parent requirement without exceptions is unconstitutional.

a. By imposing a requirement that the physician notify both biological parents before performing an abortion on a minor, Minnesota has treated abortion differently than any other medical procedure. In areas that do not deal with sexuality or substance abuse, states require, at most, a single parent's consent before performing medical procedures on a minor. This is true regardless of the immaturity of the minor or the dangerousness of the procedure.[53] Thus, in Minnesota, a physician could

---

[51] *See* AAP, Comm. on Adolescence, *Role of the Pediatrician in Management of Sexually Transmitted Diseases in Children and Adolescents*, 79 Pediatrics 454, 454 (1987); *Rosen* at 44.

[52] Roemer, *Legislation on Contraception and Abortion for Adolescents*, 16 Fam. Plann. Persp. 241, 247 (1985) (access is fostered by assuring confidentiality of abortion services).

[53] Even the federal regulations governing the participation of children in medical research deem consent by one parent to be

face the anomalous situation that he could perform heart surgery on an infant with the consent of a single parent, but would be subjected to criminal and civil sanction if he performed an early first trimester abortion on a 17 year old with her mother's written consent. The obvious purpose of this scheme is to discourage an adolescent from exercising her constitutional right to have an abortion and the practical effect is to jeopardize the minor's health.

b. The Minnesota statute fails to make exceptions to the two-parent notification requirement in a number of circumstances where notification of the second parent could not possibly serve any state interest in fostering family communication, protecting the minor's health or in providing an immature minor with guidance in important decisionmaking. For example, the statute makes no exception for a long-absent biological parent, a parent who has indicated no interest or willingness to become involved in the care and rearing of the minor daughter, or even an abusive parent (except in the narrow circumstances where the minor is willing to report the physical or sexual abuse to officials who will begin formal investigation of the charges). In none of these cases can the statutory requirement of notifying *both* biological parents be said to serve any legitimate state interest.[54] In sum, the two-parent notification requirement of the Minnesota statute utterly fails to advance any legitimate state interests in a carefully tailored fashion.

---

sufficient except where the research poses greater than minimal risk *and* the procedure offers no prospect of direct benefit to the child or is so experimental as to be classified as "not otherwise approvable." 45 C.F.R. §§ 46.406 and 46.407 (1988).

[54] This Court's decision in *Bellotti II* is not to the contrary. In that case, this Court concluded that the requirement of obtaining the consent of both parents did not constitutionally burden a minor's right to seek an abortion "[a]t least when the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649. However, the statute at issue in *Hodgson*, as drawn and as applied, clearly covers minors whose parents are not and have never been together in the same household with the minor.

C. In Order To Serve Their Interests, As Required By The Constitution, Both Ohio and Minnesota Are Obliged To Provide Some Opportunity For A Minor To By-Pass Having To Provide Notice To Either Or Both Parents, Respectively.

As this Court has recognized, despite the State's interest in encouraging familial communication about important life decisions by minors, the "need to preserve the constitutional right and the unique nature of the abortion decision . . . require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 at 642. Because of the extraordinary burdens imposed by a parental notification requirement and the special developmental characteristics of adolescents, if required parental notice is permitted, the state must provide an effective alternative procedure that will both protect the minor's fundamental right to choose appropriate health care and accommodate the state's legitimate interests.[55]

For the purpose of determining the need for a by-pass procedure, it is significant that the parental notification requirements at issue in these cases apply to mature minors, as well as to immature minors.[56] This Court has recognized that a minor's maturity is of particular importance in the context of a state statute restricting a minor's abortion right. Thus, despite the general au-

---

[55] As this Court noted in *Bellotti II*, the alternative procedure need not be judicial. 443 U.S. at 643 n. 22. In light of the serious deficiencies of some judicial by-pass procedures, *cf.* Hodg. Cert. Pet. App. 27a, 82a, 93a (findings of district court), it may well be that an administrative procedure would be more effective in reducing delay, trauma to the minor and risk to her health and well-being.

[56] The present cases thus involve a very different issue from that posed in *Matheson* where the minor class challenging the statute made no allegation based on maturity. *Matheson*, 450 U.S. at 412 n.22 (because the particular class was one of immature minors, the case does not require the Court to determine the circumstances in which a state must provide an alternative to parental notification); *id.* at 414 (Powell, J., concurring).

thority that is given to the state to "resort to objective, though inevitably arbitrary criteria such as age limits" when regulating the legal rights of minors, "the peculiar nature of the abortion decision *requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.*" *Bellotti II*, 443 U.S. at 643-44 n.23 (emphasis added). In the absence of a by-pass procedure, neither of the parental notification schemes at issue in these cases would permit any such individualized evaluation of the pregnant minor's maturity.

There are considerable variations in the maturity of adolescents; a substantial number of older adolescents (those 16 and 17 years old) and even some younger adolescents are sufficiently mature to make reasoned, thoughtful and competent decisions about such medically and ethically complex subjects as whether or not to terminate a pregnancy. See *supra* p. 12. This is not to say that mature minors generally will not profit from involving their parents in a decision about abortion—most would and, in fact, most do. But the State's interest in protecting a minor from the consequences of a choice that is not informed and mature (*Bellotti II*, 443 U.S. at 635) would not be advanced by requiring a mature minor to involve her parents in all circumstances. Given that the vast majority of adolescent pregnancies and abortions occur among 16-17 year olds, *supra*, at 4 & n.3, 5, and that many of them have attained intellectual and emotional maturity, *supra*, at 12, absolute enforcement of parental notification would impose significant burdens on a large class of minors without promoting the State's interest in protecting immature minors.[57] Moreover, failure to provide an alternative to

[57] The magnitude of this case is illustrated by the actual experience in Minnesota where approximately half of the minors seeking abortions under the parental notification statute chose to utilize the by-pass procedure and of that group (almost all age 16 or older), only a handful were determined both to be immature and not to be better served by having an abortion. Hodg. Cert. App. 27a (findings of the district court).

parental notification would impose an "exceptional[] burden[]" on those immature minors whose best interests would be served by having an abortion without involving their parents. *Bellotti II*, 443 U.S. at 642.

This Court has previously held that a constitutionally adequate by-pass must assure the minor's confidentiality; it must be swift; and it must entail an examination into the individual pregnant minor's maturity and, if she is found not to be mature, into her best interests. *Bellotti II*, 443 U.S. at 643-44. See also *Ashcroft*, 462 U.S. at 490-93 and *Akron I*, 462 U.S. at 438-40. There is no reason that a by-pass procedure for a parental notification requirement should differ from the sound dictates of *Bellotti II*: the burden imposed by breaching a minor's confidentiality is substantially identical whether the State requires parental notification or parental consent; the burden of delay in the two cases is exactly the same; and the State's interest in protecting the minor from the consequences of immature or unwise decisions does not vary depending on the means the State has chosen to encourage parental involvement. Moreover, as acknowledged by this Court (*Bellotti II*, 443 U.S. at 644 n.23) and amply demonstrated by health care professionals, minors differ substantially in their maturity and in what would advance their best wishes, and thus an individualized by-pass assessment is absolutely essential to achieve narrowly the State's purposes if parental notice is required.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be affirmed, and the decision of the Eighth Circuit should be affirmed to the extent that it holds that an effective by-pass procedure must be provided if the State is permitted to require parental notification.

Respectfully submitted,

ANN E. ALLEN
AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS
409 12th Street, S.W.
Washington, D.C. 20024
(202) 638-5577

STEPHAN E. LAWTON
THOMAS N. BULLEIT, JR.
REED, SMITH, SHAW & MCCLAY
(Counsel to the American Academy of Pediatrics)
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 457-6100

LAURIE R. ROCKETT
HOLLYER, JONES, BRADY, SMITH, TROXELL, BARRETT & CHIRA
(Counsel to the American Medical Women's Association, Inc.)
342 Madison Avenue
New York, NY 10173
(212) 818-1110

JOEL I. KLEIN
ONEK, KLEIN & FARR
(Counsel to the American Psychiatric Association)
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

CARTER G. PHILLIPS *
ELIZABETH H. ESTY
MARK E. HADDAD
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

* Counsel of Record

October 13, 1989

APPENDIX

CONFIDENTIALITY IN ADOLESCENT HEALTH CARE

POLICY STATEMENT (1988)

This statement was approved as policy by the following organizations: the American Academy of Family Physicians; the American Academy of Pediatrics; the American College of Obstetricians and Gynecologists; the Nurses' Association of the American College of Obstetricians and Gynecologists; and the National Medical Association.

Adolescents tend to underutilize existing health care resources. The issue of confidentiality has been identified, by both providers and young people themselves, as a significant access barrier to health care.

Adolescents in the United States, while generally considered healthy, have a range of problems, including some of such severity as to jeopardize their development and health, their future opportunities and even their lives. To illustrate, there is an urgent need to reduce the incidence of adolescent suicide, substance abuse, and sexually transmitted diseases and unintended pregnancy.

As the primary providers of health care to adolescents, we urge the following principles for the guidance of our professional members and for broad consideration in the development of public policy:

1. Health professionals have an ethical obligation to provide the best possible care and counseling to respond to the needs of their adolescent patients.

2. This obligation includes every reasonable effort to encourage the adolescent to involve parents, whose support can, in many circumstances, increase the potential for dealing with the adolescent's problems on a continuing basis.

3. Parents are frequently in a patient relationship with the same providers as their children or have been exercising decision-making responsibility for their children with these providers. At the time providers establish an independent relationship with adolescents as patients, the providers should make this new relationship clear to parents and adolescents with regard to the following elements:

- The adolescent will have an opportunity for examination and counseling apart from parents, and the same confidentiality will be preserved between the adolescent patient and the provider as between the parent/adult and the provider.

- The adolescent must understand under what circumstances (e.g., life-threatening emergency), the provider will abrogate this confidentiality.

- Parents should be encouraged to work out means to facilitate communication regarding appointments, payment, or other matters consistent with the understanding reached about confidentiality and parental support in this transitional period when the adolescent is moving toward self-responsibility for health care.

4. Providers, parents, and adolescents need to be aware of the nature and effect of laws and regulations in their jurisdictions that introduce further constraints on these relationships. Some of these laws and regulations are unduly restrictive and in need of revision as a matter of public policy. Ultimately, the health risks to the adolescents are so impelling that legal barriers and deference to parental involvement should not stand in the way of needed health care.

Supreme Court, U.S.
FILED
OCT 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

(20) (22)

Nos. 88-1125 and 88-1309

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JANE HODGSON, M.D., et al.,
Petitioners,

v.

STATE OF MINNESOTA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICUS CURIAE OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH, AND THE AMERICAN ACADEMY OF MEDICAL ETHICS.

Stephen R. Kaufmann
P.O. Box 5131
Illinois Building, Suite 800
Springfield, Illinois 62705
(217) 544-1144
Attorney for Amici Curiae

109 pp

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES vi

INTERESTS OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. PARENTAL NOTIFICATION REQUIREMENTS SERVE TO PROTECT MINORS FROM BEING COERCED INTO UNWANTED ABORTIONS. 5

II. PARENTAL NOTIFICATION REQUIREMENTS PROVIDE HELP TO REDUCE OR PREVENT THE HARMFUL AFTEREFFECTS OF ABORTION IN MINORS. 11

III. ROE DID NOT GRANT WOMEN A FUNDAMENTAL RIGHT TO ABORTION, BUT FOUND THIS NEW RIGHT AS EVOLVING FROM THE DEVELOPMENT OF NEW TECHNOLOGIES WHICH MAY HAVE MADE ABORTION "SAFER THAN CHILDBIRTH." . 13

A. ABORTION TECHNOLOGIES INVOLVE HEALTH RISKS WHICH WERE NOT KNOWN, WERE NOT UNDERSTOOD, OR

page

WERE OTHERWISE IGNORED IN ROE V. WADE. 14

B. THE STATE'S TWO-FOLD INTEREST IN PROTECTING THE HEALTH OF WOMEN AND PROTECTING THE LIFE OF HUMAN EMBRYOS MITIGATES AGAINST ANY ABSOLUTE RIGHT TO ABORTION TECHNOLOGY. 17

IV. ROE DID NOT RECOGNIZE AN ABSOLUTE RIGHT OF ABORTION, BUT RATHER FOUND THIS NEW "RIGHT" AS HAVING EVOLVED FROM TECHNOLOGICAL ADVANCES. 18

V. THE STATE HAS A LEGITIMATE INTEREST IN REGULATING BIRTH CONTROL TECHNOLOGIES SUCH AS ABORTION. . . 20

A. THE MEDICAL COMMUNITY IS ALREADY LEGITIMATELY REGULATED BY GOVERNMENT BODIES, AND THIS REGULATION INCLUDES REGULATION OF BIRTH CONTROL TECHNOLOGIES. . . 20

page

B. THE RIGHT OF THE STATE TO CONTROL BIRTH CONTROL TECHNOLOGIES IS ALREADY ESTABLISHED IN CONSTITUTIONAL LAW. 20

C. STATES MUST BE FREE TO ADJUST REGULATION OF BIRTH CONTROL TECHNOLOGIES TO MEET CHANGING CONDITIONS. 28

D. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS ESPECIALLY JUSTIFIED BECAUSE MANY PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS HAVE A FINANCIAL INTEREST IN PROMOTING BIRTH CONTROL TECHNOLOGIES WHICH MAY HAVE DETRIMENTAL SIDE-EFFECTS OR MAY BE LESS THAN FULLY EFFECTIVE. 30

E. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS ESPECIALLY JUSTIFIED BECAUSE MANY PHYSICIANS, FAMILY PLANNING

page

AGENCIES AND DRUG MANUFACTURERS ARE IDEOLOGICALLY BOUND TO REDUCING BIRTHS AMONG SOME CLASSES OF WOMEN REGARDLESS OF THE DETRIMENTAL SIDE-EFFECTS WHICH THEIR TECHNOLOGIES WILL IMPOSE ON WOMEN. 31

VI. THREATS TO TRUE REPRODUCTIVE FREEDOM FROM PRIVATE INTERESTS AND THE STATE REQUIRE THAT THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE FREEDOM MUST BE CLARIFIED AND STRENGTHENED. 45

A. THE FUNDAMENTAL RIGHTS OF REPRODUCTIVE FREEDOM AS GUARANTEED IN THE CONSTITUTIONALLY RESERVED RIGHTS OF INDIVIDUALS ARE THOSE NATURAL RIGHTS WHICH ARISE FROM A PERSON'S NATURAL SEXUALITY. SPECIFICALLY, 1) THE STATE MAY NOT FORCIBLY LIMIT ANY PERSON'S

page

NATURAL FERTILITY OR PREVENT PERSONS FROM NATURALLY CONCEIVING OR BEARING CHILDREN, AND 2) THE STATE MAY NOT FORCE ANY PERSON TO CONCEIVE CHILDREN NOR COMPEL ANY PERSON TO PROVIDE REPRODUCTIVE MATERIAL FOR THE ARTIFICIAL CONCEPTION OR GESTATION OF CHILDREN. 51

B. THE STATE'S REGULATION OF BIRTH CONTROL TECHNOLOGIES POSES NO THREAT TO THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE DECISIONS. 58

CONCLUSION 64

APPENDIX A -

DESCRIPTION OF AMICI 1a

APPENDIX B -

page

A SUMMARY OF SOME PUBLISHED CASES OF MINORS AND WOMEN COERCED INTO ABORTION 3a

TABLE OF AUTHORITIES

Cases

Buck v. Bell, 274 U.S. 200 (1927) . 46, 47

Eisenstadt v Baird, 405 U.S. 438 (1971) 22-24, 26, 54

Griswold v. Connecticut 381 U.S. 479 (1964) 21, 22, 25

Hodgson v Minnesota, 648 F.Supp. 764-65 (1988) 15

Poe v. Ullman, 367 U.S. 497 (1960) . . 21

page

Roe v Wade, 410 U.S. 113 (1973) 3, 11, 13, 18, 19

Wells v Ortho Pharmaceutical Co., 615 F.Supp. 262 (N.D. Ga. 1985) 26

Other Authorities

"Doctor's Abortion Business Is Lucrative", San Diego Union, Oct. 12,, 1980 B1:1. . 38

"The China Solution," Science Digest, 91:4, (April 1983). 35

Blumberg, et.al. "The Psychological Sequelae of Abortions Performed for a Genetic Indication", American Journal of Ob&Gyn. (1975), 122:7. 8

Chase, The Legacy of Malthus: The Social Costs of the New Scientific Racism (New York: Alfred A. Knopf, 1977). . 33, 38, 42, 44, 46

Craven, "Abortion, Poverty and Black Genocide: Gifts to the Poor?", Abortion and Social Justice, eds. Hilgers and Horan, (New York: Sheed & Ward, 1972). 36, 44, 46

Denes, In Necessity and Sorrow: Life and Death in the Abortion Clinic (New York: Basic Books, 1976). 37

Drogin, Margaret Sanger (Coarsegold, CA: CUL Publications, 1980). 47

Ehrenreich, et.al., "The Charge: Genocide," Mother Jones (November 1979). 39

Family Planning Perspectives, Special supplement-U.S. Population Growth and

Family Planning: A Review of the Literature, vol. 2, no. 4, October 1970, ff.p.24. 36

FDA Consumer 25 (April 1976) 28

Francke, The Ambivalence of Abortion (New York: Random House, 1978). 15

Friedman,et.al.,"The Decision-Making Process and the Outcome of Therapeutic Abortion", American Journal of Psychiatry (December 12, 1974), vol.131, 1332-1337. 6

Greer, Sex and Destiny: The Politics of Human Fertility (New York:Harper & Row, 1984). 33, 38, 44, 60

Hardin, "The Tragedy of the Commons," Science December, 1968, 1243-1248. 43, 44

Heath,"Psychiatry and Abortion", Canadian Psychiatric Association Journal (1971), vol.16, 55-63. 8

Jick, "Vaginal Spermicides and Congenital Disorders" 245 J.A.M.A. 1329-32 (1981). 26

Kasun, The War Against Population: The Economics and Ideology of Population Control, (San Francisco: Ignatius Press, 1988). 33, 41, 42, 44, 48, 60

Kippley, The Art of Natural Family Planning, (Cincinnati: Couple To Couple League International, 1984.) 61

Lader, Abortion II: Making the Revolution (Boston: Beacon Press, 1973). 34

Lazarus, "Psychiatric Sequelae of Legalized Elective First Trimester Abortion", Journal

of Psychosomatic Ob&Gyn, (1985),vol.4, 141-150. 6

Ludmerer, Genetics and American Society: A Historical Appraisal (Boston: John Hopkins University Press, 1972). 47

Mahkorn, "Pregnancy and Sexual Assault", , The Psychological Aspects of Abortion, Mall and Watts, ed., (Washington D.C.: University Publications of America, 1979). . . 8

Maloof "The Consequences of Incest: Giving and Taking Life", The Psychological Aspects of Abortion, Mall and Watts, eds. (Washington D.C.: University Publications of America, 1979). 8

Mendelsohn, Male Practice: How Doctors Manipulate Women (Chicago: Contemporary Books, 1981). 40, 41

Miller, "Native American Peoples on Trail of Tears Once More," America, 9 December 1978. 46

Nathanson, Aborting America (New York: Doubleday, 1979). 37

National Right to Life News, "Mother Files $1 Million Lawsuit...", October 23, 1986, 6. 12

Osofsky, eds., The Abortion Experience (New York: Harper and Row Publishers, Inc., 1973). 9

Pare and Raven,"Follow-up of Patients Referred for Termination of Pregnancy", The Lancet (1970) vol.1,635-638. 7

Rayburn and Laferia,"Mid-Gestational Abortion for Medical or Genetic

Indications", Clinics in Ob&Gyn. (March 1986), vol.13,no.1. 8

Reardon, Aborted Women - Silent No More, (Chicago, Loyola University Press, 1987). 2, 5-10, 17, 37, 46

Rosenblum, "Coercion in Liberation's Guise," Abortion and Social Justice, ed. Hilgers and Horan, (New York: Sheed and Ward, 1972). 45

Sanger, The Pivot of Civilization (New York: Brentano's Publishers, 1922). . . 44

Senay, "Therapeutic Abortion: Clinical Aspects", Archives of General Psychiatry (1970),vol.23,pp408-415. 6

Simon, The Ultimate Resource (Princeton: Princeton University Press, 1981). 33, 36, 42, 60

The Human Right to Family Planning,
International Planned Parenthood
Federation, London, 1984. 41

Zeckman and Warrick, "Abortion Profiteers"
Special Reprint, Chicago Sun-Times,
1978. 37

Zimmerman, Passage Through Abortion (New
York: Praeger Publishers, 1977). . 2, 5, 6

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

Nos. 88-1125 and 88-1309

JANE HODGSON, M.D., et al.,
Petitioners,

v.

STATE OF MINNESOTA, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICUS CURIAE OF THE ELLIOT INSTITUTE FOR SOCIAL SCIENCES RESEARCH, AND THE AMERICAN ACADEMY OF MEDICAL ETHICS.

INTERESTS OF AMICI

The Elliot Institute for Social Sciences Research, and the American Academy of Medical Ethics favor holding the Minnesota statute, Minn. Stat. Ann. §§ 144.343 (2)-(7) (1987) constitutional in its entirety. Amici believe that limitations on State regulation of abortion have resulted in the exploitation of women and minors who are at high-risk of suffering abortion related complications. Knowing that these high-risk women are being coerced into abortion for the convenience of others, Amici supports parental and State involvement which protects women from unwanted abortions and which preserves their natural rights to reproductive freedom.

SUMMARY OF ARGUMENT

Thirty to sixty percent of all women having abortions actually want their child-

ren.[1] Many of these women submit to unwanted abortions only because they feel pressured or coerced into aborting pregnancies which are "unwanted" by their boyfriends, husbands, physicians, counselors, welfare workers, or population planners. The involvement of parents may often be the only protection a minor has from the pressures which make her feel abortion is her "only choice."

It is an undeniable fact that abortion involves health risks. Though the exact frequency and extent of these risks are in dispute, the right to evaluate these threats properly lies with the State. The State has a right to judge the "significance" of the health risks of any product or service and to regulate or prohibit trades or practices accordingly. This

---

[1] M. Zimmerman, Passage Through Abortion, 110-112 (1977) (hereinafter Zimmerman); D. Reardon, Aborted Women - Silent No More, 12,51 (1987) (hereinafter Reardon).

right includes the right to regulate reproductive technologies, including abortion.

Abortion, itself, is not a fundamental right, but rather an "evolved" right. In Roe v Wade, 410 U.S. 113, 163 (1973) this right was described as evolving from advances in medical technology by which abortion may now be safer than childbirth. According to this reasoning, as technological changes reveal abortion to be more or less dangerous, the State's "compelling" interests increase or decrease proportionately. Therefore, since abortion involves risks even in the first trimester, some of which were not recognized prior to Roe, the State has a compelling interest in regulating abortion throughout pregnancy.

The fundamental issue before this Court is to identify the proper balance between the rights of individuals and of the State. Amici will show that the right of States to regulate birth control technologies

includes the right to regulate abortion. Yet at the same time, Amici recognizes that the State's right to regulate these technologies, is properly limited by the inherent and natural right of individuals to conceive and bear children.

Such a balance of natural rights versus regulation of technology can and should be enunciated, especially now when individual rights are being threatened as never before. In the place of the present confusion surrounding "privacy" rights, Amici offers the Court a clear rationale and timeless standard for protecting both the natural reproductive rights of individuals and the right of State to regulate technologies and commerce.

ARGUMENT

I. PARENTAL NOTIFICATION REQUIREMENTS SERVE TO PROTECT MINORS FROM BEING COERCED INTO UNWANTED ABORTIONS.

Many women and minors face coercive pressure to undergo unwanted abortions of desired pregnancies.[2] Furthermore, it has been shown that 65 to 70 percent of women

---

[2] Between 30 and 60 percent of women having abortions have a positive desire to carry the pregnancy to term and keep their babies. [Zimmerman,110-12,120; Reardon, 12,51] This desire to keep the child is overcome only by external pressures. In a study of over 250 women who had suffered physical or psychological aftereffects from abortion, 55 percent felt "forced" into an unwanted abortion by others and 64 percent felt "forced" by their circumstances. Only 33 percent felt free to make their own decision, and 61 percent felt their lives and decisions at that time were very much "controlled by others." [Reardon, 10-11] Pro-choice researchers have similarly found that over two-thirds of the women made statements suggesting they had "no choice" or were "forced" to have an abortion. [Zimmerman, 193] Testimony from minors who were coerced into abortion are included in the appendices to this brief.

seeking abortions have a negative moral view of abortion.[3]

Coercion and moral ambivalence are the primary factors which determine whether or not a woman is likely to suffer long-term mental health problems as a result of her abortion. Women are at high risk of severe post-abortion psychiatric reactions if: 1) they feel coerced by others, either overtly or covertly, into choosing an abortion; 2) they feel "forced" by circumstances into aborting a wanted pregnancy; 3) they have ambivalent feelings about the moral rightness of their abortion; or 4) if they have unresolved feelings of desire for their pregnancies or their babies.[4]

---

[3] Zimmerman, 69; Reardon, 13

[4] Friedman,et.al.,"The Decision-Making Process and the Outcome of Therapeutic Abortion", Am. J. Psychiatry, v.131, 1332-1337 (1974) (hereinafter Friedman); Senay, "Therapeutic Abortion: Clinical Aspects", 23 Archives of Gen. Psych., 408-415, (1970); Lazarus, "Psychiatric Sequelae of Legalized Elective First Trimester

Abortion", 4 J. of Psychosomatic Ob&Gyn, 141-150 (1985); Pare and Raven,"Follow-up of Patients Referred for Termination of Pregnancy",The Lancet, v.1, 635-638 (1970); Reardon, 131-38.

If any of these conditions exist, the woman is likely to experience her abortion as in conflict with her maternal instincts and moral self-image. For these women, abortion is not a glorious right by which they are able to reclaim control over their lives; instead it is an "evil necessity" to which they are forced to submit because they "have no choice." Rather than affirming their values, these women feel forced to compromise and betray their values. The resulting blow to a woman's self-image can result in: suicidal behavior, drug and alcohol abuse, radical personality changes, loss of interest in previously enjoyed activities, emotional breakdown, memory loss, eating disorders, sexual dysfunction, psychosomatic illness, emotional numbness, sleep disorders, increased tendency toward violence, child abuse, difficulty bonding with later children, and more. The summary of a detailed survey of 100 high-risk abortion patients, entitled "Post-Abortion Reactions of High Risk Abortion Patients," has been lodged with this brief.

It is noteworthy that the criteria for high risk abortion patients - feelings of being under pressure to abort and feelings of ambivalence - are typical of women who abort for reasons of physical health. psychological health, fetal malformation, and rape or incest. Indeed, when viewed within the framework of high-risk criteria, all of the categories typically associated with "hard case" abortions are actually contra-indications for abortion. While there are

Sixty to eighty percent of all women having illegal abortions can be classified as "soft-core" aborters who choose abortion only to please others, or because they feel at a loss for other options.[5] For these women, abortion is at best a marginal choice, at worst a choice which is literally forced upon them. Very few of these women would freely choose abortion in

---

many reasons for this, a simplified explanation is that the harder the circumstances which a pregnant woman faces, the more likely she is to feel "forced" into a decision which is not freely her own. See Rayburn and Laferia,"Mid-Gestational Abortion for Medical or Genetic Indications", Clinics in Ob&Gyn. (1986), vol.13,no.1., Heath,"Psychiatry and Abortion", 16 Canadian Psych. Assoc. Journal, 55-63 (1971); Blumberg, et.al. "The Psychological Sequelae of Abortions Performed for a Genetic Indication", 122:7 Am. J. Ob&Gyn. (1975), Mahkorn, "Pregnancy and Sexual Assault", and Maloof "The Consequences of Incest: Giving and Taking Life", The Psychological Aspects of Abortion, Mall and Watts, eds. (1979); Reardon, 161-218; Friedman, 1332-1337.

[5] Reardon, 131-134,297-300.

the presence of emotional, social, or financial support. Very few would have had an illegal abortion under the protection of pre-Roe laws.[6]

Thus, one effect of legalizing abortion has simply been to make it easier to pressure women into unwanted abortions. Parents are frequently the only ones who can help to alleviate these pressures.[7]

Ironically, nothing prevents parents from forcing their daughters to have abortions. Such coercion is in fact, rela-

---

[6] Only 6 to 20 percent of the women having abortions would have been willing to seek an illegal abortion. Osofsky, eds., The Abortion Experience, 196-98 (1973); Reardon, 13.

[7] In the Reardon sample of 252 high-risk women, 83 percent stated they would have kept the pregnancy if they had been encouraged to do so by one or more other persons, and 84 percent would have carried to term under "better circumstances." To the degree that parents may provide the encouragement or circumstantial aid which a minor needs and wants, young girls can be helped to avoid the "evil necessity" of an unwanted abortion. [Reardon, 10-11]

tively common. [Reardon, 11] There are even documented cases where the parent with custody of a child forced an abortion on the girl which the non-custodial parent would have prevented. [Reardon, 212-218]

Parents who would take a pro-abortion stance almost inevitably get the opportunity to force their will upon their child, since a pregnancy cannot be hidden forever. Yet parents who would support and encourage a daughter to keep her child are often denied any input.

In short, without parental notification, present law acts as a one way funnel which allows parents to pressure their daughters into abortions, yet prevents those parents who would support childbirth from helping their daughters avoid unwanted abortions.

II. PARENTAL NOTIFICATION REQUIREMENTS PROVIDE HELP TO REDUCE OR PREVENT THE HARMFUL AFTEREFFECTS OF ABORTION IN MINORS.

Roe recognized that women do not have an absolute right to abortion, but rather that it is "primarily a medical decision, and basic responsibility for it must rest with the physician." (at 166, also 163) Yet parental involvement is equally important, and perhaps even more important, since the attending physician may have little or no knowledge of the girl's medical history. Worse yet, the abortion providers may have a blatant disregard for a young girl's medical history.[8]

---

[8] In 1986, Mrs. Wallis B. Renner filed a $1 million lawsuit against Planned Parenthood of Central Indiana claiming they risked the life of her 16-year-old daughter in providing her with an abortion despite two court orders blocking the abortion. Mrs. Renner had obtained the court orders because her daughter had certain abnormalities of the cervix which her own doctor testified would cause serious physical problems or even death if the girl underwent an abortion. The Planned Parenthood

In addition parents have an obvious need to know when their child has been through an abortion so that they can provide special care if and when it becomes necessary. The fact that a minor might be too ashamed to tell her parents about an abortion is highly suggestive that she has conflicting feelings about her decision, and thus is more likely to be a high-risk patient. Furthermore, to allow the abortion to remain hidden only increases the pressure on the daughter to repress and hide her feelings which, in turn, may aggravate her long-term reaction.

---

counselors even denied Mrs. Renner the right to ensure that the out-of-state abortionist was informed of her daughter's condition. Following the abortion, Mrs. Renner's daughter suffered severe cramps for which she required treatment. Bond, "Mother Files $1 Million Lawsuit," National Right to Life News, October 23, 1986, p6.

III. ROE DID NOT GRANT WOMEN A FUNDAMENTAL RIGHT TO ABORTION, BUT FOUND THIS NEW RIGHT AS EVOLVING FROM THE DEVELOPMENT OF NEW TECHNOLOGIES WHICH MAY HAVE MADE ABORTION "SAFER THAN CHILDBIRTH."

The challenge against State notification laws hinges on the contention that such laws impose undue hardship on a minor's exercise of her fundamental rights. But access to abortion technology is clearly not a fundamental right of women, as can be seen by the fact that Roe assigns responsibility and control over abortion primarily to the attending physician. Roe, 410 U.S. at 163 and 166.

But if the consultation and consent of a physician can be required in the making of this health decision, why not the consultation and consent of parents? Why not the consultation and consent of the State? Parents and the State have an interest in safeguarding the health of women which is

equal to or greater than that of individual physicians.

The following arguments will examine the State's compelling interest in safeguarding the health of women through parental notification or direct regulation of abortion technology.

A. ABORTION TECHNOLOGIES INVOLVE HEALTH RISKS WHICH WERE NOT KNOWN, WERE NOT UNDERSTOOD, OR WERE OTHERWISE IGNORED IN ROE V. WADE.

While Roe considered only the mortality rate of abortion in its determination that abortion is "safe," new evidence suggests that there are unforseen psychological and reproductive complications resulting from abortion. These health risks have been amply documented for the Court in other briefs and the medical literature and will not be elaborated on here.

Notably, even proponents of abortion do not claim that it is risk free.[9] Indeed, they oppose notification requirements on the grounds that a delay in procuring an abortion can result in a statistically significant increased mortality risk. Hodgson v Minnesota, 648 F.Supp. 756, 764-65 (1988). But if such statistical risks are compelling enough to warrant judicial action, then certainly the State can also find in the same statistical risks compelling reasons for regulating abortion.

Abortion's defenders do not deny its risks so much as downplay them, arguing

---

[9] In fact, the undesirable nature of abortion is universally acknowledged. Abortion providers go to great lengths to encourage sterilization or improved birth control practices for patients, and frequently express disdain toward women who come back seeking repeat abortions. [Francke, The Ambivalence of Abortion, 182 (1978)] If there is nothing wrong with abortion, why do abortion supporters advocate its avoidance? If abortion is "safe," why not promote its use in place of the Pill which has numerous health risks.

that the damages caused by 1.5 million abortions per year are "acceptable" or "minimal." But such evaluations are clearly value judgments. If the State can be concerned about unintended deaths from abortion, why not subsequent miscarriages or ectopic pregnancies? Who is to decide what the "acceptable" limits of abortion induced depression, guilt, suicide, or child abuse are to be?

If the Court continues to reserve to itself the right to judge the relative risks of abortion, will it require that the Surgeon General bring future research into the aftereffects of abortion before the Court to be ratified and approved? Or is all future research irrelevant once the Court has declared this technology to be safe? Obviously not.

Given the uncertainty surrounding the impact of all technologies, the State's compelling interests may change with time.

The State must be free to adjust regulation of technology in accordance with such new information and needs.

B. THE STATE'S TWO-FOLD INTEREST IN PROTECTING THE HEALTH OF WOMEN AND PROTECTING THE LIFE OF HUMAN EMBRYOS MITIGATES AGAINST ANY ABSOLUTE RIGHT TO ABORTION TECHNOLOGY.

Since abortion has health risks, even during the first trimester, the State may find in these risks a compelling interest to protect women from these risks throughout pregnancy.[10]

---

[10] The State's right to regulate this technology is especially important since there is no guarantee that women considering abortions will be adequately and accurately informed of the health risks or will be in the proper emotional state to rationally weigh these risks. The record of abortion providers withholding information about the risks of abortion for fear of discouraging their client from "the right choice" has been well documented by numerous sources. For a review of the literature see Reardon, 232-271.

IV. ROE DID NOT RECOGNIZE AN ABSOLUTE RIGHT OF ABORTION, BUT RATHER FOUND THIS NEW "RIGHT" AS HAVING EVOLVED FROM TECHNOLOGICAL ADVANCES.

The rationale for the abortion right enumerated in Roe rests entirely on the disputed "fact" that advances in medical technology make "abortion in early pregnancy...relatively safe"(at 149) and that today "mortality in abortion may be less than mortality in normal childbirth." (at 163).

But how can a "fundamental" human right come into existence only when abortion appears to be safer than childbirth? If it is a fundamental right, then it is a right which exists regardless of its dangers. By what power can any fundamental right be expanded or contracted merely by changes in medical technology?

The answer is that abortion is not a fundamental right. Rather, it is an

evolved right which rests upon advances in medical science.

Because it was dealing with an evolved right, the Roe majority erred in thinking that the medical "facts" which it found to be compelling in 1973 would not change with the acquisition of new knowledge, new technologies, and new social values in 1990 and beyond. If at one moment in history the State's "legitimate interests in protecting both the pregnant woman's health and the potentiality of human life" (Roe, 410 U.S. at 115,149) can contract, then at another point in history they can expand. If, for example, new technologies make unsuspected risks more apparent, the State's rights may expand. Similarly, knowledge of fetal development, new theories of "meaningful life," and advances in fetal medicine and

artificial wombs may also change the states "compelling" interests over time.[11]

V. THE STATE HAS A LEGITIMATE INTEREST IN REGULATING BIRTH CONTROL TECHNOLOGIES SUCH AS ABORTION.

A. THE MEDICAL COMMUNITY IS ALREADY LEGITIMATELY REGULATED BY GOVERNMENT BODIES, AND THIS REGULATION INCLUDES REGULATION OF BIRTH CONTROL TECHNOLOGIES.

B. THE RIGHT OF THE STATE TO CONTROL BIRTH CONTROL TECHNOLOGIES IS ALREADY ESTABLISHED IN CONSTITUTIONAL LAW.

---

[11] In its eagerness to grant physicians the right to perform "safe" abortions, which many States were already recognizing, the Roe majority's fundamental error was in granting itself the authority to restrict and define those interests which the State could find to be "compelling." If the State is not free to be guided by its own judgments of what is compelling and what it not, then the State is not free at all.

In Griswold v. Connecticut 381 U.S. 479 (1964), at 485, the Court recognized that the State could regulate the manufacture, sale, and distribution of contraceptives in the same way that it is empowered to regulate any other trade or commerce.[12]

As emphasized in Griswold, the failure of the Connecticut law was not that its goals, or even its means were illegitimate, but rather that its means were incongruous with other laws. To allow the manufacture and distribution of contraceptives, but to ban their "use" is unreasonable. Such a

---

[12] In his dissent in Poe v. Ullman, 367 U.S. 497 (1960), which anticipated his majority opinion in Griswold, Justice Douglas recognizes that States would have a right to ban completely the sale of contraceptives through drug stores, or even ban the manufacture of contraceptives because: "Where either the sale or the manufacture is put under regulation, the strictures are on business and commercial dealings that have had a long history with the police power of the States. The present law, however, deals not with sale, not with manufacture, but with use." (at 519).

means, in the absence of less intrusive controls, "sweep unnecessarily broadly and thereby invade the area of protected freedom." (at 485) The necessity of proving the use, not just possession, of contraceptives to enforce this law clearly would involve severe invasion of marital privacy. Nonetheless, as Griswold allows, the State does have the right to regulate contraceptives by other means.

Similarly, in Eisenstadt v Baird, 405 U.S. 438, 443,454 (1971) and White concurring, at 463, the plurality allows for the State's legitimate interests in regulating contraceptives for the purposes of protecting health or discouraging extramarital relations. In its recognition of these interests, Eisenstadt supports the present arguments of Amici.

But the Eisenstadt decision warrants further discussion because while the Court therein acknowledged the State's right to

regulate birth control technologies, in fact the plurality did not allow itself to be governed this principle. Instead the Court gave itself the authority to strike down the Massachusetts law on the grounds that it doubted the sincerity of the Massachusetts legislators' goals.[13]

Specifically, the Court questioned the sincerity of the Massachusetts' legislation

---

[13] Though the State sincerely claims its legislation is intended to be a health measure, the majority rejects that claim. (at 452) The State claims further that its legislation is intended to deter immorality, and the Court finds this claim to be absurd. (at 449) When the Court thus judges the sincerity of duly elected legislators, the Court overreaches itself. If legislators are insincere and oppressive in their legislative efforts, they will be forced to answer to the people when seeking reelection -- especially if their insincerity is leading them to oppress the people's rights. But if their reasoning, even if flawed, represents the opinion of the majority of citizens, than the legislature's rationale is a reasonable representation of the people's will. Similarly, whether or not a State's legislation is effective at reaching difficult goals is an issue for the legislatures to decide, not the judiciary.

regulating distribution of contraception on moral grounds because the State allowed for the "exception" of unregulated distribution of condoms. (at 448,449) But this "exception" existed because the State chose to classify condoms as being primarily a prophylactic with a secondary effect as a contraceptive. For logical reasons the State therefore chose to regulate prophylactics differently than other contraceptives.[14] Given the present AIDS crisis, which Surgeon General Koop assures us can be alleviated by the promotion of condoms, the Eisenstadt decision appears in hindsight to have dismantled an important public health

[14] And even if condoms should be classified as a contraceptive, the simple fact that a State prefers to encourage the use of one contraceptive method over another, does not provide constitutional grounds for preventing States from regulating birth control technologies which it does not favor.

policy which gave preferable treatment to prophylactic birth control devices.

The existence of "exceptions" in any law is not proof of a legislature's insincerity, much less its unconstitutionality. If the laws appear to be filled with "exceptions", such is the natural result of legislatures working to achieve compromises which reflect both charity and justice, freedom and control. Though the law in question was imperfect and prone to "exceptions," such compromises are the backbone of American legislation.[15]

The Eisenstadt plurality further ruled that States could not limit distribution of contraceptives to physicians simply because the Court did not believe that protecting the health and ensuring accurate contracep-

[15] When the judiciary sets itself up to judge the sincerity of legislator's motives and the logical purity of their laws, it is doing nothing less than engaging in judicial activism. (see Griswold, 381 U.S., Black dissenting, 520-524)

tive advice was the true intention of the legislature.(at 450-451) But even if one ignores this disparagement of the Massachusetts legislature's integrity, this argument fails because it takes a very narrow view of the State's health concerns. Birth control technologies involve a broad range of health and social issues, including the risk of unplanned pregnancies.

Specifically, the Eisenstadt majority forbad State regulation of the distribution of contraceptives which have no health risks. (at 451, White concurring, 464) But spermicidal agents, the contraceptive at issue in Eisenstadt, are now known to carry the risk of causing genital irritation, infection, serious fetal malformations, and miscarriage.[16]

---

[16] Jick, "Vaginal Spermicides and Congenital Disorders" 245 J.A.M.A. 1329-32 (1981). In Wells v Ortho Pharmaceutical Co., 615 F.Supp. 262 (N.D. Ga. 1985), plaintiffs were awarded $5.6 million in compensatory damages for birth defects

Since the health effects of any technology can remain undetected for many years, it is imprudent for the Court to ever classify any contraceptive as "safe" merely on the evidence available at one point in time. Determination of when a contraceptive has been sufficiently proven to be "risk-free" is properly left to the individual States.

In addition spermicides, like many other contraceptive devices, have a high failure rate in preventing conception. Therefore, State regulation of those who distribute and counsel others in the use of birth control technologies is clearly reasonable when the State's "health" interests are broadly construed to include concern for unplanned pregnancies.

---

resulting from spermicide use.

C. STATES MUST BE FREE TO ADJUST REGULATION OF BIRTH CONTROL TECHNOLOGIES TO MEET CHANGING CONDITIONS.

Reproductive control decisions have a number of personal and social implications. For example, during a time of a great venereal disease threat such as AIDS, it is conceivable that the State may seek to promote prophylactic contraceptives and discourage other methods. At other times, the State may wish to ban contraceptives which are less effective or have greater risks than other alternatives.[17]

Judicial intervention in the regulation of birth control technologies threatens the ability of the States to respond to changing social and public health needs. If at times legislation falls behind current

---

[17] Such was the case when the FDA forced the removal of "sequential pills" from the market because, according to current data, combination pills are more effective and have fewer risks. FDA Consumer 25 (April 1976).

knowledge of what is "safe" or "effective," public opinion will soon force change. The judiciary should restrain its desire to intervene as a super-legislature.

In the cases of Eisenstadt and Roe, the Court forced changes upon the States which the legislatures were already freely considering. The result of such judicial activism is the establishment of arbitrary and confusing law, an invitation to duplicate such activism in the lower courts, and heightened tension between the courts and the legislatures. Let legislators legislate, and eventually they will get it right on their own.

D. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS ESPECIALLY JUSTIFIED BECAUSE PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS HAVE A FINANCIAL INTEREST IN PROMOTING BIRTH CONTROL TECHNOLOGIES WHICH MAY HAVE DETRIMENTAL

SIDE-EFFECTS OR MAY BE LESS THAN FULLY EFFECTIVE.

The birth control and abortion industries in America encompass a multi-billion dollar market plus hundreds of millions in government subsidies. Drug manufacturers, physicians, and family planning agencies all enjoy a share in these profits, and all of these parties have a financial interest in these technologies.

Part of this promotion includes defending their technologies from charges of being unsafe. Thus, like the tobacco industry which publishes a study exonerating cigarettes for every study which condemns them, so the drug companies publish a study "proving" their contraceptives are "safe" for every study which suggests the opposite. The controversies surrounding the health risks of the IUD and the Pill, for example, have gone on for decades and are still unresolved.

Thus, while evidence exists to defend or condemn any birth control device, those who sell these products will tend to believe and promote the evidence which supports their interests. If the State considers such a one-sided assessment of risks to be an exploitation of the people, it may properly regulate these technologies according to its own assessment of risks and effectiveness.

E. STATE REGULATION OF BIRTH CONTROL TECHNOLOGIES IS ESPECIALLY JUSTIFIED BECAUSE MANY PHYSICIANS, FAMILY PLANNING AGENCIES AND DRUG MANUFACTURERS ARE IDEOLOGICALLY BOUND TO REDUCING BIRTHS AMONG SOME CLASSES OF WOMEN REGARDLESS OF THE DETRIMENTAL SIDE-EFFECTS WHICH THEIR TECHNOLOGIES WILL IMPOSE ON WOMEN.

The natural reproductive rights of persons are being threatened. But contrary to the rhetoric surrounding the abortion

issue, the rights of individuals are threatened not by anti-abortionists, but by pro-abortionists.

Many of the persons and organizations who advocate abortion under the banner of "reproductive freedom" are in fact less concerned about the reproductive freedom of individuals than about the control of individuals' reproduction. These population controllers and social engineers realize that in order to achieve their eventual goal of forced reproductive control for the "common good" they must first expand individual "rights" to include the tools they will need. After all, if abortion is accepted for the individual good of women, why not require forced abortion for the "common good?"

A good case can be made that it is population controllers who initiated the movement to legalize abortion, financed the movement, promoted abortion, and provided

abortions, and have erected social structures to pressure women, especially among the poor, into having unwanted abortions. These groups and individuals have exploited women's rights rhetoric to advance their own goals at the expense of women's rights and with the intent of further exploitation of women.[18]

The examples of "pro-choice" advocates supporting coercive population control, including forced abortion, are numerous. For example, Lawrence Lader, founder of the National Abortion Rights Coalition, and author of the pro-abortion tract Abortion (1966) which cited as an authority eight

---

[18] While this argument is only tangentially related to the issues at hand, ample evidence can be found in the J. Kasun, The War Against Population: The Economics and Ideology of Population Control, (1988) (hereinafter Kasun); A. Chase, The Legacy of Malthus: The Social Costs of the New Scientific Racism (1977) (hereinafter Chase), J. Simon, The Ultimate Resource (1981) (hereinafter Simon); G. Greer, Sex and Destiny (1984) (hereinafter Greer).

times in Roe v. Wade, was instrumental in convincing N.O.W. to adopt a pro-choice position because of the symbolic importance of the "right of women to control their own bodies."[19] But while Lader defends a "pro-choice" position on one hand, he is also a radical proponent of coercive population control, arguing that forced population control, including forced abortion, is "imperative," both at home and abroad, since "We must accept the principle that having a child is no longer a matter of private will, but of public welfare." [Lader, 218-222.]

In a review of the Chinese program of forced population control which includes forced abortion, forced sterilization, forced contraceptive implants, and infanticide of handicapped newborns and undesir-

[19] Lader, Abortion II: Making the Revolution, 36-40 (1973).

able female offspring, Lader has only the highest praise.[20] Similarly, N.O.W. president Molly Yard has defended the Chinese anti-choice policy, saying: "I consider the Chinese governments policy among the most intelligent in the world...a one-child per family policy."[21] And the international arm of Planned Parenthood has willingly sacrificed millions of dollars of U.S. government funding rather than stop providing personnel and funding to support the coercive population control in China.

Planned Parenthood has frequently supported coercive population control. For example, at the White House Conference on Hunger in 1969, Dr. Charles U. Lowe of H.E.W. and Dr. Alan Guttmacher of Planned Parenthood urged a national policy of (1)

[20] Lawrence Lader, "The China Solution," Science Digest, 91:4, April 1983, 78.

[21] Transcript of "Oprah Winfrey Show," July 6, 1989.

mandatory abortion for any unmarried girl found pregnant within the first three months of pregnancy, and (2) mandatory sterilization of any such girl giving birth out of wedlock for a second time.[22] Planned Parenthood president Faye Whattleton has likewise promoted an us-against-them, rich-versus-poor mentality as motivation for population control at any price.[23]

---

[22] E. Craven, "Abortion, Poverty and Black Genocide: Gifts to the Poor?", Abortion and Social Justice, eds. Hilgers, 235 (1972). Similarly, Frederick Jaffe, Vice President of the Planned Parenthood/World Population and head of research for Alan Guttmacher, has argued for government population programs which would require "permits for children", "compulsory sterilization of all who have two children", "compulsory abortion", "encourage homosexuality", and "fertility control agents in water supply." Family Planning Perspectives, Special supplement-U.S. Population Growth and Family Planning: A Review of the Literature, vol. 2, no. 4, October 1970, ff.p.24.

[23] In a fundraising letter [Simon, 327] Whattleton inflames the fears of true-blue Americans against the rising expectations of Third World peoples, writing:

> Thai women and millions of other women like them in India, China, Africa and

Pro-choice sources also reveal that some abortionists openly display sexist and even misogynous attitudes toward women;[24] they

---

> throughout the developing nations control our destiny. Their decisions--decisions of hundreds of millions of young women--about their family's size--control your future more surely, more relentlessly than the oil crisis or the nuclear arms race.
>
> ...unless population growth is harnessed and slowed to meet the limited resources and human services of these nations, development will be shattered. Chaos, mass famine and war will continue to increase. We will be affected for better or worse.
>
> The great tinderbox of revolution and international anarchy is rising expectations of the world's masses coupled with unrestrained population growth. Starvation, revolution and violent repression will fill our headlines unless human fertility is reduced... (Emphasis her own.)

In short, her message is that if we do not control them, they will breed themselves into a position of power over us; preservation of America's dominance depends on aborting, sterilizing, and contracepting the Third World at any price.

[24] Denes, In Necessity and Sorrow 227,79,134 (1976); Nathanson, Aborting America, 110 (1979); Zeckman and Warrick, "Abortion Profiteers" Special Reprint, Chicago Sun-Times, 11-15, (1978); Reardon p266-270.

provide abortions less to help the women than to prevent these "unfit" persons from raising "unfit" children.[25] Such attitudes are pervasive, throughout the medical and population control industry.[26]

Persons or organizations who advocate coercion, privately or publicly, would certainly not hesitate to conceal or under-

[25] Dr. Edward Allred, owner of the largest chain of abortion clinics in California is a staunch advocate of abortion as a method of controlling the population of minority groups: "Population control is too important to be stopped by some right-wing pro-life types. Take the new influx of Hispanic immigrants. Their lack of respect of democracy and social order is frightening. I hope I can do something to stem that tide; I'd set up a clinic in Mexico for free if I could.... When a sullen black woman can decide to have a baby and get welfare and ~~food~~ stamps and become a burden to all of us it's time to stop." "Doctor's Abortion Business Is Lucrative", San Diego Union, Oct. 12,, 1980 B1:1.

[26] For an in depth analysis of the population controller's shocking disregard for the health of Third World women, see noted feminist Germaine Greer's, Sex and Destiny (1984). See also Simon, Chase, and Kasun.

state the risks of abortion or birth control, or even experiment on women with insufficiently tested technologies.[27]

For example, at a 1962 conference sponsored by the Population Council, the IUD was being promoted as the panacea for controlling the world's "overpopulation." Arguing that the risks of IUD use were acceptable, Dr. J. Robert Willson, of the University of Michigan School of Medicine defended its wide-spread promotion saying:

"If we look at this from an overall, long-

[27] In 1970, Planned Parenthood President, Dr. Alan Guttmacher testified before a Senate subcommittee that the health dangers of the Pill are secondary to the social "dangers" of pregnancy and overpopulation. "Expert Decries 'Alarm' on Birth Control Pill," New York Times, Feb. 26, 1970, 50:3. Similarly, Dr. Ravenholt, head of AID's population control programs, defended the widespread promotion of Depo-Provera, despite initial negative results, on grounds that the ill-effects could not be fully ascertained until tested on tens of millions of women. Ehrenreich, et.al., "The Charge: Genocide," Mother Jones, November 1979, p30.

range view, perhaps the individual patient is expendable in the general scheme of things, particularly if the infection she acquires is sterilizing but not lethal." These "expendable" patients are, of course, the "non-productive" welfare recipients, "irresponsible" teenagers, and the "ignorant masses" of the world's under-developed nations.[28]

Dr. Robert S. Mendelsohn has criticized the medical community for participating in the social engineering program of population controllers at the expense of women's health:

> ...some of the worse examples of callous experimentation on unsuspecting women involve new forms of birth control...It is clear to me that present-day physicians will do almost anything to

[28] R. Mendelsohn, Male Practice: How Doctors Manipulate Women 120 (1981) (hereinafter Mendelsohn).

> prevent women from having babies, particularly if they are black or brown, uneducated, or poor. They have been so brainwashed by the population control zealots that no price is too high to pay to lower the birth rate among welfare mothers or in the underdeveloped countries of the world. [Mendelsohn,126]

Population control zealots have announced their determination to advance their goals without regard to local customs, religious beliefs, or national sovereignty. According to Planned Parenthood policy, population control agencies in America and abroad "should not use the absence of law or the existence of an unfavorable law as an excuse for inaction [in promoting birth control and abortion technologies]; action outside of the law, and even in violation

of it, is a part of the process of stimulating change."[29]

If population controllers are willing to promote their agenda in violation of public law, certainly they are willing to promote it in violation of individual rights.

---

[29] The Human Right to Family Planning, International Planned Parenthood Federation, London, 20-21 (1984). Accordingly, International Planned Parenthood has established a policy of promoting and training illegal abortions in developing countries which forbid abortion.[Kasun,188] Similarly, in the U.S., pro-abortion groups such as the Federation of Feminist Women's Health Centers have vowed to train illegal abortionist and teach women self-abortion techniques, the most dangerous kind of abortion, if abortion becomes illegal. ("Group says it will teach do-it-yourself abortion technique," State Journal-Register, Springfield, IL, July 23, 1989, p37) Clearly, these abortion proponents are willing to encourage dangerous abortions even at the risk of killing women; indeed if such deaths occur, they will use such deaths to prove the need for "safe and legal abortions" as they have in the past. But in fact, the legality of abortion has never guaranteed its safety, in terms of morbidity or mortality. See the Feminists for Life Brief in Webster v. Reproductive Health Services.

While the sincerity of population controllers beliefs are not at issue here, it is noteworthy that the myth of overpopulation has been thoroughly exploded and the overwhelming benefits of population growth are only now being understood.[30] For over seventy years eugenicists have been using the threat of imminent national and worldwide disaster as an excuse to interfere with the reproductive lives of people, both at home and abroad, who are either poor, illiterate, or disenfranchised. When

---

[30] See authorities Simon, Kasun, Chase. Even population controllers and eugenicists admit that the arguments against their theory of limited world resources and overpopulation are difficult to refute, but insist merely that their approach of population control is a safer bet. [Hardin, "The Tragedy of the Commons," Science, December, 1968, 1243-1248.] Hardin, incidentally, was one of the earliest proponents of abortion as a "woman's right to control her own body," yet he too supports coercive population control programs, especially of "feeble-minded" groups, because "Injustice is preferable to total ruin." ibid.

boiled down to its essence, their overpopulation theory is predicated on 1) the fact that on average poor people (and nations) always have more children than rich (and nations), and 2) the fear that the children of the poor pose a threat to the wealth and security of the rich. [31]

---

[31] See Authorities Chase, Greer, Kasun, Hardin. For many wealthy individuals and nations, population control has become a substitute for charity. According to one Planned Parenthood supporter, "I'm hooked on this charity...It prevents the need for other charities." (New York Times, Feb. 4, 1978, p20.) Indeed, Planned Parenthood founder, Margaret Sanger abhorred supportive charities for the poor, especially pre-natal medical care, because such charities "perpetuate constantly increasing numbers of defectives, delinquents and dependents. My criticism, therefore, is not directed at the 'failure' of philanthropy, but rather at its success." Sanger, The Pivot of Civilization 105-123 (1922).

For many individuals and governments, advocacy of population control of the poor has supplanted truly progressive social legislation. [Craven, 223-242] It is not poor women who have lobbied the government for abortion and birth control, it is the rich who lobby for it for them. ibid For most poor women, it far easier to get birth control pills than aspirin, easier to get an abortion than dental care. This fact of discrimination is not lost on minorities.

VI. THREATS TO TRUE REPRODUCTIVE FREEDOM FROM PRIVATE INTERESTS AND THE STATE REQUIRE THAT THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE FREEDOM MUST BE CLARIFIED AND STRENGTHENED.

While Amici asks the Court to explicitly confirm the State's right to regulate birth control technologies, such as abortion, Amici also recognizes a need to clarify and strengthen the legitimate and inherent reproductive rights of all persons.

As noted above, population controllers pose a real threat to reproductive freedom.

According to Mrs. Laura Anderson, a black social worker: "The current issue of population, in my mind, displaces an emerging American conscience for human dignity and eradication of poverty and hunger....In my opinion, when we attempt to solve problems by getting rid of people or potential people who will have these problem, like welfare recipients and those who will be poor or hungry, that's genocide. And I join with many people in making this charge against the move toward population control." [Rosenblum, "Coercion in Liberation's Guise," Abortion and Social Justice, ed. Hilgers, 154 (1972).]

The State in turn may also pose such a threat. Federally funded family planning programs have periodically come under attack from recipients who felt coerced into "voluntary" sterilizations or "elective" abortions.[32]

In Buck v. Bell, 274 U.S. 200,207 (1927) the Court explicitly allowed the State to force sterilization on any person considered a "potential parent of socially inadequate offspring" because it is "better for all the world, if instead of waiting to

[32] "[T]here is uncontroverted evidence in the record that...poor people have been improperly coerced into accepting sterilization..." U.S. District Court of D.C., Judge Gesell, Relf V. Weinberger, civil actions Nos. 73-1557,74-243, March 1974.) See also Craven, 263; Reardon 272-278; and Chase, 16-19. In a study of four Indian Health Service hospitals between 1973 and 1976, the GAO found that 3406 sterilizations were performed without the patient's informed consent as a result of a general policy to restrict population growth of Indians. Miller, "Native American Peoples on Trail of Tears Once More," America, 9 December 1978, 423.

execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."[33]

The threat of government control of reproduction even extends outside our

[33] Two years prior to Buck v. Bell, an unknown European foreshadowed Holmes' decision claiming that the unfit were sapping the strength of the State, and in order regulate their births, "the State will have to avail itself of modern medical discoveries. It must proclaim as unfit for procreation all those who are afflicted...and practical measures must be adopted to have such people rendered sterile." The book calling for control of reproduction as a cornerstone of social policy was Mein Kampf, by Adolf Hitler. [Chase,135]

By 1932, American sterilization programs had forcibly sterilized 15,000 persons. German health officials, in turn, structured German eugenic programs on the American model. Ludmerer, Genetics and American Society 118 (1972); Drogin, Margaret Sanger, 24 (1980). When the Germans surpassed America's population control efforts, Paul Popenoe of the American Birth Control League (the original Planned Parenthood), praised the Germans for "proceeding toward a policy that will accord with the best thought of eugenicists in all civilized countries." Ludmerer, 117.

borders. In 1976 U.S. policy, which conditions foreign aid on aggressive population control policies, prodded India into forcibly sterilizing three million people in mobile tent-camps.[34] American policy has similarly encouraged coercive population control programs in numerous other Third World nations. [Kasun,79-94]

But for population controllers, the model government program of population control is China's one-child policy which includes the forced abortion of women who are "handcuffed, tied with ropes or placed in pig's baskets." [Kasun, 91]

True reproductive freedom does not exist under present interpretation of Constitutional rights. If under Bell the State has

[34] Kasun, 85-86. At approximately the same time, Dr. Ravenholt, director of AID's Office of Population insisted that one-quarter of the fertile women of the world must be sterilized to meet U.S. goals of population control and to maintain "the normal operation of U.S. commercial interests around the world." [ibid, 81]

the right to prevent the reproduction of undesirable persons, then surely this would encompass the right to implement forced abortions, or forced contraceptive implants. All that currently separates American population control policy from Chinese policy is the legislative will to openly embrace coercion.

Amici argues that the first step which must be taken toward restoring reproductive freedom is the abandonment of the umbrella "right of privacy." It must be recognized that when the Court first began to articulate this "right," it burdened itself with vague terminology which by its very nature can be either totally meaningless or irresistibly powerful.[35]

[35] The right of privacy presently guiding judicial decision is an undefinable enigma; it "cannot be said to be absolute" [Roe, 154] yet it is a "fundamental" right which repeatedly prevails over State interests. Does the "right of privacy" include only sexual behavior? Birth control access? Reproductive freedom? All private

Envisioned as arising from the shadowy penumbra of the Constitution, this "right" lacks clear guiding principles or even a common understanding which can serve to protect the people, guide the judiciary, or justly restrict the legislatures. Thus, if only for the sake of clarity in the law, this catch-all "right of privacy" must be repudiated.

Amici argues that in the place of the "right of privacy" the Court should recognize the "natural reproductive right" of individuals. This more narrowly defined right addresses the issues raised by the contraception and abortion cases, and draws a clean line between the rights of individuals and the privileges of the State.

With seventy years of legal confusion surrounding issues related to reproductive freedom, such a clarification of the law is

---

behaviors? Semi-private behaviors?

urgently and immediately needed from the Court. A logical and timeless framework for defining the "natural reproductive rights" of persons is described in the remainder of this brief.

A. THE FUNDAMENTAL RIGHTS OF REPRODUCTIVE FREEDOM AS GUARANTEED IN THE CONSTITUTIONALLY RESERVED RIGHTS OF INDIVIDUALS ARE THOSE NATURAL RIGHTS WHICH ARISE FROM A PERSON'S NATURAL SEXUALITY. SPECIFICALLY, 1) THE STATE MAY NOT FORCIBLY LIMIT ANY PERSON'S NATURAL FERTILITY OR PREVENT PERSONS FROM NATURALLY CONCEIVING OR BEARING CHILDREN, AND 2) THE STATE MAY NOT FORCE ANY PERSON TO CONCEIVE CHILDREN NOR COMPEL ANY PERSON TO PROVIDE REPRODUCTIVE MATERIAL FOR THE ARTIFICIAL CONCEPTION OR GESTATION OF CHILDREN.

Whether or not one believes the Declaration of Independence's claim that the inalienable rights of all persons are

endowed upon them by their Creator, the natural reproductive rights of all people are clearly central to our biological humanity. Any law which transgresses these timeless rights for the sake of any social goal, whether to eliminate the "unfit" or to "create a race of thoroughbreds" through eugenic manipulations, violates all human dignity and freedom.

History demonstrates that the more totalitarian a State becomes, the more likely it is to seek to control every aspect of life, even and especially human reproduction, so as to control both the "quality" and quantity of its population. Accordingly, no just government has the right to coerce or force sterilization, contraception, or abortion upon any person or group of persons. Recognition of this right must begin with a rejection of Buck v. Bell.

Amici would further argue that the right to natural fertility includes the right to enter into a natural, heterosexual marriage for the purpose of establishing a family.

But while the right to intercourse within marriage is an inalienable corollary to the natural right of reproduction, sexual activity outside of the marital covenant is not similarly included. The distinction lies in the fact that extramarital intercourse is rarely intended as an exercise of reproductive freedom, but instead is an exercise of sexual self-gratification. Furthermore, the State has had a long standing, and well recognized interest in safeguarding and promoting the special nature of marital relations and protecting the stability of the family unit. Sexual activity outside of marriage such as fornication, adultery, homosexuality, incest, statutory rape, and bestiality have never been recognized as natural rights,

and the State should retain the power to legislate against such activities. Such activities are contrary to nature, destructive of the family, exploitive of persons, diminish human dignity, and beget children into unstable families.

On the other hand, the State's right to discourage sexual activity outside of marriage must still be limited to the extent that it may not forcibly limit the natural fertility of persons engaged in extra-marital activities. Furthermore, the children of illicit unions should be accorded the same rights and status of all other persons since by their conception, their parents entered into a de facto marriage covenant, though perhaps a bigamous one, which invokes mutual responsibilities and duties toward their children and each other.

The right of natural reproductive freedom was alluded to by the Court in

Eisenstadt v. Baird, 405 U.S. 438, at 453, in its statement regarding the right to self determination with regard to an individuals "decision whether to bear or beget a child."

While Amici agrees with the core principle of individual reproductive rights which underlies this statement, the conclusions reached in Eisenstadt are overly broad. For while every individual has the right to control his or her natural reproductive powers, this right does not include the right to use any means or technology a person wants to control the bearing and begetting of children.

While the State must be prohibited from infringing on natural reproductive rights, the State does have a legitimate right to regulate and even proscribe birth control technologies which can be used to limit fertility, enhance fertility, or artificially create new human, or non-human, life.

Since all technologies have social and economic consequences, health consequences, moral consequences, and very frequently, unforseen consequences, and are subject to abuse, nearly all technologies have at one time or another been subject to liability claims in the courts and regulation by duly empowered governments.[36]

With regard to birth control technologies, a term which includes artificial conception and gestation technologies as well as contraceptive and abortifacient technologies, the consequences of these technologies are becoming increasingly complex. For example, the issues of surrogate mothers, custody of frozen human embryos,

---

[36] The only types of technology which might have some claim to Constitutional protection are technologies related to the right to bear arms. But even this technology cannot be given an absolute status. Individuals are not entitled to own any conceivable weapon, but rather are entitled to "reasonable" access to firearms.

<u>in vitro</u> fertilization, and visitation rights of sperm donors, are even now perplexing both the judiciary and the legislature. In the future, such issues as genetic engineering, artificial wombs, animal wombs, cloning for replacement organs, and a whole host of other technologies will arise which will dwarf the present quagmire. Surely the State must have a legitimate interest in regulate present as well as future birth control technologies.

There is no Constitutional basis for distinguishing between birth control technologies and any other technology. Therefore, the Court cannot and should not treat birth control technologies as a "favored technology" and impose restraints on the right of States to regulate this class of technologies.

To limit the right of States to regulate technology on the basis of a shadowy "right of privacy" which is dimly perceived within

the Constitution and hazily-defined within this Court's rulings, is a short-sighted course which will surely lead to ever more confusion in the decades ahead. Perhaps worse, such a limitation on the States will serve as an invitation to technocrats to exploit men and women with ill-conceived and dangerous technologies which will wreak havoc on individuals and society.

B. THE STATE'S REGULATION OF BIRTH CONTROL TECHNOLOGIES POSES NO THREAT TO THE INDIVIDUAL'S NATURAL RIGHT TO REPRODUCTIVE DECISIONS.

While the State has a right to regulate birth control technologies, it is obvious that the State has no interest or desire to enact a general prohibition of birth control technologies. Indeed, quite to the contrary, federal, state, and local governments have been spending hundreds of millions of dollars promoting contraceptive

use. Given the overwhelming public and government support for increasing contraceptive use, there is no realistic basis in the allegations of abortion proponents that allowing the States to regulate reproductive technologies would lead to a ban against all birth control. Even if some States were to choose to regulate some birth control technologies for reasons of health, moral, or social interests, it is evident that such regulation would be accompanied by promotion of other contraceptives as a substitute.[37]

---

[37] It has been falsely argued that anti-abortionists seek to eventually ban all birth control technologies. But in fact no one has ever suggested any rationale or desire to seek a Constitutional ban or court ruling which would limit or ban the states from allowing contraceptives. The grain of truth to these allegations is that if constitutional safeguards for the human embryo are ever recognized or enacted, this safeguard would prohibit chemical abortifacient as well as surgical abortion. But such a turn of events, would not effect contraceptive and sterilization technologies and would serve only to direct birth control research into the pursuit of these

Furthermore, even the abstract possibility that the State might one day seek to "force" population growth by a ban on contraceptives poses no threat to reproductive freedom. The history of population growth, around the world, shows that even without access to contraceptive technology or abortion, peoples of all eras and nationalities have limited their births according to their needs through the employment of delayed marriage, withdrawal, periodic or total abstinence, or even with unreliable rhythm methods.[38]

These natural methods of fertility regulation have been advanced in the last twenty years by the discovery of at least six new methods of natural family planning, each with many variations, which employ

---

non-abortive alternatives.

[38] See authorities Greer, Kasun and Simon

from one to seven body symptoms for identifying the exact time of female fertility. The most commonly recommended methods have method effectiveness ratings for avoiding pregnancy of from 97-99 percent, rates which are at least comparable to the Pill, and easily exceed the effectiveness rates of IUDs, condoms, jellies and the rest.[39]

These natural methods of fertility control, both the old and the new, employ no technology, only self-knowledge. The dissemination of such knowledge would be protected by First Amendment rights. Therefore, it is unreasonable to believe

---

[39] The final report of a 1978 federal study of NFP, found a 100 percent method effectiveness rate for a Sympto-Thermal variation of NFP and a 94% effectiveness rate for the Ovulation Method. The highest tested effectiveness rate ever reported belongs to a variation of the Temperature-Only method which has been demonstrated to have only 7 unplanned pregnancies per 10,000 fertile woman-years, a rate which is less than half the failure rate for vasectomy. J. Kippley, The Art of Natural Family Planning, 14-17 (1984).

that even an oppressive government's ban against all birth control technologies could never "force" people into having "unwanted" children.

The existence of natural methods of birth control demonstrates that individuals will always have reasonable alternatives to birth control technologies and a reasonable opportunity to exercise their reproductive freedom. The State is not obligated to guarantee any more than these natural opportunities, though in its sovereignty it is certainly free to provide technological aids if it so chooses.

In some ways, natural reproductive rights are similar the right of free speech. Ultimately, the inalienable right to free speech is guaranteed by the natural abilities of humans to communicate. But while the right of free speech is enhanced by mass communication technologies, not all persons have equal access to these techno-

logies, nor is the State required to provide access to these technologies. Clearly, while speech is a natural right which the State may not infringe upon, technological enhancements of this right are open to regulation.

If regulation of free speech or reproductive technologies become unduly oppressive, the natural rights of individuals provide a safeguard by which the people can subvert or overthrow an oppressive rule. Thus, the Court can and should restrict itself to protecting these natural rights.

When these timeless, natural rights are protected, the people will be able to press the government for the subsidiary "rights" to the technologies they desire to enhance their natural rights. Left alone, the laws passed by properly elected legislatures will eventually come to reflect the "compelling" interests of the people. Such laws cannot, by definition, be oppressive

of natural rights since the people of a democracy will not freely vote to oppress themselves.

CONCLUSION

In summary of the above arguments, Amici respectfully petitions the Court to: (1) hold that the Minnesota statute, Minn. Stat. Ann. §§ 144.343 (2)-(7), is constitutional; (2) reject Roe v. Wade and its progeny; (3) sustain the result of Griswold v. Connecticut; (4) reject the overly broad results of Eisenstadt v. Baird; (5) reject Buck v. Bell; (6) reject the "right of privacy" as unconstitutionally vague; and (7) recognize the "natural right of reproductive freedom" as a fundamental and inalienable right of all human beings.

It is clear that the confusion created by these prior cases and mishandled issues has led to the conflict at hand. The natural right of reproductive freedom suggested here is in keeping with the

historical and moral values of both the Western and Eastern heritages, and is in accord with the natural law, right reason, and the fundamental respect of individual human dignity. Such a timeless principle would certainly have received the unanimous consent of America's Founding Fathers.

Sixty years of judicial activism in the area of reproductive control must necessarily be reversed swiftly and completely. Amici urges the Court to recognize the right of States to regulate reproductive technologies however they deem necessary, and at the same time, restore protection in the law for every individual's natural right to reproductive freedom.

Respectfully submitted,

Stephen R. Kaufmann
P.O. Box 5131
Illinois Building, Suite 800
Springfield, Illinois 62705
(217) 544-1144
Attorney for Amici Curiae

APPENDICES

APPENDIX A

DESCRIPTION OF AMICI

The Elliot Institute for Social Sciences Research is an independent, not-for-profit research group committed to a program of original research in the areas of abortion, birth control, and population control. It is a leader in researching the long-term physical and psychological effects of abortion on women, and it is actively involved in research exposing the myth of overpopulation and its origin in the racist and exploitive of the eugenic and population control movements.

The American Academy of Medical Ethics is a professional organization with an affiliation of 20,000 physicians who are committed to preserving the guiding

principles of the original Hippocratic Oath. As a consequence of its member's fidelity to this ancient and honored oath, the AAME is dedicated to the preservation and protection of all human life, from the moment of conception until the moment of natural death. Therefore, the AAME opposes the use of medical technology to destroy the lives of unborn children, opposes the abuse of medical science for the purpose of exploiting women and the poor, and opposes the withholding of medical treatment from the disabled or infirm for the purpose of shortening their lives.

APPENDIX B

A SUMMARY OF SOME PUBLISHED CASES OF MINORS AND WOMEN COERCED INTO ABORTION

Some summaries from D. Reardon, Aborted Women - Silent No More (1987):

1. Gaylene "Hayes" was manipulated into an abortion by school authorities and was encouraged to conceal the pregnancy and abortion from her parents. After the abortion, at age 14, she became self-destructive. p36-40.

2. Alice Gilmore, 18, was manipulated into an abortion by clinic despite her repeated announcements that she wanted to keep her baby. Afterwards, she suffered sexual dysfunction, loss of self esteem, and severe depression. p147-150

3. "Tammy Conrad," 18, discovered she was pregnant while she was hospitalized for psychiatric care. She desired to keep the baby, but was subsequently coerced by her psychiatrist into an unwanted abortion "for her own good." She subsequently become suicidal. p179-182

4. Jakie Bakker became pregnant as the result of rape at age 19. After being counseled to abort, she suffered many physical and emotional aftereffects which were more severe and longlasting than her reaction to the rape. She feels lied to by abortion providers. p206-210.

5. Edith Young was forced into abortion without her understanding or consent at age twelve to hide the fact of her pregnancy resulting from an incestuous

rape by her step-father. When she later learned what abortion was, and that she had been forced not only into sex, but into the "murder" of her child, she suffered severe a emotional impact on her subsequent self-destructive behavior. She believes she and her baby could have been protected if her natural father had been informed. p212-218.

6. Jerri "Porter", 18, was pressured by her boyfriend into aborting a pregnancy which she wanted to keep. Family planning counselors encouraged the abortion, insisting that her desires to keep the baby were not "realistic." p278-279.

7. Lorijo Nerad and her husband Jim, during a time of temporary unemployment, were pressured by welfare caseworkers into sterilization and abortion of a wanted

child. The negative emotional impact on both of them led to child abuse, drug abuse, and radical personality changes. p273-278.

Some summaries from C.M. Friedman, et al. "The Decision-Making Process and the Outcome of Therapeutic Abortion," American Journal of Psychiatry, (1974)

1. "Candice," a 22-year old woman with borderline intelligence but with no previous history of mental illness, was pressured into an unwanted abortion by a genetic counselor, a surgeon, and her parents. Forty-eight hours later she began to go through denial of the abortion and became so agitated that she was transferred to psychiatric hospitalization because she lacked the "ego resources to deal with her grief."

2. "Krista" felt pressured into an abortion by a boyfriend who backed down fro a promise of marriage. She subsequently post-abortion psychiatric illness which required psychiatric treatment.

Samples of testimonies of coercion contributed to the files of the Elliot Institute for Social Sciences Research.

Testimony of "Susan Blossmor" on file at the Elliot Institute.

Dear Sir,

Thank you for your interest in abortion. I want to tell my story in order to help others from making the same mistake and feeling the horrible pain. Although it is hard for me to do it helps me face my feelings. Thank you for giving me this chance. If you have questions feel free to contact me.

After I became pregnant, my family would not support my decision to keep my baby. My boyfriend said he would give me no emotional or financial help whatsoever. All the people that mattered to me told me to abort. When I said I didn't want to

they started listing reasons why I should. "It would be detrimental to your career and health. You will have no social life, no future with men." Could I actually do it? I started feeling like maybe I was crazy to want to keep it. I finally just told everyone that I would have the abortion just to get them off my back, but inside I still didn't want to have the abortion. Unfortunately when the abortion day came I shut off my inside feelings. I was scared to not do it because of how my family and boyfriend felt.

I know my decision would have been different if at least my parents would have supported me. I just felt so alone in my feelings to keep my baby.

I'm so angry at myself for giving in to the pressure of others. If there is one thing that I learned from this experience - that is never to give in to other people's

opinions on your own situation. Stand up for what you know is right!!

When I went to the clinic, the counselor that I spoke with did not ask me if I was sure about my decision. She did not try to ask me how I felt about the whole thing. She just explained the procedure briefly. Inside I was screaming for her to ask me how I felt about what I was going to do so I could tell her that I just didn't feel right about it, but I was just too far away from my feelings at that point to be able to speak out. I had turned off my feelings for the moment.

When I was lying on the procedure table waiting for the doctor a nurse sat with me and held my hand. I started crying and she said that I wasn't sure that I was doing the right thing. She just said that I was fortunate that abortion was legal and I was able to have this procedure done. She then said that the procedure was safe

and didn't hurt very much. She said, "We just ask that you don't scream or yell because the other patients in the next room would be able to hear." She then tried to get my mind off of what was going to happen by asking me about boating on Lake Michigan. I wanted to get up off that table then but was afraid of what my boyfriend and parents would say and do. That nurse did not want to hear about my doubts. She could not have cared much about how I felt about the abortion. She was worried about other patients hearing me. My God! All she was worried about was her job -- assisting in the procedure.

After the procedure while I was in the recovery room I was very upset and crying. The nurses would not even look at me. It was like they just didn't want to deal with my feelings. I was the last person done that day so they started to clean the procedure room. A nurse came out of the

procedure room and started rinsing the clear plastic tubes of the suction tubes in the sink in the recovery room. They were full of blood! I couldn't believe how insensitive they could be.

As soon as I came out of that procedure room I knew I had made the biggest mistake of my life. While still in the room I said to myself, "Ok, now you're suppose to feel relieved." That's what the books said I would feel (I read about abortion beforehand). Well I kidded myself with that idea for about 30 seconds I did not feel relieved. I hated myself! But it was too late -- my baby was dead! It was the worst feeling of frustration that I've ever had in my entire life. I could not reverse what I had done. God help me!

Two days after the abortion I wrote a suicide note to my parents and boyfriend. I just couldn't fathom how I could possibly live with the knowledge of what I had done.

I killed my own baby! I went down the basement an figured out how to shoot my father's pistol. Hysterical and crying I put the barrel of the gun into my mouth. All of a sudden I heard someone upstairs. For some reason my father had stopped by to pick up something (at 10 a.m. usually no one is home). I stopped what I was doing and went upstairs. He saw that I was upset and asked me if I wanted to have lunch with him at noon. I felt I at least owed him lunch. By the time lunch was over I was too scared to do it. Eventually I came to the conclusion that I should look to the future.

Since the month after my abortion I've been trying to get pregnant again. I've tried 4 months in a row now. But since my boyfriend is away at school my timing of sexual intercourse and ovulation has not coincided. He does not know that I am doing this. I know that is not fair to

him. But I can't think of any other way to make up for what I have done. Rationally I know what I'm doing is maybe stupid. But a big part of me just has to make up for things. I can't explain but I just have to get pregnant again. I just got off the phone with my boyfriend. I'm going to see him this weekend to try again.

I still am not satisfied with my choice today. It has not been that long since the abortion. I would be just about 7 months pregnant right now. My baby was due at the beginning of April. But I do not think my feelings on this will ever change. I killed my own child. How can anyone ever feel that type of choice was a right one? The only thing that gives me some comfort is the knowledge in my heart that my child is in a much better place then we know with God. I believe that when I die I will finally be able to see my baby. I'm so sorry.

Sincerely,

"Susan Blossmor"

Testimony of "Jill Nolan" on file at the Elliot Institute

Dear Sir,

This is a letter from one who regrets her abortion very much. I was still 19 when I got pregnant living with a boyfriend (who is soon to be my ex-husband) in Detroit on Michigan Avenue by Livennois. And I was faced with "the CHOICE". How I'd wished I could've been like the wholesome looking mother-to-be on the T.V. commercials. The one with a cute maternity dress and a nursery all made up ready and waiting and a warm protective husband coming home, putting his arms around her saying "honey, I can hardly wait."

My boyfriend wanted nothing to do with a future with me. A baby implied a future, commitment. He had already gotten the cow for free - why raise the calf?

Yet in the face of abandonment, I did not look at reality and use my courage to squarely tell him what I wished to do. "I'm going to have this baby, whether you stay and meet my emotional needs or not."

As human beings, we have 2 basic needs; for love and worth, to love and to be loved, to feel worth about yourself and to have the security of knowing someone sees worth in you. In desperation, to meet these needs in my life even temporarily, even imaginarily, I grasped on to my boyfriend and his insistence that I have an abortion. Thus I sacrificed my first born to the idol of temporary emotional security.

It was so easy to be swayed, despite vague moral convictions that abortion was

murder. For I felt so immature, selfish and unready to have a child.

Are mothers ever ready? Babies and children bring out the best and the worst in us. Yes, we have the potential for learning of a noble self sacrificial, forbearing kind of love, but, more often than that, children on a daily basis, also expose our own innate selfishness. The power both to train and scar our children lies in our hands. And there is little support in our society to help a woman choose to keep and raise her child. Parents, many from scarred backgrounds need education on how to train and love their children and this is not readily available.

My boyfriend and my family insisted that there was no way out but to choose abortion. I chose to be verbally manipulated to carry out their point of view, rather than thinking through the choice. I was given no alternatives. A

clinic was quickly found to take care of our little "problem."

At the clinic, the doctor seemed so abrupt and angry, so tense and under pressure. I felt like the only difference in his eyes between me and the unborn child in my womb was 19 years. Had I been 19 years younger, unable to speak and helpless, I too would have met the same fate in his office, the death penalty. The crime, being a "useless" member of society. My life seemed so valueless in the doctor's sight.

A person's self esteem (the worth they feel about themselves) determines the value they place on the lives of others. "Love others as you love yourself." Yet how do you love others when, deep down, you despise yourself?

The Nazi movement didn't start with Hitler. He just jumped on the bandwagon of a movement originating in the 20's by a

groups of doctors and psychiatrists in Germany. They proposed "mercy" killing of elderly or mentally impaired members of society. These dear peoples lives were valueless in their sight. Hitler just extended this kind of thinking to the Jews (the apple of God's eye) and other minority groups. I believe that this same kind of thinking (stemming from zero self esteem) is what is behind abortions in this country.

At the clinic I learned a shameful lesson I wished I'd never learned, perhaps the same lesson Nazi soldiers learned when "just carrying out orders" in concentration camps. I too, was just "following orders." I wanted to be a "good" girlfriend. I pray that now, I can be (instead of a spineless robot, the gutless wonder) a woman of conviction.

The weeks, months, years following the abortion, I fell in and out of depression

(only masked for a time by bursts of desperate hyperactivity). The sadness over what happened hangs about me like the hovering scent of funeral flowers that linger in a room after the funeral has come and gone.

I later got pregnant. But this time, I battled with my own selfishness and fears and my boyfriend and stood up for my rights to be a mother and for the rights of my unborn child, who is soon going to be nine and is very beloved by us all.

I am now being divorced. I never enjoyed sex for years and this damaged my live-in relationship and shortlived marriage to this same boyfriend. Whenever we made "love" I saw the CHOICE of abortion looming behind every expression of "love" between us.

Now, I am engaged to be married to one in whose eyes I am loved, one who sees me

and all human beings as a pearl of great price. His name is Christ.

I'm pro choice now. I'm determined not to let anybody but Christ (through the common sense plan of conduct transformation laid out in his word, the Bible) influence my moral choices anymore. I want to be an independent thinker and not let man do my thinking for me anymore. If you don't "do" your own thinking, someone else will "do" your thinking for you.

Testimony of Jeanene Clark on file at the Elliot Institute.

When I was 16 years old I became pregnant and subsequently had an abortion. This decision was based upon lies and lack of knowledge has caused me many years of anguish and will continue to do so for the rest of my life. Here is my story:

August 1977 - I was 16 and I was pregnant. I knew this because I had gone to the local Health Department for a free pregnancy test and they had called me back that morning. The counselor on the phone asked me what I was going to do. What was I going to do? I had just began "experimenting" with sex. I wasn't suppose to get pregnant. That happened to other people, not me. I answered the counselor, "I don't know, maybe an abortion. I just don't know." The counselor picked up on this statement and offered to make an appointment for me at a Dallas abortion clinic. I agreed. I was never counselled towards anything, or offered any alternative other than abortion. My abortion was publicly funded.

A few days later I was taken to the Fairmont Abortion Clinic in Dallas, Texas. Upon arrival I was "counselled" about the

abortion I was about to have. The counselor showed me a picture of a six week old "fetus." (The age they had decided on for my baby) This picture looked like chopped liver. I was told by the counselor that at this stage of development, the fetus was not a baby. That it was no more than a "wad of tissue." I was informed that there was nothing to the procedure. It would not hurt any more than menstrual cramps, and there were few side effects. I was told that I would have to stay there for an hour after the abortion (which I did not do) to make sure my bleeding was not too severe. That I should take a morphine pill to relax me and I could have a morphine shot with the pill if I wanted it. I did not. I was taken to an exam room when I was placed in an examination position. The doctor asked if I minded if a woman who was being trained observed the procedure. I agreed. The doctor dilated

my cervix and proceeded to insert the vacuum aspirator. I felt when the baby caught and immediately began having severe cramps. The doctor finished and they rushed the bottle (which contained my baby) out of the room before I could see it. This tends to disturb the patient when she sees her baby (who only minutes ago was sleeping peacefully in her womb) ripped to shreds in a glass jar. I was then taken to a waiting area to make room for another woman who had made the "choice" to murder her baby. I continued to have severe cramps for the rest of the day. I felt sad and empty, as if a part of my soul had been taken away.

As I looked back at my post-abortion life, I realize that so many of the mistakes that I made and created for myself were due to the subconscious image I had created of myself, I had killed my own

baby. How could anyone love me when I couldn't love myself?

I began to drink heavily and use drugs. I had severe depressions in which I contemplated suicide. I had and still have horrible nightmares involving babies and people trying to kill me. I still get depressed and cry a lot. I pray at night that God will let my baby know that I didn't kill him because I hated him. I long to hold him so much now that it hurts, and I want him to know that.

I harbor secret fears that one of my children will be taken from me because of this horrible act that I have committed. This fear was compounded when I almost miscarried one of my children at twelve weeks. I feel sure the problem was connected to my abortion. The problems go on and on. I had never allowed myself to calculate the month that my baby would have been born. Recently I figured out when the

baby would have been born and was horrified when I realized that it was within weeks of when both of my children were born. I had felt intense pressure from within myself to become pregnant at this particular time with both my children. And now the realization has hit me that subconsciously I have substituted my live children for my dead child, by conceiving and giving birth at the same times.

I have spent many years trying to push the memory of what I have done to the back of my mind, but it won't stay there. I have constantly compared my dead child to what he would have been doing had he lived. I understand that most women who choose to abort experience the same feelings. My child would have been in first grade this year. It's very hard for me to look at a first grader.

I have shed many tears over the last few years and now I'm angry. I'm angry at

myself, my family, Fairmont Clinic, their counselors, the doctors, (who can commit murder on a daily basis) and most of all I'm mad at my government, who prints "IN GOD WE TRUST" on our coins, yet has legalized the daily painful, violent slaughter of the youngest members of our society.

I hope and pray that our great nation can turn this thing around before it is too late for all of us. And most of all before we as individuals have to stand before God and confess what we have done to His most perfect creation.

Signed

Jeanene Clarke

BEFORE ME, the undersigned authority on this day appeared Jeanene Clarke who affirmed the above statements under oath, and has stated that they are true and correct.

Lillian E. Mahoney
Notary Public in and for Texas
My commission expires: 7/31/85

Supreme Court, U.S.
FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-1125, 88-1309

In the Supreme Court of the United States

October Term, 1989

JANE HODGSON, M.D., ET AL.,
Petitioners,
Cross-Respondents,

vs.

THE STATE OF MINNESOTA, ET AL.,
Respondents,
Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE
IN SUPPORT OF THE STATE OF MINNESOTA

By WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA
Counsel of Record
P. O. Box 94005, Capitol Station
Baton Rouge, Louisiana 70804-9005
504-568-5575

WITH ATTORNEYS GENERAL JOINING FOR
THE STATES OF ARIZONA, MISSOURI,
AND PENNSYLVANIA

WILLIAM J. GUSTE, JR., Attorney General
JENIFER SCHAYE and MEREDITH H. LIEUX,
Assistant Attorneys General
JO ANN P. LEVERT and THOMAS A. RAYER,
Of Counsel.

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

Table of Authorities ii
Interest of Amicus i
Summary of Argument 3
Argument 5

THE TENTH AMENDMENT AND THE *WEBSTER* DECISION PROVIDE THE CONSTITUTIONAL BASIS FOR THE COURT TO UPHOLD THE CONSTITUTIONALITY OF THE MINNESOTA STATUTE WHICH REQUIRES NOTICE TO PARENTS WHERE A MINOR CHILD SEEKS AN ABORTION BECAUSE THE STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE INTEREST.

1. The Tenth Amendment Reserves Powers not Granted in the United States Constitution to the States and the People.
2. *Webster* Has Effected Substantial Changes in the Area of Abortion.
3. The State Has a Compelling Interest in Protecting Human Life or Potential Human Life in the Womb of the Mother, as well as a Compelling Interest in Protecting the Health and Well-being of a Pregnant Daughter. These Interests are Attained by Requiring Parental Notice Where a Minor Seeks an Abortion.

Conclusion 15
Appendix A ..... App. 3
Appendix B ..... App. 5
Appendix C ..... App. 9

TABLE OF AUTHORITIES

PAGE

CASES:

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed. 2d 687 (1983) 11

Cage v. Wood, 484 So.2d 850 (La. App. 1st Cir. 1986) 15

Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970) 7

Ex Parte Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890) 8

FERC v. Mississippi, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) 8

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) 7

Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979) 8, 9

Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984) 3

McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) 8, 9

Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) 6

Pizzalotto v. Wilson, 437 So.2d 859 (La. 1983) .. 15

Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) 12

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973) ..... *passim*

Rose v. Rose, 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987) 8, 9

San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) 7

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) 11

PAGE

United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941) 7

Webster v. Reproductive Health Services, et al, ___ U.S. ___ , 109 S.Ct. 3040 (1989) ..... *passim*

Wetmore v. Markoe, 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390 (1904) 9

Williamson v. Lee Optical Inc., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955) 11

Younger v. Harris, 401 U.S. 37 (1971) 8

CONSTITUTIONS AND STATUTES

U.S. Const., Amend. X 7

U.S. Const., Amend. XIV 6

H. Con. Res. 10, 1989 La., Second Extraordinary Session ..... App. 9

La. C.C. art. 216 (West 1989) 14

La. C.C. art. 235 (West 1989) 14

La. C.C. art. 237 (West 1989) 14

La. R.S. 40:1299.35.0 (West Supp. 1989) ..... 2, App. 3 & 10

La. R.S. 40:1299.35.5 (West Supp. 1989) ..... 2, 3, 13, App. 5

La. R.S. 40:1299.40 (West Supp. 1989) 15

M.S.A. 144.343 Subsec. 22-5 9

OTHER AUTHORITIES

J. Nowak, R. Rotunda, & J. Young, *Handbook on Constitutional Law* (1978) 9

L. Tribe, *American Constitutional Law*, (1988) 9

The Constitution of the United States of America, Analysis and Interpretation (J. Killian ed. 1987) 9

Nos. 88-1125, 88-1309

In the Supreme Court of the United States

October Term, 1989

JANE HODGSON, M.D., ET AL.,
Petitioners,
Cross-Respondents,

vs.

THE STATE OF MINNESOTA, ET AL.,
Respondents,
Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

In its *amicus* brief in *Webster v. Reproductive Health Services, et al,* No. 88-605, Attorney General Guste for the State of Louisiana, joined by the Attorneys General of Arizona, Idaho, Pennsylvania, and Wisconsin, urged the Court to overturn *Roe v. Wade*[1] in its entirety, recognizing that the State has a compelling interest in protecting human life from the moment of conception. Louisiana has enacted a statute which expresses the State's

[1] 410 U.S. 113, 93 S.Ct. 705 (1973).

compelling interest in protecting the unborn child from conception.[2]

The *Webster*[3] plurality overruled the rigid three-part or trimester framework in *Roe*, acknowledging the states' compelling interest in protecting potential human life and maternal health throughout pregnancy. The Court in *Webster* also adopted a minimum level of scrutiny (instead of "strict scrutiny" required by *Roe*) in determining whether an abortion statute is constitutional, that is, whether it has a rational relation to any valid state objective. Mr. Justice Blackmun's dissent accurately characterized the plurality opinion, noting that state statutes in the area of abortion are now to be judged by the Court's most lenient standard of review, and that *Roe* would not survive the *Webster* analysis.[4] The State of Louisiana supports this judgment, which in effect, overrules *Roe v. Wade* in its entirety.

Louisiana has an interest in the disposition of the present case. Similar to Minnesota, Amicus has a number of statutes which seek to preserve the integrity of the family, including the rights and obligations of parents who make decisions that affect minor children. In particular, pursuant to La. R.S. 40:1299.35.5,[5] Louisiana requires that parents be informed of and consent to an abortion procedure on their minor daughter, or where parental

[2] La. R.S. 40:1299.35.0, reproduced in Appendix *A* at App. *3*.

[3] *Webster v. Reproductive Health Services, et. al*, 109 S.Ct. 3040 (1989).

[4] *Webster*, supra, 109 S.Ct. at 3067.

[5] Louisiana Revised Statutes 40:1299.35.5 is reproduced in Appendix B at App. 5.

consent is not obtained by the minor, the statute provides an alternative or by-pass procedure, whereby judicial consent may be obtained.[6]

To the extent that notice is implicit within Louisiana's parental consent statute, the decision of the Court in this case can impact upon the statutory scheme in Louisiana and other states. Pursuant to this reasoning, Louisiana, Minnesota and the Several States, therefore, have compelling interests in the preservation of a state's right to legislate in matters affecting the family and domestic relations.

Amicus urges the Court to find that a statute is constitutional which requires parental notice where a minor seeks an abortion because such a statute reasonably furthers the state's compelling interest in protecting human life or potential human life in the womb of the mother.

Amicus urges the Court to find that Minnesota's interests in protecting both the health and well-being of a pregnant minor and the unborn child amply justify a statutory requirement that parents receive notice prior to the performance of an abortion on their minor daughter.

SUMMARY OF ARGUMENT

THE TENTH AMENDMENT AND THE *WEBSTER* DECISION PROVIDE THE CONSTITUTIONAL BASIS FOR THE COURT TO UP-

[6] *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984; affirmed 794 F.2d 994 (5th Cir. 1984) held that R.S. 40:1299.35.5 is constitutional.

HOLD THE CONSTITUTIONALITY OF THE MINNESOTA STATUTE WHICH REQUIRES NOTICE TO PARENTS WHERE A MINOR CHILD SEEKS AN ABORTION BECAUSE THE STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE INTEREST.

The Tenth Amendment to the United States Constitution reserves power not delegated to the United States to the Several States and to the people. The police power reserved to the States under the Tenth Amendment enables the States to set standards of behavior that promote the safety, health or morals of the people. Neither the States nor the people have renounced their power to make pronouncements about the value of unborn human life or about regulations on or limitations to abortion. Conversely, Louisiana and other states have persisted to legislate in these areas.

Under the principles of federalism, the Court again should leave with the States the latitude to legislate in matters of abortion limitation, including those areas which preserve the family integrity. In the exercise of judicial restraint, as embodied within the Tenth Amendment, the Court should uphold the Minnesota procedures which mandate parental notification of a minor's intent to obtain an abortion or the alternative judicial by-pass option.

Amicus submits that *Webster* has abandoned *Roe's* heightened scrutiny as the standard for reviewing the constitutionality of state abortion statutes and has returned to the traditional rational basis test, which requires only that the Court determine whether the statute has a rational relation to a legitimate state objective. The

challenging party bears the burden of proving the statute unreasonable.

Minnesota and the Several States have a legitimate interest in protecting maternal health and familial relationships. The Minnesota statute bears a rational relationship to that objective and should, therefore, pass constitutional muster.

According to *Webster*, the Several States also have a compelling interest in protecting human life or potential human life. The Minnesota statute, therefore, is reasonable even if it forms part of the state's review process in furthering this compelling interest.

ARGUMENT

THE TENTH AMENDMENT AND THE *WEBSTER* DECISION PROVIDE THE CONSTITUTIONAL BASIS FOR THE COURT TO UPHOLD THE CONSTITUTIONALITY OF THE MINNESOTA STATUTE WHICH REQUIRES NOTICE TO PARENTS WHERE A MINOR CHILD SEEKS AN ABORTION BECAUSE THE STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE INTEREST.

1. The Tenth Amendment Reserves Power not Granted in the United States Constitution to the States and the People.

Abortion legislation falls squarely within the police power reserved to the States under the Tenth Amendment.[7] The police power enables the States to set stan-

[7] U.S. Const. Amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

dards of behavior so as to promote the public well-being of its citizens. In *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273 (1887), the Court spelled out the fundamental legislative nature of the State police power, warning that judicial usurpation of this power violates the principles of federalism formalized in the Tenth Amendment:

> It belongs to [state legislatures] to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
>
> [T]he courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department.
>
> . . .
>
> It cannot be supposed that the states intended, by adopting [the Fourteenth Amendment], to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. 123 U.S. at 661-664, 8 S.Ct. at 297-98. (citation omitted.)

Chief Justice Rehnquist recognized the application of those fundamental principles to abortion legislation in his dissent in *Roe v. Wade*: "[T]he drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to [abortion]." *Roe v. Wade*, 410 U.S. at 177 (Rehnquist, J., dissenting).

Significantly, the Court has recognized restrictions placed on its own powers by the federalism principles embodied in the Tenth Amendment. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), the Court explained: "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—*including the judiciary*—deems state involvement to be." *Id* at 546. (Emphasis added)

Conforming with the view of the majority, Justice Powell in his dissent stated: "Judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution." *Id.* at 570.

Neither the Several States nor the people have consensually renounced their power to make moral pronouncements about the value of unborn human life or about abortion. Thus, in matters of domestic social policy and public morality touching upon the everyday familial lives of the people, where a fundamental right protected by the Constitution is not thereby infringed, the Several States should be free to legislate for the public good. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 93 S.Ct. 1278 (1973); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153 (1970); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1941). And, the *Webster* Court has now concluded that the right to abortion is not a fun-

damental constitutional right. *Webster*, supra, 109 S.Ct. at 3058 (1989).

Justice O'Connor perhaps best sums up the ever evolving concept of federalism in her separate opinion in *FERC v. Mississippi*, 456 U.S. 742 (1982):

> During the last Term of service on this Court, Justice Black eloquently explained that our notions of federalism subordinate neither national nor state interests:
>
> "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). *Id.* 456 U.S. at 796, 797.

This Court has specifically applied these fundamental principles of federalism to domestic affairs. In *Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029 (1987), the Court recognized traditional family autonomy, noting that:

> We have consistently recognized that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' *Ex Parte Burrus*, 136 U.S. 586, 593-594, 10 S.Ct. 850, 852-853, (1890); see *Hisquierdo*, supra 439 U.S., at 581, 99 S.Ct., at 808; *McCarty*, supra, 453 U.S., at 220, 101 S.Ct., at 2735. 'On the rare occasion when state family law has come into conflict with a federal statute, this court has limited review under the Supremacy Clause to a determination whether congress has 'positively required by direct enactment' that state law be preempted. *Hisquierdo*, supra, 439 U.S., at 581, 99 S.Ct., at 808, quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 175 (1904). Before a state law governing domestic relations will be overridden, it 'must do 'major damage' to 'clear and substantial' federal interests.' *Hisquierdo*, supra, 439 U.S., at 581, 99 S.Ct., at 808. 481 U.S. at 625 (1987)

Under the *Rose* analysis, the standard for reviewing the Minnesota Statute, M.S.A. 144.343 Subsec. 22-5, is limited to a consideration of whether the State, in requiring parental notification of a minor's intent to obtain an abortion, has thereby "done major damage" to a "clear and substantial" constitutional right which the pregnant child may possess. However, unlike the *Rose* analysis, the *Webster* minimum scrutiny analysis limits judicial review to a consideration of whether the parental notification statute bears a rational relationship to a legitimate state interest, because under *Webster*, there is no constitutional right to abortion. *Webster*, supra, 109 S.Ct. at 3057, 3063, 3076. Under this test, the statute has a presumption of constitutionality and the challenger bears the burden of proving it unreasonable.[8]

Amicus, therefore, urges the Court to exercise ju-

---

[8] *See*, L. Tribe, American Constitutional Law 1439-1442 (1978); The Constitution of the United States of America, Analysis and Interpretation 1697-1702 (J. Killian ed. 1987); J. Nowak, R. Rotunda, & J. Young, Handbook on Constitutional Law 524-525 (1978).

dicial restraint and find that governmental regulation of domestic and family relations is reserved to the States and to the people through the democratic process.

2. *Webster* Has Effected Substantial Changes In the Area of Abortion.

In *Webster*, the plurality explicitly narrowed *Roe*; Justice O'Connor avoided reconsideration of *Roe*; Justice Scalia called for an express over-ruling of *Roe*. According to Justice Blackmun, "the plurality and Justice Scalia would overrule *Roe* and return to the State virtually unfettered authority to control [abortion]." *Webster v. Reproductive Health Services, et al*, 109 S.Ct. at 3067 (Blackmun, J., dissenting).

The Court in *Webster* rejected the trimester framework established in *Roe*. Chief Justice Rehnquist noted that the detailed approach in *Roe* conflicted with "a Constitution cast in general terms," *Id.* at 3056, and he rejected the basic premise in *Roe* that "the State's interest in protecting potential human life should come into existence only at the point of viability, [or] that there should be a rigid line allowing state regulation after viability but prohibiting it before viability." *Id.* at 3057.

Significantly, the Court in *Webster* abandoned *Roe's* heightened scrutiny as the standard for reviewing abortion statutes and returned to the traditional rational basis test, noting that:

> The experience of the court in applying *Roe v. Wade* in later cases, (citation omitted) suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion, (citation omitted) a

> "limited constitutional right," (citation omitted) or a *liberty interest* protected by the Due Process Clause, which we believe it to be. *Webster*, 109 S.Ct. at 3058 (Emphasis added).

Justice O'Connor has previously rejected *Roe's* heightened scrutiny test, in her dissents in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) and in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814, 828, 106 S.Ct. 2169, 2207, 2214 (1986). *Webster*, 109 S.Ct. at 3063 (1989).

The state's objectives of protecting potential human life and maternal health throughout pregnancy are consistent with Justice O'Connor's previous dissents.

After *Webster*, it is therefore apparent that five justices have defined the state's interests as being "compelling" in the protection of potential human life and maternal health at all stages of pregnancy. Using a minimum level of scrutiny as the standard of review, the Minnesota statute should, therefore, pass constitutional muster. The Court must only determine whether the statute has a rational relation to a legitimate state objective. *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491; 75 S.Ct. 461, 466 (1955).[9]

The plurality in *Webster*, supra, initially notes that "*Roe v. Wade* implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion," *Id.* at p. 3042; and further concludes that the:

---

[9] *See, Roe v. Wade*, 410 U.S. 113, 173, 221, where Justice Rehnquist presented the traditional due process test, citing *Williamson*. (Rehnquist, J., dissenting).

". . . State has a *compelling interest in ensuring maternal health* and *in protecting potential human life*, and these interests exist throughout pregnancy." *Id.* at 3057. (Emphasis added).

These articulated compelling state interests afford ample justification for a state to require appropriate parental notification of a pregnant child's decision to seek an abortion. However, Amicus suggests that the state also has a compelling interest in fostering and promoting parental involvement in the wrenching decisions facing their pregnant daughter. This interest emanates from recognition of and deference to the constitutionally established rights of all parents to nurture and support their children in the making of momentous and enduring decisions. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Amicus, therefore, urges the Court to apply the standard of review it established in *Webster*, supra, to this case. The Court should find that the provisions of the Minnesota parental notification statute reasonably afford the parents of a pregnant child opportunity to exercise their fundamental right of participation in the grave decision of their child to have an abortion. *Webster*, 109 S.Ct. at 3058.

Clearly, the Minnesota Statute in question passes constitutional muster, for various reasons well articulated in the Brief of the Relator, State of Minnesota. The pregnant child is offered adequate and realistic alternatives which afford her the opportunity to choose an abortion, notwithstanding parental objection or non-involvement. The judicial by-pass procedures, like those under the Louisiana Statute, R.S. 40:1299.35.5, do not unduly endanger her health or impose unreasonable restraints upon her decision-making process, nor do they increase the traumatic experience of the abortion.

3. The State Has a Compelling Interest in Protecting Human Life or Potential Human Life in the Womb of the Mother, as well as a Compelling Interest in Protecting the Health and Well-being of a Pregnant Daughter. These Interests are Attained by Requiring Parental Notice Where a Minor Seeks an Abortion.

Amicus urges the court to recognize herein that the State's interests in protecting the long-term health and well-being of a pregnant minor as well as that of the unborn child are compelling, and that these interests may be legitimately achieved through legislation requiring that parents receive notice prior to the performance of an abortion on their minor daughter. The origins of the State's interests in protecting and encouraging familial interrelationships emanates from Roman and ancient laws under which individuals had no societal existence except as part of a family. The common law gives recognition to familial interrelationships through its judicial precedents. The civil law, under which Louisiana is governed, gives recognition to these relationships through a written code, derived from the French Code Napoleon of 1804.

Accordingly, the Louisiana Civil Code expressly defines the scope of parental authority as being vested in

both the father and mother until a child reaches the age of majority or is emancipated. La. C.C. art. 216.[10]

The Louisiana Civil Code also provides that minor children do not have the legal capacity to contract or to represent themselves in litigation so the mother and father have the parental duty to protect and represent them. La. C.C. arts. 235 and 237.[11]

In conformity with these long established principles of law governing the rights and obligations of parent and child, and because of this Court's holding in *Roe* and its progeny,[12] Louisiana requires statutory consent to the abortion procedure in the form of a notarized statement

[10] Art. 216. Parental authority. A child remains under the authority of his father and mother until his majority or emancipation.

In case of difference between the parents, the authority of the father prevails. La. C.C. art. 216.

[11] Art. 235. Parental protection and representation of children in litigation.

Fathers and mothers owe protection to their children, and of course they may, as long as their children are under their authority, appear for them in court in every kind of civil suit, in which they may be interested, and they may likewise accept any donation made to them.

* * *

Art. 237. Parents' liability for offenses and quasi-offenses of children.

Fathers and mothers are answerable for the offenses or quasi-offenses committed by their children, in the cases prescribed under the titles: *Of Quasi-Contracts, and of Offenses and Quasi-Offenses.*

[12] The Louisiana Legislature passed House Concurrent Resolution No. 10 immediately after the decision in *Webster* on or about July 10, 1989, making it clear that Louisiana has never accepted permissible abortion and that any post-*Roe* legislation is for the purpose of restricting abortion to the maximum extent possible under the reasoning of the United States Supreme Court. H. Con. Res. 10, 1989 La., Second Extraordinary Session reproduced in Appendix C at App. 9.

by the minor's parent, or the abortion procedure is characterized as a battery on the minor by the physician. *Cage v. Wood*, 484 So.2d 850 (La. App. 1st Cir. 1986).

The Louisiana Medical Malpractice Act[13] requires written and informed consent prior to invasive surgical or medical treatment. The courts have held that invasive procedures without valid written consent are considered a statutory battery. *Pizzalotto v. Wilson*, 437 So.2d 859 (La. 1983). Certainly, societal interests require that parents help guide their distressed daughter through decisions related to abortion. At a minimum, the parents have an obligation to care for the minor in the event some complication develops.

Amicus suggests that the interests of the people of Minnesota in protecting familial rights are no less than those of the people of Louisiana. The Minnesota notification statute is reasonably related to the governmental objective of preserving family autonomy with emphasis on the health and well-being of minor daughters and the life of unborn children. The by-pass provisions provide reasonable alternative means to seek judicial action for giving or witholding notice whenever necessary. The Eighth Circuit decision should be affirmed.

CONCLUSION

Minimum constitutional scrutiny of abortion statutes as articulated in *Webster* and judicial restraint as embodied in the Tenth Amendment to the United States Constitution, require that the Court reaffirm herein the

[13] La. R.S. 40:1299.40

proposition that the States retain the right to legislate in matters affecting familial relationships and the life of unborn children.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
Louisiana Department of Justice
Post Office Box 94005
Capitol Station
Baton Rouge, Louisiana 70804-9005
Telephone: (504) 342-7013

Jenifer Schaye
Assistant Attorney General

Meredith H. Lieux
Assistant Attorney General

Jo Ann P. Levert
Of Counsel

Thomas A. Rayer
Of Counsel

Joined by:
William L. Webster
Attorney General of Missouri

October 1, 1989

APPENDIX A

LOUISIANA LEGISLATIVE INTENT

La. R.S. 40:1299.35.0 Legislative intent

It is the intention of the Legislature of the State of Louisiana to regulate abortion to the extent permitted by the decisions of the United States Supreme Court. The Legislature does solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the Legislature finds and declares that the longstanding policy of this State is to protect the right to life of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced.

APPENDIX B

LOUISIANA PARENTAL CONSENT STATUTE

§ 1299.35.5. Minors

A. No physician shall perform or induce an abortion upon any pregnant woman who is under the age of eighteen years and who is not emancipated judicially or by marriage unless the physician has received one of the following documents:

(1) A notarized statement signed by the mother, father, legal guardian, or tutor of the minor declaring that the affiant has been informed that the minor intends to seek an abortion and that the affiant consents to the abortion.

(2) A court order as provided in Subsection B of this Section.

B. The following provisions shall apply to all applications for court orders by minors seeking abortions and appeals from denials of applications:

(1) Jurisdiction to hear applications shall be in the court having juvenile jurisdiction in the parish where the abortion is to be performed or the parish in which the minor is domiciled.

(2) Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step by step instructions for filling out and filing the application forms. All application forms shall be submitted to the at-

torney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

(3) Each application shall be heard in chambers, confidentially, in a summary manner, and within forty-eight hours of the filing thereof.

(4) If the court finds that the minor is sufficiently mature and well enough informed to make the decisions concerning the abortion on her own, the court shall issue an order authorizing the minor to act on the matter without parental consultation or consent.

(5) If the court finds that the minor is not competent to make the decision concerning the abortion on her own, but finds that the abortion nevertheless would be in the best interest of the minor, the court shall issue an order authorizing the abortion.

(6) Appeals from decisions of the court hearing the application shall be by trial de novo in the court of appeal.

(7) Each clerk of each court of appeal shall prepare appeal forms in clear and concise language which shall provide step by step instructions for filling out and filing the appeal forms. All appeal forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the appeal forms.

(8) Each appeal shall be heard in chambers, confidentially, in a summary manner, and within forty-eight hours of the filing thereof.

(9) The decision of the court of appeal shall be based on the criteria provided in Paragraphs (4) and (5) of this Subsection.

(10) Each minor who declares to the clerk of the court hearing the application or appeal that she does not have sufficient funds to pay for the costs of the application or the appeal shall be allowed to proceed in forma pauperis.

(11) Each minor who files an application or an appeal shall be entitled to a hearing and a determination by the court independently of any notice to or consultation with her parents, tutor, or guardian.

(12) Except as otherwise provided in this Section, or as otherwise provided by rule of court, hearings of applications and appeals shall be conducted in accordance with the provisions of the Louisiana Code of Juvenile Procedure.

APPENDIX C

LOUISIANA HOUSE CONCURRENT RESOLUTION

Second Extraordinary Session, 1989

HOUSE CONCURRENT RESOLUTION NO. 10

BY REPRESENTATIVES DIMOS, JENKINS, ALARIO, ST. RAYMOND, ACCARDO, ATER, BELLA, BRADLEY, BRUN, BRUNEAU, CAIN, CARRIER, CRANE, DAMICO, DIEZ, DONELON, DUKE, ELLINGTON, ENSMINGER, FORSTER, GARRITY, GAUDIN, GEE, GUIDRY, GUZZARDO, HAIK, HAND, HEBERT, HEBERT, HERRING, KIMBALL, LABORDE, LANCASTER, LANDRIEU, LEMOINE, MARTIN, MCCLEARY, MCFERREN, MILLER, ODINET, PATTI, SALTER, SCOGIN, SIRACUSA, SITTIG, A. D. SMITH, A. J. SMITH, J. R. SMITH, SOUR, STELLY, STINE, STRAIN, S. H. THERIOT, THOMPSON, TRAVIS, VOLENTINE, AND WADDELL AND SENATORS BARES, HAINKEL, LAURICELLA, BRINKHAUS, CROSS, DECUIR, DOLAND, FOSTER, HOLLIS, LANDRY, MCLEOD, OSTERBERGER, POSTON, ULLO, WINDHORST, AND RAYBURN

A CONCURRENT RESOLUTION

To express the intent of the legislature that the district attorneys of this state shall enforce state criminal laws which prohibit abortion to the fullest extent

permitted under and consistent with the U.S. Constitution as interpreted by the United States Supreme Court.

WHEREAS, Louisiana's criminal abortion statutes, R.S. 14:87 through 88, remain a part of the Louisiana Revised Statutes of 1950; and

WHEREAS, since the Roe v. Wade decision the Louisiana Legislature has passed a number of statutes designed both to restrict abortion to the maximum extent permitted by the United States Supreme Court and to protect the unborn as well as women, doctors, and nurses who do not wish to participate in abortion; and

WHEREAS, the Louisiana Legislature has clearly stated its intent in R.S. 40:1299.35.0, that Louisiana's criminal statutes prohibiting abortion take priority over those statutes which only regulate abortion and that abortion should be prohibited as soon as permitted by federal courts.

THEREFORE, BE IT RESOLVED that it is the intent of the Legislature of Louisiana that the district attorneys of this state shall enforce the criminal statutes pertaining to abortion, R.S. 14:87, 87.1, 87.2, 87.4, 87.5, and 88, to the fullest extent permitted by and consistent with the Constitution of the United States as interpreted by the United States Supreme Court.

SPEAKER OF THE HOUSE
OF REPRESENTATIVES

PRESIDENT OF THE SENATE

B9305, 10-89, 125

Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1309

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

STATE OF MINNESOTA, *et al.*,
Cross-Petitioners,

v.

JANE HODGSON, *et al.*,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND THE RUTHERFORD INSTITUTES OF MINNESOTA AND OHIO AS AMICI CURIAE IN SUPPORT OF CROSS-PETITIONERS

THOMAS W. STRAHAN
The Rutherford Institute
of Minnesota
1313 Fifth Street S.E.
Suite 324
Minneapolis, MN 55414
(612) 331-5217

ROBERT R. MELNICK
The Rutherford Institute
of Ohio
18 N. Phelps Street
Suite 300
Youngstown, OH 44503
(216) 744-8973

NANCY J. GANNON
Counsel of Record
for Amici Curiae
GEORGE W. KOCH, JR.
Catholic League for
Religious and Civil Rights
1100 West Wells Street
Milwaukee, WI 53233
(414) 289-0170

OCT 13 1989

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PARENTS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO CONTROL THE CARE, CUSTODY AND EDUCATION OF THEIR CHILDREN: THIS INCLUDES THE RIGHT TO BE INVOLVED IN THEIR MINOR CHILD'S DECISION IN A MATTER OF PROFOUND MORAL AND RELIGIOUS SIGNIFICANCE SUCH AS ABORTION 4

A. Parents Have a Constitutionally Protected Right to Control the Care, Custody and Education of Their Children. 4

B. Parental Consultation Is Particularly Important When Minors Seek an Abortion, a Decision Which Raises Issues of Profound Moral and Religious Significance. 6

II. BECAUSE OF THIS COURT'S DECISION IN *WEBSTER V. REPRODUCTIVE HEALTH SERVICES,* STATES NOW ENJOY GREATER LATITUDE IN REGULATING ABORTION. 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES — Page

Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) 10

Bellotti v. Baird (Bellotti II), 443 U.S. 622 (1979) . . . *passim*

Collautti v. Franklin, 439 U.S. 379 (1979) 9

Ginsberg v. New York, 390 U.S. 629 (1968) 4

H.L. v. Matheson, 450 U.S. 398 (1981) 10

May v. Anderson, 345 U.S. 528 (1933) 9

Meyer v. Nebraska, 262 U.S. 390 (1923) 3, 4

Moore v. East Cleveland, 431 U.S. 494 (1977) 4, 8

Parnham v. J.R., 442 U.S. 584 (1979) 6

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 3, 4, 5

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 7, 10, 11

Prince v. Massachusetts, 321 U.S. 166 (1944) 5

Quilloin v. Walcott, 434 U.S. 246 (1978) 4

Roe v. Wade, 410 U.S. 113 (1973) 3, 10, 11

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 7

Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) 3, 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3, 4, 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 4

STATUTES

Minn. Stat. Ann. §144.343 (2) 2, 3, 12

No. 88-1309

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF MINNESOTA, *et al.*,

Cross-Petitioners,

v.

JANE HODGSON, *et al.*,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND THE RUTHERFORD INSTITUTES OF MINNESOTA AND OHIO AS AMICI CURIAE IN SUPPORT OF CROSS-PETITIONERS

INTEREST OF AMICI CURIAE

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the rights and sanctity of each human life. One of the League's strongest interests has been the defense of parents' rights to direct the upbringing of their children.

The Rutherford Institute is a non-profit religious organization named for Samuel Rutherford, a seventeenth century Scottish rector dedicated to religious liberty. The

Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of religious liberty and other constitutional guarantees. With chapters in many states and its national office in Charlottesville, Virginia, the Rutherford Institute seeks to educate the public on vital issues confronting the religious community.

The Catholic League for Religious and Civil Rights and the Rutherford Institutes of Minnesota and Ohio are filing this brief in support of parental notification. No issue is more critical from a legal, theological or moral standpoint than the status of the unborn. Concomitant with this is the degree to which parental rights and the traditional family unit is to be conferred with and involved in the crisis of teenage pregnancy.

This brief will urge reversal of the Eighth Circuit Court of Appeals' decision only insofar as it upheld the district court's determination that a bypass procedure is constitutionally required as an alternative to parental notification. The Catholic League and the Rutherford Institutes of Minnesota and Ohio have obtained written permission to file this brief from counsel of record for the parties in this case. These letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The application of constitutional principles to the question of whether a state may require physicians to notify the parents of an unemancipated minor prior to performing an abortion on their daughter, without establishing a bypass procedure, necessitates reversal of that portion of the Eighth Circuit Court of Appeals' decision which affirmed a lower court's invalidation of Minn. Stat. Ann. §144.343 (2) (the pure notice provision). The Eighth Circuit summarily affirmed a lower court's ruling that a bypass procedure is constitutionally required as an alternative to parental notification. Since the Court of Appeals failed to adequately

explain its reasons for affirming the lower court's decision, perplexing constitutional issues remain unresolved.

By requiring that parents be notified before their daughters have an abortion, the State of Minnesota has demonstrated that it correctly perceives and supports parents' preeminent right to direct their children's upbringing. The Minnesota statute conforms with established tradition and prior decisions of this Court which have upheld the constitutionally protected right of parents to control the custody, care and education of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Since the abortion decision raises profound moral and religious issues, *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979), parental consultation is particularly appropriate in any decision involving abortion. The "primary role" and "fundamental interest of parents, as contrasted with . . . the State, to guide the religious future and education of their children . . . is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

Generally, state regulation of abortion has been permissible to foster "compelling state interests" by "narrowly drawn" legislation. *Roe v. Wade* 410 U.S. 113, 155 (1973). However, in light of this Court's decision last term in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), states now enjoy greater latitude in regulating abortion.

Minnesota's legitimate interest in protecting the integrity of the family and the well-being of minors justifies the requirement of parental notification without an alternative bypass procedure, which is codified in Minn. Stat. Ann. §144.343 (2).

ARGUMENT

I. PARENTS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO CONTROL THE CARE, CUSTODY AND EDUCATION OF THEIR CHILDREN: THIS INCLUDES THE RIGHT TO BE INVOLVED IN THEIR MINOR CHILD'S DECISION IN A MATTER OF PROFOUND MORAL AND RELIGIOUS SIGNIFICANCE SUCH AS ABORTION.

A. Parents Have a Constitutionally Protected Right to Control the Care, Custody and Education of Their Children.

The right of parents to oversee the upbringing of their children is a tradition firmly rooted in constitutional jurisprudence. "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). In describing the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, this Court noted in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) that "it denotes not merely freedom from bodily restraint but also the right of the individual to contract and to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and *bring up children*. . . ." (emphasis added).

Numerous decisions of this Court have acknowledged and supported the traditional family structure, which places parents in a position of authority over their children. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Moore v. East Cleveland*, 431 U.S. 494 (1977); and *Quilloin v. Walcott*, 434 U.S. 246 (1978). In a long line of cases beginning with *Meyer, supra* and *Pierce v. Society of Sisters*, 268 U.S. 510, (1925), this Court has consistently affirmed parents' constitutionally protected rights in relation to their children. "The child is not

the mere creature of the State: those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535.

Parents' ability to provide a structured environment to facilitate their children's sound moral and psychological development depends in large measure on parents' capacity to assume leadership within the family; and the notion of effective leadership necessarily implies the exercise of authority. In *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1979) Justice Powell stated that "central" to many of the theories which attempt to determine the most effective way for parents to help their children to achieve responsible adulthood and "deeply rooted in our nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children." 443 U.S. at 638 (plurality opinion).

While discussing "the affirmative process of teaching, guiding, and inspiring by precept and example" which "is essential to the growth of young people into mature, socially responsible citizens," Justice Powell noted that:

> We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. "Thus, [i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither supply nor hinder*."

443 U.S. at 638, quoting *Prince v. Massachusetts*, 321 U.S. 166 (1944) (emphasis in original).

Writing for the majority in *Parnham v. J.R.*, 442 U.S. 584, 602 (1979), the same year that *Bellotti II* was decided, Chief Justice Warren Burger explained the policy considerations underlying this Court's adherence to the principle of parental dominion over their children:

> Our jurisprudence has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

(citations omitted).

Very clearly, the requirement imposed by Minnesota that parents be informed prior to their daughter's having an abortion is a reasonable and necessary legislative effort to ensure that parents' constitutionally protected rights will not be circumvented. Certainly notice of their children's activities is a minimum expectation of parents; and surely without such notice, parents are powerless to act in the best interests of their children or, in fact, to act at all.

B. Parental Consultation Is Particularly Important When Minors Seek An Abortion, a Decision Which Raises Issues of Profound Moral and Religious Significance.

Implicit in the concept of parental custody is the belief that parents are responsible for the health care of minor children. "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parnham*, 442 U.S. at 603.

> [P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long range consequences, a State reasonably may determine that parental consultation often is desirable and often in the best interest of the minor.

Bellotti II, 443 U.S. at 640 (plurality opinion).

The difficulties ordinarily encountered by minors seeking medical treatment are exacerbated by the extreme gravity of the abortion decision, which may result in both physical and psychological trauma. The stressful nature of the abortion decision and the need for parental consultation were noted by Justice Stewart in his concurring opinion in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976):

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried, pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

428 U.S. at 91 (Stewart, J., concurring).

Justice Stevens recently described the abortion decision as "a difficult choice having serious and personal consequences of major importance to [the women's] own future — perhaps to the salvation of her immortal soul." *Thornburgh v. American*

College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (Stevens, J., concurring).

By involving parents in the abortion decision, Minnesota invokes established wisdom which holds parents responsible for the moral upbringing of their children. Involvement in the crucial moral decisions of their children's lives is essential if parents are to effectively discharge their duty. If parents fail in this effort, successive generations of individuals lacking the ability to make morally coherent decisions may well be the norm for the future.

In *Moore v. East Cleveland*, 431 U.S. 494 (1977) this Court discussed the preeminent position of the family in society and noted the family's traditional function as guardian of the nation's moral and cultural heritage. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." 431 U.S. at 503-04. (plurality opinion).

Commenting on this passage, Justice Powell observed that "the unique role in our society of the family requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children." *Bellotti II*, 443 U.S. at 634.

Minors need their parents' protection and guidance in order to successfully achieve the degree of moral and emotional development necessary to withstand the vicissitudes of modern life and to become contributing members of society. Parents have a corresponding responsibility to provide religious and moral direction through example, teaching and discussion. "The duty to prepare the child for 'additional obligations' . . .must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

The family's ability to carry out its vital functions is jeopardized, if not vitiated completely, when parents are kept in a conspiracy of silence, unaware of the moral dilemmas with which their children struggle. Children's unique position in society has been recognized by this Court. "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." *May v. Anderson*, 345 U.S. 528, 536 (1933) (Frankfurter, J., concurring). The Minnesota legislature has acted properly and responsibly to ensure that minors contemplating the wrenching decision of whether to have an abortion will have an opportunity to resolve this crisis within the protective framework of the family.

Because the abortion decision is fraught with so many enduring consequences not readily apparent to adolescents, and because it has far-reaching moral implications, the absence of parental guidance at this critical time is tragic — for the children, the parents and the family.

II. BECAUSE OF THIS COURT'S DECISION IN *WEBSTER V. REPRODUCTIVE HEALTH SERVICES*, STATES NOW ENJOY GREATER LATITUDE IN REGULATING ABORTION.

This Court has never ruled on the question of whether a judicial bypass procedure is constitutionally required as an alternative to parental notification. In light of last term's decision in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), it is clear that states now enjoy greater latitude than before in regulating abortion. In *Webster*, this Court upheld various provisions of a Missouri statute which placed certain limitations on women's abortion decisions. Chief Justice Rehnquist, writing for the plurality, noted that "[t]here is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Collautti v.*

Franklin, 439 U.S. 379 (1979) and *Akron v. Akron Center for Reproductive Health, Inc., supra.*" 109 S.Ct. at 3058. (citation omitted in original.)

Although this Court has determined that a minor's decision to have an abortion may not be subject to a third party's absolute veto (*Danforth*), it has also expressly declined to equate notice requirements with consent requirements. *H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (n.17 quoting *Bellotti II*, 443 U.S. at 640.) Justice Stevens has observed that "[n]either *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to parents, without affording them or any other third party an absolute veto." 443 U.S. at 654, n.1 (Stevens, J., concurring).

The *Matheson* Court considered the constitutionality of a Utah statute which required parental notice. It held that although the appellant lacked standing to challenge the statute on its face, the statute was constitutional as applied to an unemancipated girl who had made no claim regarding either her maturity or her relationship with her parents. In ruling that the statute was constitutionally sound, this Court expressed its approval of parental consultation regarding the abortion decision:

> As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.

450 U.S. at 409 (quoting *Bellotti II*, 443 U.S. at 640).

Cross-Respondents below assert that a minor's right to privacy based on *Roe v. Wade*, 410 U.S. 113 (1973) is infringed by Minnesota's parental notification statute. However, as Justice Stevens has noted:

> [T]he holding in *Roe v. Wade* (citations omitted) that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision.

Danforth, 428 U.S. at 102 (Stevens, J., concurring and dissenting).

Justice Stevens has observed that "[t]he State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." *Id.*

Justice Powell has described the proper relationship between competing interests when parents' rights to direct their children's upbringing conflict with rights claimed by children who wish to assert their autonomy:

> Properly understood, then, the traditional parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

Bellotti II, 443 U.S. at 638 (plurality opinion)(footnote omitted).

The important considerations articulated by Justice Powell are reflected in Minnesota's requirement of parental notification. This legislation fosters two substantial state interests: it supports the integrity of the family by recognizing

parental authority and it protects children in crisis by providing them with an opportunity for parental consultation.

A requirement of parental notice without a judicial bypass procedure as an alternative does not give any third party a veto over a minor's decision to have an abortion. It merely allows parents to know in advance of their daughter's intentions. The privacy-based constitutional right of parents to direct their children's upbringing deserves vigilant protection. Minnesota's legitimate concern with preserving the integrity of the family and protecting minors justifies enactment of a parental notification statute without a judicial bypass procedure.

CONCLUSION

Minn. Stat. Ann. §144.343 (2) (the pure notice provision) which requires physicians to notify parents of an unemancipated minor under the age of 18, at least 48 hours prior to performing an abortion on their daughter comports with constitutional standards previously articulated by this Court. That portion of the decision of the Eighth Circuit Court of Appeals which upheld the district court's ruling that a bypass procedure is constitutionally required as an alternative to parental notification should be reversed.

Respectfully submitted,

NANCY J. GANNON
Counsel of Record for Amici Curiae
GEORGE W. KOCH, JR.
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

THOMAS W. STRAHAN
The Rutherford Institute of Minnesota
1313 Fifth Street S.E., Suite 324
Minneapolis, MN 55414
(612) 331-5217

ROBERT R. MELNICK
The Rutherford Institute of Ohio
18 North Phelps Street, Suite 300
Youngstown, OH 44503
(216) 744-8973

October 12, 1989

Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-790, 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

No. 88-790

BERNARD J. TURNOCK, et al., *Appellants*,

v.

RICHARD M. RAGSDALE, et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF THE HON. CHRISTOPHER H. SMITH, ALAN B. MOLLOHAN, VIN WEBER, ROBERT K. DORNAN, EARL HUTTO, JOHN LaFALCE, VIRGINIA SMITH, BILL EMERSON, HENRY J. HYDE AND GORDON J. HUMPHREY MEMBERS OF THE CONGRESS OF THE UNITED STATES, IN SUPPORT OF APPELLANTS IN TURNOCK AND CROSS-PETITIONERS IN HODGSON

James Bopp, Jr.
Counsel of Record
Barry A. Bostrom
BRAMES, McCORMICK, BOPP & ABEL
191 Harding Avenue
Post Office Box 410
Terre Haute, Indiana 47808-0410
(812) 238-2421
Counsel for Amici

Graphics Ltd., Indianapolis, IN 46206

QUESTION PRESENTED HEREIN

Whether stare decisis, in light of the standards announced in *Patterson v. McLean Credit Union*, prevents reconsideration of *Roe v. Wade*?

TABLE OF CONTENTS

	Page:
Question Presented Herein	i
Table of Contents	ii
Table of Authorities	iii
Interest of Amici	2
Summary of Argument	2
Argument	3
I. The Stare Decisis Standards for Reconsideration of Precedent Announced in *Patterson* are fully Met	3
A. *Roe v. Wade* has been Undermined by Subsequent Changes and Development in the Law	5
1. *Roe* has been Undermined by *Webster v. Reproductive Health Services*	6
2. *Roe* has been Undermined by *Michael H. v. Gerald D.* and *Bowers v. Hardwick*	11
B. *Roe v. Wade* is a Positive Detriment to Coherence and Consistency in the Law	13
1. *Roe v. Wade* is an Unworkable Decision which has Created Inherent Confusion in the Law	13
2. *Roe v. Wade* Poses a Direct Obstacle to the Realization of Important Objectives Embodied in other Laws	16
C. *Roe v. Wade* is Outdated and is Inconsistent With the Sense of Justice and the Social Welfare	20
II. *Roe v. Wade* Should be Reversed	27

TABLE OF AUTHORITIES

Cases:	*Pages:*
Supreme Court Cases	
Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)	6, 7, 9, 10, 13
Bowen v. Kendrick, 108 S.Ct. 2562 (1988)	21
Bowers v. Hardwick, 106 S.Ct. 2841 (1986)	6, 11
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932)	4
Colautti v. Franklin, 439 U.S. 379 (1979)	16
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 557 (1985)	28
Gary-Northwest Ind. Women's Serv. v. Orr, 451 U.S. 934 (1981)	14
Harris v. McRae, 448 U.S. 297 (1980)	21
Michael H. v. Gerald D., 109 S.Ct. 2333 (1989)	6, 12
Moore v. East Cleveland, 431 U.S. 494 (1977)	11
Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989)	4, 5, 13, 20
Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)	16
Roe v. Wade, 410 U.S. 113 (1973)	5, 9, 11, 12, 14, 15
Simopolous v. Virginia, 462 U.S. 506 (1983)	13
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)	5, 7, 8, 13, 27
Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989)	6, 7, 9, 11

Other Cases

Bonbrest v. Kotz, 65 F.Supp. 138 (D.D.C. 1946)..... 17, 18

Dietrich v. Northampton, 138 Mass. 14 (1884)..... 17

Douglas v. Town of Hartford, 542 F. Supp. 1267 (D. Conn. 1982)..... 18

Harman v. Daniels, 525 F. Supp. 798 (W.D. Va. 1981).. 18

Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) 19

McGarvey v. Magee-Womens Hosp., 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973).. 18

Poole v. Endsley, 371 F. Supp. 1379 (N.D. Fla. 1974), *aff'd in part*, 516 F.2d 898 (5th Cir. 1975)..... 18

Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).... 24

Sox v. United States, 187 F. Supp. 465 (E.D.S.C. 1960). 18

Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) 19

Wolfe v. Schroering, 388 F. Supp. 631 (W.D. Ky. 1974), *aff'd*, 541 F.2d 523 (6th Cir. 1976)..... 14

Statutes

20 U.S.C.A. 2771-72 (West Supp. 1988)..... 25

42 U.S.C. Sec. 300-300a-6a (1982 ed. and Supp. IV).... 21

42 U.S.C. Sec. 300z et seq. (1984) (Adolescent Family Life Act)..... 21

42 U.S.C. Sec. 1396 et seq. (1982 ed. and Supp. IV) ("Hyde Amendment")..... 21

42 U.S.C. Sec. 1983 (1976)..... 18

Child Abuse Amendment of 1984, 42 U.S.C.A. Sec. 5101-03 (West Supp. 1988)..... 25

Education of the Handicapped Act, 20 U.S.C.A. Sec. 1400-85 (West Supp. 1988)..... 25

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Sec. 794 (West Supp. 1988)..... 25

Executive and Legislative Materials

Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong. 1st Sess. 47, 73-74, App. B (1983) (prepared statement of Lynn D. Wardle)..... 21

Proclamation No. 5761, 53 Fed. Reg. 1464 (1988) 21

Miscellaneous

Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151 (1958)..... 4

Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Public Law 180 (1989)..... 11, 14, 15, 16, 22

Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of of Roe v. Wade?*, 15 J. CONTEMP. L. 131 (1989)..... 22

Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461 (1989)..... 24, 25

Brief for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology, Roe v. Wade, 410 U.S. 113 (1973)..... 14

Brief for Robert L. Sassone at 25-36, *Roe v. Wade*, 410 U.S. 113 (1973)..... 15

Brief of the American Academy of Medical Ethics, as *Amicus Curiae*, filed herein 12

Bush, *Fertility-Related State Laws Enacted in 1982*, 15 Fam. Plan. Persp. 111 (1983)..... 21

Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987) 4

Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250 (1975) 15

Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) 22

Ethics and Medical Genetics in the United States: A National Survey, 29 Am. J. Med. Genetics 815 (1988). 25

Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 1985 N.C.L. Rev. 375 22

Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579 (1965) 19

Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in *New Perspectives on Human Abortion* 69-91 (T. Hilgers, D. Horan & D. Mall eds. 1981) 15

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) 6

Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L.J. 267 (1986) 22

Kolata, *Fetal Sex Test Used as Step to Abortion*, The New York Times, Dec. 25, 1988, at A1 25

Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 Am. J. L. & Med. 1 (1983) 26

Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467 4

Morgan, *Roe v. Wade and the Lessons of Pre-Roe Case Law*, 77 Mich. L. Rev. 1724 (1979) 22

Morrison, *Torts Involving the Unborn — A Limited Cosmology*, 31 Baylor L. Rev. 131 (1979) 19

Most in U.S. Favor Ban on Majority of Abortions, Poll Finds, The Boston Globe, Mar. 31, 1989, at A1.... 25, 27

Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. Sch. L. Rev. 1221 (1982) 16

Note, *Douglas v. Town of Hartford: The Fetus as Plaintiff Under Section 1983*, 35 Ala. L. Rev. 397 (1984) 18

Note, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 U.C.L.A. L. Rev. 1195 (1982) 22

Note, *The Fetus Under Section 1983: Still Struggling for Recognition*, 34 Syracuse L. Rev. 1029 (1983) 18

Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349 (1970) 18

Plato, *Phaedrus* 11

Prosser and Keeton on the Law of Torts (W. Keeton ed. 5th ed. 1984) 18

Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 Duke L.J. 1401 19

Rosenblum & Grant, *The Legal Response to Babies Doe: An Analytical Prognosis*, 1 Issues in Law & Med. 391 (1986) 25

Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L.J. 67 14

Torres and Forrest, *Why Do Women Have Abortions?* 20 Family Planning Perspectives 169 (1988) 23

W. Prosser, *Handbook on the Law of Torts* 336 (4th ed. 1971) 17

Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231 ..... 21, 22

Wash. Post, Nov. 13, 1988, at C6, col. 1 21

Wertz & Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, Hastings Center Rep., May/June 1989, at 21 25

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

No. 88-790

BERNARD J. TURNOCK et al., *Appellants*,

v.

RICHARD M. RAGSDALE et al., *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

No. 88-1309

STATE OF MINNESOTA et al., *Cross-Petitioners*,

v.

JANE HODGSON et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF AMICI CURIAE OF THE HON. CHRISTOPHER H. SMITH, ALAN B. MOLLOHAN, VIN WEBER, ROBERT K. DORNAN, EARL HUTTO, JOHN J. LaFALCE, VIRGINIA SMITH, BILL EMERSON, HENRY J. HYDE AND GORDON J. HUMPHREY MEMBERS OF THE CONGRESS OF THE UNITED STATES, IN SUPPORT OF APPELLANTS IN TURNOCK AND CROSS-PETITIONERS IN HODGSON

INTEREST OF AMICI[1]

The amici are members of the Congress of the United States. Representatives Christopher H. Smith and Alan B. Mollohan are Co-Chairmen of the Congressional Pro-Life Caucus, an organization of congresspersons who oppose abortion on demand. Representatives Vin Weber and Virginia Smith are members of the United States House of Representatives Appropriations Committee which has jurisdiction over the appropriation of federal funds for the provision of abortion services. Representatives Robert K. Dornan, Earl Hutto, John J. LaFalce, Bill Emerson, and Henry J. Hyde are members of the Congressional Pro-Life Caucus. Senator Gordon J. Humphrey is a member of the Senate Judiciary Committee and the Senate Pro-Life Action Task Force for Women, Children and the Unborn. All support the reconsideration and reversal of *Roe v. Wade* by this Court.

SUMMARY OF ARGUMENT

In *Patterson v. McLean Credit Union*, this Court set out three standards, any one of which, if met, deprive a precedent of stare decisis respect. Your amici argue that *Roe v. Wade* meets all three tests. First, *Roe v. Wade* has been undermined by subsequent changes and development in the law. *Roe* been systematically undermined by its progeny which depart from the limitations expressed in *Roe*. Further, *Webster v. Reproductive Health Services* heralded a new willingness to uphold state laws protective of unborn human life in contrast to the previous extreme hostility to any meaningful regulation of abortion. The decision also demonstrated the disappearance of majority support for the trimester scheme set up in *Roe*, and a change in the standard of review for abortion regulations.

Second, *Roe v. Wade* is a positive detriment to coherence and consistency in the law. *Roe* is an unworkable decision which has

[1] This Brief Amici Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed with the Clerk of this Court.

created inherent confusion in the law because of the use of the trimester medical criteria. It also poses a direct obstacle to the realization of important objectives embodied in other laws in relation to the rights of the unborn in tort law, in wrongful death actions, in equity, in criminal law, and in laws relating to respect.

Third, *Roe v. Wade* is outdated and should be found to be inconsistent with the sense of justice and the social welfare. Examples of this inconsistency include: the rejection of *Roe* in scholarly analysis and political activity; the use of *Roe*, in practice and in law, to justify discrimination against the unborn in general, and those with disabilities in particular; the practice of sex selection abortions; the developments in medicine whereby the fetus is treated as a patient; public opinion in opposition to abortion on demand; and abortion as the exception which swallows all commonly accepted rules of law.

ARGUMENT

I. THE STARE DECISIS STANDARDS FOR RECONSIDERATION OF PRECEDENT ANNOUNCED IN *PATTERSON* ARE FULLY MET.

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution where correction through leglislative action is practically impossible, this Court has often overruled its prior decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fuitful in the sciences, is appropriate also in the judicial function.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-410 (1932) (Brandeis, J., dissenting).[2] On almost 90 occassions since *Burnet*, this Court has reviewed and reversed its decisions on constitutional law. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 494-496 (listing 47 constitutional decisions overturned 1960-1979); Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 Mich. L. Rev. 151, 167, 184-194 (1958) (identifying 60 constitutional law decisions among 90 overrulings of prior Supreme Court decisions). The Library of Congress has identified, through 1986, 184 cases in which this Court has reversed its own prior rulings. Congressional Research Service, *The Constitution of the United States, Analysis and Interpretation*, 2115-2127, & Supp. (1987).

Given the importance of stare decisis in the law, it is appropriate that this Court set forth a reliable standard for determining when reconsideration is proper. This was done most recently in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), which stated:

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that "any departure from the doctrine of *stare decisis* demands special justification." We have also said that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory constuction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, *unlike in the context of constitutional interpretation*, the legislative power is implicated, and Congress remains free to alter what we have done.

---

[2] Justice Brandeis identified 28 instances in which the Court had reversed or qualified its own prior reading of the Constitution. That number has at least tripled in the years since *Burnet*. *See* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 Wis. L. Rev. 467, 467.

Id. at 2370 (emphasis added). Thus, unlike *Patterson*, reconsideration of *Roe v. Wade*, 410 U.S. 113 (1973), involves constitutional interpretation rather than statutory interpretation. The burden borne in establishing the necessity of reconsideration is therefore diminished.

In *Patterson*, this Court set out three standards, any one of which, if met, constitutes sufficient justification to reconsider a judicial precedent. Your amici argue that *Roe v. Wade* meets all three tests and is thus ripe for reconsideration.

The *Patterson* standards are: (1) Whether the precedent has been "undermined by subsequent changes or development in the law;" (2) Whether the precedent is "a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision," or "because the decision poses a direct obstacle to the realization of important objectives embodied in other laws;" or (3) Whether the precedent is "outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Patterson*, 109 S.Ct. at 2371 (citations omitted). Each of these tests will be applied to *Roe v. Wade* below.

A. *ROE V. WADE* HAS BEEN UNDERMINED BY SUBSEQUENT CHANGES AND DEVELOPMENT IN THE LAW.

Contributing to the undermining of *Roe* is the fact that, while claiming to follow *Roe*, this Court has systematically gutted *Roe* in order to provide for the desired result. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783 (1986) (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent."). The doctrine of stare decisis presupposes a precedent with content to be followed. By emptying *Roe* of content, the Court's appeal to stare decisis is now an appeal only to the skeletal concept that a woman may have an abortion whenever she desires, for whatever reason.

However, the undermining of *Roe* in *Roe's* progeny takes a secondary place to the important changes heralded by the decisions in *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989), *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989), and *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986).

1. *ROE* HAS BEEN UNDERMINED BY *WEBSTER V. REPRODUCTIVE HEALTH SERVICES.*

The most profound change in abortion jurisprudence came when this Court decided *Webster*. Supreme Court Justice Oliver Wendell Holmes, Jr. declared that the state of the law is nothing more than a prediction of what the courts will do. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897). This is an insight impressed upon modern jurisprudence by the philosophical school of legal realism. Employing this analysis, one may readily determine the state of abortion law by examining the opinions of members of the new *Webster* majority in prior abortion cases and in *Webster*. The evidence indicates that a significant, de facto alteration has occurred in the state of abortion law. Several aspects of *Webster* undermine *Roe* and its progeny.

First, the alteration of abortion jurisprudence is apparent in the fact that the challenged provisions of the Missouri abortion law were all upheld. The provisions had all been declared unconstitutional by the Eighth Circuit Court of Appeals and would have been declared unconstitutional by the four member dissent in *Webster*. 109 S.Ct. at 3068 n.1 (Blackmun, J., dissenting).

This willingness to uphold life-protective laws is a dramatic change from this Court's prior pattern of striking down virtually every meaningful regulation of abortion. This new willingness to uphold state efforts to protect unborn human life signals a *sub silentio* reversal of the extreme results and hostility to virtually any abortion regulation which were evident in the Court's most recent abortion decisions, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

Second, the alteration of abortion jurisprudence is evident in the disappearance of majority support for the trimester scheme set up in *Roe*. This decision results in a de facto reversal of that scheme, along with its viability line for protection of unborn life. Justice O'Connor declared her belief that a state has a compelling interest in unborn life and maternal health throughout pregnancy in her earlier dissents to *Akron* and *Thornburgh*. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting)("I . . . remain of the views I expressed in my dissent in *Akron*. The State has compelling intersts in ensuring maternal health and in protecting potential human life . . . throughout pregnancy."). With Justices Rehnquist, White, Scalia and Kennedy declaring the same view in *Webster*,[3] five justices have now recognized that a state's interest in protecting unborn human life does not become compelling *only* after viability, but exists throughout pregnancy. Likewise, the line between first and second trimesters, where *Roe* said the states' interest in maternal health becomes compelling, is now meaningless.

Third, the de facto shift in abortion jurisprudence may be seen in Justice O'Connor's argument that the Missouri viability testing requirement was compatible with *Akron* because it did not "unduly burden" a woman's right to abortion. *Webster*, 109 S.Ct. at 3062-64. This unduly burdensome or "absolute obstacle" test, which she championed in *Akron* and under which she felt the *Akron* ordinances could be upheld, was rejected by the *Akron* majority which struck down the *Akron* ordinances she approved. *Akron*, 462 U.S. 420 n.1. With four other justices now willing to go even further in *Webster* than was Justice O'Connor, it is clear that the absolute obstacle test now is the resulting standard among the majority. Thus, for the time

---

[3] Justice Scalia would reverse *Roe* outright in *Webster*, holding that there is no fundamental constitutional right to abortion. However, if such a right is maintained, it is assumed he would agree that the state has countervailing compelling interests.

being, it will be the de facto standard of review for abortion statutes. A review of Justice O'Connor's *Akron* and *Thornburgh* dissenting opinions reveals that many state regulations of abortion will pass muster under her analysis.[4]

At present, four justices of the new majority will scrutinize abortion statutes using a rational basis test, the Court's lowest level of scrutiny. Justice O'Connor has no problem with this standard of review, except in the cases where the legislation is an absolute obstacle or a "severe limitation" to obtaining an abortion. While the scope of this test is not yet fully fleshed out, the practical result is that *Roe* has been substantially modified and much legislation to protect unborn life will be permitted.

Fourth, another aspect of the de facto shift in abortion jurisprudence is closely related to the previous one. It involves the nature of the woman's interest in abortion itself, which governs the standard of review. Under the usual analysis, if one has a "fundamental right," the state must show a "compelling interest" to regulate it. That standard is almost impossible to meet, making regulation of fundamental rights virtually

[4] In *Thornburgh*, Justice O'Connor stated her absolute obstacle analysis as follows:

> I . . . remain of the views expressed in my dissent in Akron. The State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist throughout pregnancy. Under this Court's fundamental-rights jurisprudence, judicial scrutiny of state regulation of abortion should be limited to whether the state law bears a rational relationship to legitimate purposes such as the advancement of these compelling interests, with heightened scrutiny reserved for instances in which the State has imposed an undue burden on the abortion decision. An undue burden will generally be found in situations involving absolute obstacles or severe limitations on the abortion decision, not wherever a state regulation may inhibit abortion to some degree. And if a state law does interfere with the abortion decision to an extent that is unduly burdensome, so that it becomes necessary to apply an exacting standard of review, the possibility remains that the statute will withstand the stricter scrutiny. *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting, joined by Rehnquist, J., in her opinion)(internal quotation marks and citations omitted.).

impossible for the state to do. However, if one only has a "liberty interest," a state need only demonstrate a "rational basis" for its regulations — a much simpler task, allowing states to extensively regulate it.

The *Webster* plurality declared that a woman has only a liberty interest in abortion under the Fourteenth Amendment, not a fundamental right to abortion as *Roe* held. *Webster*, 109 S.Ct. at 3058. Justice Scalia concurs that there is no fundamental right to abortion. *Id.* at 3064-67. Justice O'Connor, by her advocacy of the rational basis standard of review in most cases, concurs, as well, that there is no general fundamental right to abortion. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, where there is an undue burden, she might find a fundamental right (for she would employ the compelling interest standard in such cases). She made an assumption, *arguendo*, in *Akron*, where she said, "Even *assuming* that there is a fundamental right to terminate pregnancy *in some situations*, there is no justification in law or logic for the trimester framework . . . ." *Id.* at 459 (emphasis added).

Thus, five justices now agree that, at a minimum, there is no *general* fundamental right to abortion; in most cases, there is only a liberty interest. Four would hold that there is no fundamental right to abortion in any situation. Of course, as noted above, five justices now find that states have the compelling interests — in both unborn life and maternal life — necessary to allow states to regulate abortion.

Fifth, another aspect of the de facto shift in abortion jurisprudence exists with regard to the "narrowly tailored" test in *Roe*. The *Roe* Court indicated that to regulate a woman's fundamental right to abortion a state must show (1) that it has a compelling interest in doing so and (2) that any such regulation is narrowly tailored to effect only that compelling interest. *Roe*, 410 U.S. at 155. Thus, the standard of review for state regulations impinging upon the declared fundamental right to abortion has been widely thought to consist of these two prongs. But Justice O'Connor wrote in *Akron:*

> The Court has never required that state regulation that burdens the abortion decision be 'narrowly tailored' to express only the relevant state interest. In Roe, the Court mentioned 'narrowly drawn' legislative enactments, but the Court never actually adopted this standard in the Roe analysis. In its decision today, the Court fully endorsed the Roe requirement that a burdensome health regulation, or as the Court appears to call it, a 'significant obstacle" be 'reasonably related' to the state compelling interest. The Court recognizes that '[a] state necessarily must have latitude in adopting regulations of general applicability in this sensitive area.'

Akron, 462 U.S. at 467 n.11 (O'Connor, J., dissenting)(citations omitted, case names not italicized in original).

This "reasonably related" test is significantly easier for a state to meet than the "narrowly tailored" test, as Justice O'Connor proceeded to demonstrate in *Akron*. *Id.* With her fellow Justices in the *Webster* majority prepared to go farther, this reasonably related test is now the de facto second prong in the new standard for reviewing abortion laws which will come before the Court.

The practical result of all these changes is that — at a minimum — *Akron* and *Thornburgh* are now dead letters. Things declared unconstitutional in those cases — which Justice O'Connor declared constitutional under her analysis (such as informed consent requirements) — may now be found constitutional.

That the new alliance on the Court portends great changes in *Roe* seems clear enough to the *Webster* dissenters. Justice Blackmun, after reading his opponents' opinions and counting the votes in *Webster*, says he fears for the future. He observed the danger in which *Roe* has been placed:

> It is impossible to read the plurality opinion and especially its final paragraph, without recognizing its implicit invitation to every State to enact more and more restrictive

> abortion laws, and to assert their interest in potential life as of the moment of conception. All these laws will satisfy the plurality's non-scrutiny, until sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law.

Webster, 109 S.Ct. at 3077.

The chief flaw in Justice Blackmun's *Webster* analysis is that *Roe's* demise is not prospective only. In *Webster*, a de facto reconsideration and partial reversal of that ill-fated decision has already occurred.

2. *ROE* HAS BEEN UNDERMINED BY *MICHAEL H. V. GERALD D.* AND *BOWERS V. HARDWICK*.

The Court has recently clarified the fundamental rights analysis and this clarification undermines the fundamental rights analysis in *Roe*. In *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), the Court, examining the history of state regulation of sodomy, concluded that there was no fundamental right to commit sodomy. Yet, the historical case for the fundamentality of abortion is no more convincing than the historical case for sodomy. The *Roe* majority cited Plato's *Republic* as evidence of abortion's deep roots in our cultural traditions. 410 U.S. at 131. The *Bowers* majority apparently did not deem this sort of evidence as worthwhile. 478 U.S. at 193-94 (no mention whatsoever of instances in ancient texts where the practice of homosexuality is condoned). Plato's dialogues contain numerous allusions to the practice of homosexual sodomy among the ancients. *See* Plato, *Phaedrus;* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Public Law 180, 240 (1989).

The test used in *Bowers* was a historical one, that is, whether such conduct is "deeply rooted in this Nation's history and tradition." 106 S.Ct. at 2844 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., concurring)). Finding that homosexual sodomy had long been regulated by the states, the

Court concluded that it did not constitute a fundamental right. *Id.* at 2844-46.

A more recent case is *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989). In it the Court considered whether a biological father (who is adulterous) has a constitutional right to visit his child born in an intact marriage. Using the historical test of *Bowers*, the Court held that there is no fundamental right to visitation in such a case, because states have historically presumed that a child born within a marriage is the product of that marriage and rejected visitation claims by adulterous fathers.

Under the historical analysis test for determining whether proposed rights are fundamental, endorsed by the five justices who have expressed opposition to *Roe*, a fundamental right to abortion cannot be found in the United States Constitution. This is true even though more than half of the majority opinion in *Roe* was given to the history of abortion. The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means. 410 U.S. at 132-39.[5] Means' history of abortion was neither objective nor accurate.[6]

Had this historical test for fundamentality been scrupulously applied in *Roe*, no right to abortion could have been found. This being true, *Roe* should be revisited.

Roe has been undermined by subsequent changes and development in the law. Ironically, this is true both in those decisions which expand the abortion right beyond *Roe*, and in the decision in *Webster* which permits the states to restrict that right. Thus, *Roe* should be reconsidered.

---

[5] The majority cited Means seven times during its depiction of the history of abortion — without noting that he was the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

[6] *See* Brief of the American Academy of Medical Ethics, as *Amicus Curiae*, filed herein.

B. *ROE V. WADE* IS A POSITIVE DETRIMENT TO COHERENCE AND CONSISTENCY IN THE LAW.

The second test enunciated in *Patterson* is whether a precedent is a "positive detriment to coherence and consistency in the law." 109 S.Ct. at 2371. This test has two possible grounds: (1) inherent confusion is "created by an unworkable decision", or (2) the decision "poses a direct obstacle to the realization of important objectives embodied in other laws." *Id.*

1. *ROE V. WADE* IS AN UNWORKABLE DECISION WHICH HAS CREATED INHERENT CONFUSION IN THE LAW.

Roe v. Wade was intended to settle the issue of abortion in American law. However, *Roe* has proven to be inherently difficult to apply in any consistent and principled manner. This fact is evident in *Roe's* progeny, which have produced a growing body of intricate and arbitrary, judicially-created regulations surrounding the abortion decision. For example, a state may require second trimester abortions to be performed in clinics, *Simopolous v. Virginia*, 462 U.S. 506 (1983), but may not require that they be performed in hospitals, *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 459 (1983). A state may require a physician to assure that certain information be provided to a pregnant woman, *Akron*, 462 U.S. at 448, but may not require that the doctor himself provide the information. *Id.* at 449. The quantum of information a state may require to be provided has been severely circumscribed. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759, 765 (1986). Prior to the decision in *Webster*, this Court struck down any meaningful attempt to codify the restrictions allowed in *Roe* and abandoned key elements of the *Roe* formula when convenient. Far from settling the debate, these subsequent decisions have multiplied confusion and spawned further unanswered questions.

It is clear, then, that, while the pro-*Roe* majority has raised the cry of stare decisis in prior cases upholding *Roe*, it has not followed its own precedent, except in the most skeletal fashion.

Illustrations abound in prior cases and include, but are not limited to, the following important developments: (1) The erosion of *Roe's* "bright line" trimester analysis; and (2) The ignoring of the physican consultation requirements. *Gary-Northwest Ind. Women's Serv. v. Orr*, 451 U.S. 934 (1981); *Akron*, 462 U.S. at 448.[7]

The inherent confusion in the law as a result of *Roe* can be illustrated in reference to four considerations: the trimester medical criteria, physician discretion, informed consent, and records. The medical criteria employed in the *Roe* trimester scheme were faulty and inadequate as a basis for a constitutional right. The unfettered discretion and deference afforded physicians in the abortion context is anomalous in light of the extensive regulation of medical practice. *See* Bopp & Coleson, *supra*, at 285. The treatment of the informed consent doctrine in the abortion context is out of step with the current trend of the law and regresses to a widely rejected model of the physician-patient relationship. *Id.* at 291. Even reasonable recording and reporting requirements have been struck down. *Id.* at 297.

The Court in *Roe* decided that the state could not regulate abortion in the first trimester, as abortion was considered safer than continuing the pregnancy during that period. *Roe*, 410 U.S. at 149, 163. In reaching this conclusion, Justice Blackmun referred to medical data from the appellant and amicus briefs.[8] The studies cited supported the proposition that abortion was safer during this period. 410 U.S. at 149. However, a review of opposing amicus briefs reveals contradictory data ignored by the Court. *See* Brief for Certain Physicians, Professors and

[7] For a more complete discussion and further illustrations of stare decisis abuse, *see* Bopp & Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Public Law 180, 201-10 (1989).

[8] *Id.* at 330. The Court's trimester scheme should not be confused with the medical division of pregnancy into three three-month periods. *See* Wolfe v. Schroering, 388 F. Supp. 631, 635 (W.D. Ky. 1974), *aff'd*, 541 F.2d 523 (6th Cir. 1976); Special Project, *Survey of Abortion Law*, 1980 Ariz. St. L.J. 67, 139-42.

Fellows of the American College of Obstetrics and Gynecology at 33-50, *Roe v. Wade*, 410 U.S. 113 (1973); Brief for Robert L. Sassone at 25-36, *Roe v. Wade*, 410 U.S. 113 (1973). The Court gave undue deference to certain segments of the medical community over others. Moreover, the asserted facts were in reality only opinions of certain medical groups. *See* Bopp & Coleson, *supra*, at 283-84. Subsequent articles and studies have supported the argument that the *Roe* Court's medical fact was really ill-founded medical opinion.[9] The *Roe* Court's exteme deference to such opinions, and to what were basically legislative facts, was unwarranted. With this foundation removed, the first trimester rule is without basis. Moreover, as medical technology changes, the relative safety of abortion and childbirth will remain a mobile guideline.

The *Roe* Court also relied on medical factors in drawing the line between the second and third trimesters, which was placed at viability. At viability, the state's interest in fetal life was to become compelling. *Roe*, 410 U.S. at 160. However, determining viability is a difficult task, leaving legislatures with an almost insurmountable task in asserting their declared compelling interest in fetal life and doctors in the precarious position of having possible criminal penalties flow from an erroneous judgment of nonviability. The result has been more litigation, resulting in a wide berth being required of legislatures when legislating around the point of viability, and virtually unchallenged discretion being allowed physicians in

[9] *See* Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in *New Perspectives on Human Abortion* 69-91 (T. Hilgers, D. Horan & D. Mall eds. 1981) (application of more accurate formulas produced a finding that natural pregnancy is safer than legal abortion in both the first and second twenty weeks of pregnancy). *See also* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1295-1303 (1975).

making the determination of viability.[10] As with the line between the first and second trimesters, the viability line is a function of advances in medical technology. This fact renders *Roe* an unworkable decision creating inherent confusion in the law.

2. *ROE V. WADE* POSES A DIRECT OBSTACLE TO THE REALIZATION OF IMPORTANT OBJECTIVES EMBODIED IN OTHER LAWS.

Roe v. Wade poses a direct obstacle to the realization of important objectives embodied in other laws which recognize and protect unborn human life. If *Roe* were taken seriously in these other contexts, no recognition or protection of unborn human life would be possible. However, where the abortion choice is not in issue, the courts have rejected the *Roe* rationale. Examples include the rights of the unborn in tort law, wrongful death actions,[11] in equity,[12] in criminal law[13] and in laws relating to respect.[14]

[10] *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 63-65 (1976). *Danforth* stressed the flexibility of the *Roe* viability concept in upholding abortion legislation. *Id.* at 65. In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court struck down a state statute very similar to *Danforth's*. The fatal flaw was vagueness. *Id.* at 393. It is ironic that attempts to make the viability concept more definite have been struck down as too restrictive, while the formula, or very similar ones, used by the Court are inherently vague. The result is that little protection of the compelling state interest in fetal life is extant. The testimony in *Danforth* produced a wide range of definitions of viability. *Id.* at 396 n.15. See generally, Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. Sch. L. Rev. 1221 (1982).

[11] Bopp & Coleson, supra note 7, at 250.

[12] Id. at 261.

[13] Id. at 268.

[14] Id. at 281.

The most dramatic illustration of the anomalies of abortion jurisprudence can be seen in the evolution of fetal rights in tort law in the past ninety years. The rights of the unborn child have moved from a position of little legal protection to a position where even preconception wrongs are recompensible. As duties to the fetus increase, the foundation upon which *Roe* sits erodes, turning it into the exception rather than the rule in defining the personhood of the fetus.

The first American case which dealt with fetal injury was the celebrated opinion by Judge Oliver Wendell Holmes, Jr. in *Dietrich v. Northampton*, 138 Mass. 14 (1884). Holmes interpreted the Massachusetts wrongful death act to preclude recovery for the death of a four to five month old fetus.[15] He held that "the unborn child was a part of the mother at the time of injury" and that "any damage to [the fetus] which was not too remote to be recovered for at all was recoverable by her." *Id.* at 17.

Dietrich was followed until 1946, when, in the words of William Prosser, "the most spectacular [and] abrupt reversal of a well settled rule in the whole history of the law of torts" occurred. W. Prosser, *Handbook on the Law of Torts* 336 (4th ed. 1971). In *Bonbrest v. Kotz*, 65 F.Supp. 138 (D.D.C. 1946), a federal court allowed the plaintiff infant to recover for injuries sustained when he was negligently taken, as a viable fetus, from his mother's womb by the defendant doctor. *Id.* at 143. The reasoning in *Bonbrest* stated:

> As to the viable child being 'part' of its mother — this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra-uterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a 'part' of the mother in

[15] The fetus lived for "ten or fifteen minutes" after premature birth. *Dietrich*, 138 Mass. at 15. Nevertheless, the court referred to the newborn as an "unborn child." *Id.* at 17

> the sence of a constituent element — as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable foetus is not a part of its mother.

Id. at 140. As to the difficulty of proof of such claims, the court stated: "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884. We are concerned here only with the right and not its implementation." *Id.* at 143.

Since *Bonbrest*, every state has recognized prenatal harm as a legitimate cause of action for a child subsequently born. *Prosser and Keeton on the Law of Torts* 368 (W. Keeton ed. 5th ed. 1984). Compensation for prenatal injuries has also been allowed under the Federal Tort Claims Act in an action against the United States. *Sox v. United States*, 187 F. Supp. 465 (E.D.S.C. 1960). A cause of action for prenatal injuries under 42 U.S.C. Sec. 1983 (1970) was recognized in *Douglas v. Town of Hartford*, 542 F. Supp. 1267 (D. Conn. 1982). The Court held that, for purposes of Sec. 1983, a fetus was a "person" within the meaning of the statute. *Contra*, *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981)(decided on virtually identical facts); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974), *aff'd in part*, 516 F.2d 898 (5th Cir. 1975); *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (3rd Cir. 1973). *See generally*, Note, *Douglas v. Town of Hartford: The Fetus as Plaintiff Under Section 1983*, *35 Ala. L. Rev. 397 (1984)*; Note, *The Fetus Under Section 1983: Still Struggling for Recognition*, 34 Syracuse L. Rev. 1029 (1983). Some states limit recovery to post-viability injuries, but the clear trend is toward recovery for all prenatal harm. *Prosser and Keeton*, *supra*, at 368-369; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 Notre Dame L. Rev. 349, 357 (1970).

The justifications given for discarding the viability test vary. In *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960), the New Jersey Supreme Court found that age is not the only determinant of viability, and, in borderline cases, there is no principled way to determine viability. *Id.* at 367, 157 A.2d at 504. The court said:

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. Whether viable or not at the time of the injury, the child sustains the same harm after birth and therefore, should be given the same opportunity for redress.

Id. A New York appellate court in *Kelly v. Gregory*, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (the first court to reject the viability standard) focused on the issue of biological separability: "[L]egal separability should begin where there is biological separability." *Id.* at 543, 125 N.Y.S.2d at 697. Here, as in other related areas of the law, medical science empowered the engine for legal change. The court noted such knowledge, especially that dealing with fetal development, as a factor in helping to lead to this rule. *Id.* at 543-44, 125 N.Y.S.2d at 697-98.

The Supreme Court of Rhode Island has dropped the viability test in favor of a causation test: "With us the test will not be viability but causation, and our inquiry will be whether the damage sustained is traceable to the wrongful act of another." *Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222, 224 (1966). This causation test seems more rational and logical than a viability test, which has been criticized as arbitrary and transient. *See, e.g.*, Morrison, *Torts Involving the Unborn — A Limited Cosmology*, 31 Baylor L. Rev. 131, 141-144 (1979); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 Duke L.J. 1401, 1414-1420. The disallowance of claims for injuries in the first trimester may well be the denial of the most meritorious and seriously harmful claims. Gordon, *The Unborn Plaintiff*, 63 Mich. L. Rev. 579, 589 (1965). Though causation may be difficult to

determine, most courts seem to realize that such difficulty should not be a bar to the action, but something to be handled in the courtroom. Recent medical advances make proof of medical causation increasingly reliable.

Roe and its analysis stands in stark contrast to the recognition of fetal rights in other areas of the law. Although some courts have utilized *Roe* to deny fetal rights, most courts have rejected the *Roe* rationale in order to affirm the personhood and legal rights of unborn persons in areas not invòlving abortion rights, and thus not burdened by the *Roe* Court's abortion distortion. In this way *Roe v. Wade* continues to be a positive detriment to coherence and consistency in the law.

C. *ROE V. WADE* IS OUTDATED AND IS INCONSISTENT WITH THE SENSE OF JUSTICE AND THE SOCIAL WELFARE.

The third test in *Patterson* to determine when a decision should be reconsidered is whether the precedent has become "outdated" and, after being "tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare." *Patterson*, 109 S.Ct. at 2371. Many of the foregoing arguments could be reiterated in regard to *Roe* as an outdated doctrine. In addition to those arguments, there are five illustrations of this inconsistency: (1) the rejection of *Roe* in scholarly analysis and political activity; (2) the use of *Roe*, in practice and in law, to justify discrimination against the unborn in general, and those with disabilities in particular; (3) sex selection abortions; (4) the fetus as patient; (5) public opinion against abortion on demand; and (6) abortion as the exception which swallows all rules.

First, the inconsistency of *Roe* with the sense of justice and social welfare is illustrated by the political activity, scholarly analysis, and public opinion which rejects *Roe* as settled law. Since *Roe*, nearly 900 separately numbered resolutions relating to abortion have been introduced into Congress.[16] Over 300 are joint resolutions seeking Constitutional amendments that would overturn *Roe*.[17] Congress has also acted broadly to remove direct federal financial support for abortion.[18] Moreover, a 1988 Presidential proclamation declared the unborn to be protected under the Constitution, and directed the executive branch to carry out actions and programs consistent with that declaration.[19]

The strongest evidence of a popular rejection of the abortion right created in *Roe* is seen in the vast number of state legislative actions and public referenda designed to limit or regulate the performance of abortions. During the 1988 elections, public referenda in Michigan, Arkansas, and Colorado affirmed restrictions on abortion, and in Arkansas, granted rights to the unborn under the state constitution.[20] During the years since *Roe*, state legislatures from all regions have enacted hundreds of laws regulating abortion.[21] At least 23 state legislatures have sent memorials requesting Congress to propose an anti-abortion amendment to the Constitution, and 19 state legisla-

---

[16] Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U.L. Rev. 231, 247, *citing*, Legal Ramifications of the Human Life Amendment: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.J. Res. 3, 98th Cong. 1st Sess. 47, 73-74, App. B (1983) (prepared statement of Lynn D. Wardle) (600 resolutions, 1973-1985). Since 1985, over 300 more resolutions have been introduced. See Statistics prepared by Legislative Information Service, United States Senate, as of February 10, 1989.

[17] *See* Wardle, *supra* note 16, at 247-248, n.86, 270 (1973-85).

[18] *Harris v. McRae*, 448 U.S. 297 (1980); *Bowen v. Kendrick*, 108 S.Ct. 2562 (1988). *See also*, 42 U.S.C. Sec. 1396 et seq. (1982 ed. and Supp. IV) ("Hyde Amendment" restricting Medicaid funding of abortion); 42 U.S.C. Sec. 300-300a-6a (1982 ed. and Supp. IV); 42 U.S.C. Sec. 300z *et seq.* (1984) (Adolescent Family Life Act).

[19] Proclamation No. 5761, 53 Fed. Reg. 1464 (1988).

[20] Wash. Post, Nov. 13, 1988, at C6, col. 1.

[21] Bush, *Fertility-Related State Laws Enacted in 1982*, 15 Fam. Plan. Persp. 111, 111 (Table 1) (1983). Wardle, *supra* note 16, at 247 n.83.

tures have passed petitions to convene a constitutional convention to propose a human life amendment to the Constitution.[22] The democratic branches of government, therefore, have not accepted or endorsed *Roe*.

In academic circles, few if any opinions of this Court have attracted the barrage of criticism levied at *Roe*.

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function. . . . Even some who approve of *Roe's* form of judicial review concede that the opinion itself is inscrutable.[23]

Nor has *Roe* exhausted its critics, for the stream of published criticism continues to this day.[24] *Roe* remains vulnerable because it was inherently flawed from the outset,[25] and because the error has compounded itself, as subsequent case law proves.

Second, *Roe* has encouraged discrimination against the unborn in general and those with disabilities in particular.

---

[22] Wardle, supra note 16, at 247.

[23] Morgan, *Roe v. Wade and the Lessons of Pre-Roe Case Law*, 77 Mich. L. Rev. 1724, 1724 (1979) (footnotes omitted).

[24] *See, e.g.*, Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v Wade?*, 15 J. CONTEMP. L. 131, 134, (1989) ("A consensus has developed that, whatever one thinks of the holding, the analysis was inadequate."); Bopp & Coleson, *supra* note 7; Wardle, *supra* note 16; Knicely, *The Thornburgh and Bowers Cases: Consequences for Roe v. Wade*, 56 Miss. L.J. 267, 281 (1986); Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 1985 N.C.L. Rev. 375; Note, *Technological Advances and Roe v. Wade: The Need to Rethink Abortion Law*, 29 U.C.L.A. L. Rev. 1195 (1982). While not all these articles suggest reversal of *Roe* as the solution, they illustrate the continued difficulty of adhering to *Roe's* standards.

[25] Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 932, 935-936 (1973).

Discrimination against the unborn in general is illustrated by the reasons given by women who have secured abortions. Each year, since the late 1970s, approximately 30 percent of all pregnancies in the United States have ended in abortion (miscarriages excluded). Torres and Forrest, *Why Do Women Have Abortions?*, 20 Family Planning Perspectives 169, 169 (1988). In 1988, the Alan Guttmacher Institute published the results of a survey of abortion patients addressing the question of why women choose to have abortions. In all, 1,900 women responded to the questionaire with usable information. Most women cited more than one reason for aborting. The results show that 76 percent of the women were concerned about how a baby could change their lives, 68 percent felt they couldn't afford a baby now, 51 percent had problems with their relationship to the fathers or wanted to avoid single parenthood. *Id.* at 170. These are the percentages of women reporting that these reasons, respectively, were most important to them in deciding to abort. Only 7 percent of the women cited health problems (not necessarily life threatening), and only 1 percent cited rape or incest as the most important reason for aborting. *Id.*

From this information, it is clear that abortion, in practice, is used instead of birth control in the overwhelming majority of cases. Maternal health problems are at the bottom of the list. Social and economic problems, real or imaginary, are at the top of the list. Such invidious discrimination against human beings would not be tolerated elsewhere in the law. Yet this discrimination is the worst kind because it results in the death of those discriminated against. Causing the death of another human being, for less than grave reasons, violates our sense of justice.

Further, *Roe* has resulted in specific discrimination against unborn humans with disabilities. This result occurs due to the wave of wrongful birth/wrongful life causes of action recognized by various courts since *Roe*. Wrongful birth actions hold physicians and other health care professionals liable for failure to test for birth defects and to advise the parents that they could abort the child, if the child tests positive. The parents claim

that they would have aborted the child if they had been properly advised. Bopp, Bostrom & McKinney, *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 Duq. L. Rev. 461, 461-62 (1989). Wrongful life actions are similar, except that the action is brought by a child with disabilities, who claims that his life is wrongful since his parents were denied their right to abort him. *Id.*

Prior to the 1973 decision in *Roe*, wrongful birth/life actions were unsuccessful due to the prevailing public policy against abortion. *Id.* at 467. With the *Roe* Court's enunciation of a woman's privacy right which protected the abortion decision from state criminal prosecution, wrongful birth claims were recognized by some courts on the theory that the negligence of the health care provider had infringed this private, protected choice. Commentators are nearly unanimous in concluding that *Roe* provided the legal springboard for the wave of wrongful birth actions that subsequently appeared. This conclusion is supported by the language and citations to *Roe* found in the decisions which recognized the new cause of action. *Id.*

One of the most important results of holding physicians and others liable for failure to advise of the presence or possibility of birth defects is that they are forced to practice "defensive" medicine. Such potential liability creates a financial incentive for physicians to recommend amniocentesis and genetic screening in borderline cases, and in possibly most or all cases for the particularly cautious physician. An increase in prenatal testing in turn results in more abortions, both of nondisabled fetuses because of false postitive test results, and fetuses with disabilities (the extent of which are frequently unknown and unpredictable) because the fetus does not meet the couples standard of perfection. *Id.* at 485-92.

This *Roe*-engendered discrimination against fetuses with disabilities stands in stark contrast with public policy regarding such persons after birth. State public policies are commonly protective of persons with disabilities regarding the

provision of health insurance and education programs. *Id.* at 494. Federal policy likewise encourages the care and education of persons with disabilities as reflected in the Education of the Handicapped Act, 20 U.S.C.A. Sec. 1400-85 (West Supp. 1988), the Child Abuse Amendment of 1984, 42 U.S.C.A. Sec. 5101-03 (West Supp. 1988), the provision of grants to states that offer free public education to disabled children, 20 U.S.C.A. 2771-72 (West Supp. 1988), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Sec. 794 (West. Supp. 1988).

Against the backdrop of policy protecting citizens with disabilities, recognition of wrongful birth/life claims creates a jurisprudential contradiction: a legal system that at once encourages the destruction of "defectives" before birth and seeks to protect those lives after birth. Rosenblum & Grant, *The Legal Response to Babies Doe: An Analytical Prognosis*, 1 Issues in Law & Med. 391 (1986). This result, traceable directly to *Roe*, is inconsistent with the sense of justice and the social welfare.

Third, another illustration of how *Roe* is inconsistent with the sense of justice and social welfare is the rise of sex selection abortions. "There are no national data on the number of prenatal diagnoses done for sex selection, nor on the number of women who terminate pregnancies because of the sex of the fetus. But every one of more than a dozen geneticists interviewed said they regularly receive requests for prenatal diagnosis for sex selection." Kolata, *Fetal Sex Test Used as Step to Abortion*, The New York Times, Dec. 25, 1988, at A1.

On the one hand, a recent survey found that 34% of 295 United States geneticists surveyed would perform prenatal diagnosis for sex selection abortions and 28% would refer couples to someone who would perform it. *Ethics and Medical Genetics in the United States: A National Survey*, 29 Am. J. Med. Genetics 815 (1988)(cited in Wertz & Fletcher, *Fatal Knowledge? Prenatal Diagnosis and Sex Selection*, Hastings Center Rep., May/June 1989, at 21). On the other hand, a survey by the Boston Globe revealed that 93% of Americans think that

sex selection abortions should be illegal. *Most in U.S. Favor Ban on Majority of Abortions, Poll Finds* The Boston Globe, Mar. 31, 1989, at A1.

This type of selection process is not dissimilar to shopping for goods in order to find the desired size, shape and color. If sex selection abortions are consistent with the sense of justice and the social welfare, why not selection for eye or hair color, height or weight. If fetuses are not human lives, are they merely goods to be thrown away if failing to meet some predetermined set of arbitrary quality standards? This amounts to consumer genetics, an extreme devaluation of human life.

Fourth, in stark contrast to the consumerist view is the modern view of the fetus as patient. In the last few decades medical technology has advanced to the the point where visualizing, monitoring and measuring fetal activity is possible. Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 Am. J. L. & Med. 1, 15-16 (1983). Due to these advances, the fetus is not only capable of being monitored, but treated by physicians for certain conditions prior to birth. Treatments include medicines administered orally to the mother, or directly into the amniotic fluid, as well as fetal surgery. Surgery can take place entirely within the uterus or after partial removal of the fetus from the uterus onto an open operating field. *Id.* at 16-17. Such advances in medical procedure and care given to unborn humans in need of medical treatment represents a sense of justice and social welfare lost in abortion on demand.

Fifth, prior to *Webster* it seemed that abortion jurisprudence had evolved into a right to abort without limitations. This occurred despite public opinion to the contrary. In a survey by The Boston Globe/WBZ, the following percentages of persons polled wanted abortion to be illegal in the respective circumstances: when the woman is a minor- 50%, wrong time in life to have a child- 82%, fetus is not the desired sex- 93%, financial difficulties- 75%, as a means of birth control- 89%, emotional strain- 64%, father unwilling to help raise the child- 83%, father

absent- 81%, mother wants abortion, father wants baby- 72%, and father wants abortion, mother wants baby- 75%. *Most in U.S. Favor Ban on Majority of Abortions, Poll Finds*, The Boston Globe, Mar. 31, 1989, at A1. Thus, for most of the reasons commonly given by women seeking abortions, *Roe*, as expanded by its progeny, is inconsistent with the public sense of justice and social welfare.

Sixth, *Roe* and its progeny are also inconsistent with the sense of justice and social welfare as revealed by the abortion distortion factor. *Roe* became the exception which swallows all rules in the sense that limitations common to other areas of the law were struck down where abortion was concerned. For example, in Justice Burger's dissent in *Thornburgh v. American Coll. of Obst.*, 476 U.S. 785 (1986), he states: "In short, every Member of the *Roe* Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle, and I regretfully conclude that some of the concerns of the dissenting Justices in *Roe*, as well as the concerns I expressed in my separate opinion, have now been realized." *Id.* at 782-83 (Burger, J., dissenting).

The examples cited by Justice Burger included the requirement of informed consent in the interest of protecting maternal health, *id.* at 783, in the requirement of a second doctor in order to protect the "potentiality of human life," *id.* at 784, and in the requirement of parental consent or court authorization for minors to receive abortions. *Id.* at 785. Thus, prior to *Webster*, *Roe* seemed to create an constitutional right to abortion which could not be limited in any reasonable fashion.

For all the above reasons, it may be concluded that reconsideration of *Roe* is required, because *Roe* is outdated, and is inconsistent with the sense of justice and the social welfare.

II. *ROE V. WADE* SHOULD BE REVERSED.

The reasons cited for reconsideration of *Roe* also stand in support of its reversal. The tangent set by *Roe's* unconstitutional departure from the norm has led abortion jurisprudence

far from the path of the rest of the law. A correction in the angle of the trajectory is required. The most direct and constitutionally defensible correction is the reversal of *Roe*.

As recently as 1985, Justice Blackmun, author of *Roe*, declared that "when it has become apparent that a prior decision has departed from a proper understanding" of the Constitution, the prior decision must be overruled. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 557 (1985). A Supreme Court refusal to overrule *Roe v. Wade* merely because it is claimed to be entrenched would be the ultimate illustration of the super-protected nature of the abortion right.

CONCLUSION

The three tests and sub-tests set out in *Patterson* for the reconsideration of a precedent are each and all met in *Roe v. Wade*, although only one test need be met. *Roe*, therefore, is thrice qualified for reconsideration. There is no merit in delaying it.

Wherefore, for the above reasons, these Amici respectfully request the Court to reconsider and, upon reconsideration, reverse *Roe v. Wade*.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record

Barry A. Bostrom
BRAMES McCORMICK
BOPP & ABEL
191 Harding Avenue
P.O. Box 410
Terre Haute, IN 47808-0410
(812) 238-2421

Counsel for Amici